Many lawyers aspire to be the top lawyer for a major corporation, but increased risks are now associated with the coveted job of general counsel. Since the passage of the Sarbanes-Oxley Act in 2002, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have placed mounting scrutiny on in-house lawyers. Corporate scandals involving the chief legal officers of Tyco International Ltd.; Comverse Technology, Inc.; McAfee, Inc.; and Enron Corporation have brought to light serious personal and professional risks associated with the job. (See the Corporate Scandals chart on page 11.)

Unfortunately, the former in-house lawyers of Tyco, Comverse, McAfee, and Enron are not alone. In just the past five years, at least 77 SEC or DOJ probes have been launched against in-house lawyers, 28 of which have been related to options backdating. Of the 77, 25 in-house lawyers have been subjected to criminal indictments and/or convictions. 1 Interestingly, most actions against in-house lawyers have been against the chief legal officer of the company. 2

To discuss the disturbing rise in enforcement actions and prosecutions of in-house lawyers, the ABA Section of Litigation’s Committee on Corporate Counsel, in conjunction with Best Practices for General Counsel in the Post-Enron and Sarbanes-Oxley Era

By Yuri Mikulka and Alexis Hunter

Simulating Motions, Bench Trials, and Arbitrations for Case Management and Evaluation

By Ralph I. Miller and Alejandra Montenegro Almonte

“To see oursels as ithers see us!
It wad frae monie a blunder free us
An’ foolish notion”
—Robert Burns (“To a Louse”)

Simulations can be powerful management and evaluation tools for in-house counsel, especially when expanded beyond traditional jury cases to motion practice, bench trials, and arbitrations. Many forms of decision research allow in-house lawyers to focus outside counsel on key themes, to observe the performance of their advocates, to glean objective outcome evaluations, to assess the pros and cons of settlement or further litigation, and ultimately to better advise their business counterparts. Although the usefulness of traditional jury simulations as management devices has diminished because fewer civil cases are reaching juries than ever before, 1 techniques developed to study jury behavior have been adapted effectively for use with issues submitted to individual judges or

(Continued on page 10)
Message from the Annual CLE Program

Many of you reading this message will have pulled this issue of *In-House Litigator* off the registration table at the Annual CLE Conference in Scottsdale. Whether this is your first Corporate Counsel CLE Conference or your fifth (or fifteenth for many folks), the methods for getting your money's worth out of the conference have not changed over the years. We have attempted to capture below the ways to make the most of your conference experience. For those receiving this in your inbox, or reading it on the website, use these tips in February 2009 when the conference visits the Dolphin Resort at Disney World in Orlando, Florida.

**Enjoy the Great Programming**

This year’s lineup once again provides the high-caliber speakers that have kept folks coming back year after year. Dan Petrocelli will give a plenary program about his trial experience defending former Enron CEO Jeffrey Skilling. Sheila Birnbaum, who argued *State Farm v. Campbell* before the U.S. Supreme Court, will help update us on the law of punitive damages. The general counsels from Coors, Fidelity, Deutsche Bank, and other companies will give us their insights into how they, their legal departments, and the outside counsel they use all work together to serve the client. ABA leadership is also involved. Bob Rothman, the incoming chair of the Section of Litigation, will moderate our GC forum; former Section Chair Kim Askew will speak about e-discovery; and Pamela Roberts, the chair of the ABA Commission on Women in the Legal Profession, will moderate a program on women of color and how their success means success for everyone in the profession. And of course, don’t miss the opportunity to pick up an hour of credit in ethics during our Saturday morning breakout program, “Dealing with the Unethical Adversary and Difficult Client.”

**Make New Friends**

Networking is fine, but at this conference, you will find opportunities to make lifelong friends. This type of fellowship arises from the culture of openness of the four sponsoring committees and is noticeable at every event, whether it be a reception, a CLE program, or a committee or subcommittee meeting. Many of us came to our first conference knowing no one in the room and now can’t get out of the room because we see one friend after another who wants to catch up. The program cochairs and those in leadership will be looking for first-timers to introduce them to the seasoned attendees and to have dinner with them on a free night. Don’t hesitate to reach out to folks and introduce yourself. We are glad you have chosen our conference, and we’d like to see you back year after year.

**Relax During Your Free Time**

The conference is at a resort for a reason. The amenities give us a chance to relax, meet socially with other attendees, and exercise. You’ll find our folks at the golf course, tennis courts, pool, and spa. We’ve planned free time on Friday afternoon.

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http://www.abanet.org/litigation/committees/corporate/
The Committee on Corporate Counsel has closely followed the federal government’s policies and practices relating to requests for a waiver of the attorney-client privilege or the attorney work product doctrine. The Department of Justice’s current policy is reflected in the McNulty Memorandum, which permits prosecutors to request the waiver of the privilege under certain conditions. On November 13, 2007, the U.S. House of Representatives approved H.R. 3013, the Attorney-Client Privilege Act of 2007. The act would, among other things, prohibit any agent or attorney of the United States from demanding, requesting, or otherwise pressuring any company or other organization to disclose information that is protected by the attorney-client privilege or the attorney work product doctrine. ABA President William H. Neukom described the House of Representatives’ action as “an immensely important step” that “strikes the proper balance between the legitimate needs of federal prosecutors and regulators and the constitutional and fundamental rights of individuals and organizations.” As of the publication deadline for this newsletter, a similar measure is pending in the Senate Judiciary Committee. If passed, the act could have a significant impact on the practices of many members of this committee.

The recent erosion of the attorney-client privilege has been a disturbing trend; another worrisome trend has been the increase in regulatory and criminal actions against corporate counsel. The committee recently held two very successful regional roundtable meetings entitled “General Counsel Under Attack.” Committee Cochair Yuri Mikulka and Alexis Hunter have written an excellent article for this issue, highlighting some of the insights and best practices gained from those roundtable meetings.

Ralph I. Miller and Alejandra Montenegro Almonte have written a very interesting article about the use of simulated bench trials and arbitrations as a tool for case management and evaluation. In an article entitled “How to Defend a Consumer Class Action Without Breaking the Bank,” Henry Pietrkowski, Gary S. Caplan, and David Z. Smith offer practical insights and helpful advice for in-house counsel and outside counsel. Thomas Y. Allman and Courtney Ingraffia Barton have provided an update on significant cases in the one year since passage of the 2006 e-discovery amendments to the federal rules. This issue also contains two regular features: In-House Top 10 and the Practice Tip for Young, In-House Lawyers.

The committee would also like to draw your attention to the recently published novel by Andrew E. Shipley, Senior Corporate Counsel for Northrop Grumman Corp., entitled The Messenger. Many of you know Andrew from his contributions to the committee and this newsletter, and the novel is certain to be well-written and thought-provoking.

Visit the Committee on Corporate Counsel on the Web

www.abanet.org/litigation/committees/corporate
How to Defend a Consumer Class Action Without Breaking the Bank

By Henry Pietrkowski, Gary S. Caplan, and David Z. Smith

A ny company selling products or services to consumers is bound, sooner or later, to be named as a defendant in a consumer class action lawsuit. Plaintiffs’ class counsel can choose from a wide variety of statutes, including a whole alphabet soup of federal consumer laws (TILA, FCRA, FDCPA, CROA, TCPA, EFTA, RESPA, FACTA), not to mention the 50 states’ consumer fraud acts and common-law torts. Plaintiffs’ attorneys often file copycat class actions against the same defendant or industry as soon as one firm latches onto a new theory of liability. In addition, companies now face an increasing number of representative actions brought by states’ attorneys general. Depending on the size and scope of its customer base, a business may be facing dozens of simultaneous class action cases, any one of which can have a devastating effect on its bottom line.

And let’s face it: Defending class action lawsuits can be very expensive. So how can a company effectively deal with these high-stakes cases without “breaking the bank”? The answer to this question varies widely, but certain tried-and-true methods are emphasized below.

Make an Early Business Decision

After the initial dismay at being sued in a large consumer class action subsides, only one central question must be decided: How, if at all, should we defend this case? The answer to this question is, at bottom, a business decision for management to make with the advice of counsel. Management will want to know (among other things) the potential monetary exposure, disruption in employee time, and bad publicity that a class action lawsuit may engender, as well as the strength of the company’s defenses. Early development of an endgame strategy is key to making useful recommendations to company management in the high-stakes class action arena.

Because consumer class actions, by definition, involve potential claims by a large number of the company’s customers, they raise a host of issues that are just as important as how much money the company stands to lose from an adverse judgment or in defense costs. Will the lawsuit need to be reported in a public filing with the Securities and Exchange Commission? Will a strenuous defense result in unwanted publicity that could affect the company’s future sales? These concerns may lead management to think long and hard about entrenching the company in years of litigation. At other times, however, management will decide, as a matter of policy, that the company will vigorously contest all consumer class actions both in the press and in the courthouse.

The decision whether to defend or settle a consumer class action may be influenced by the nature of the claims alleged. For example, if the claims involve only a technical statutory violation, such as the “firm offer” provisions of the Fair Credit Reporting Act, the company may decide to contest the action because it is not being accused of any malicious wrongdoing and may be able to defend the case at the dismissal stage with relatively little expense. Conversely, an amorphous misrepresentation claim under a state consumer fraud statute may not be disposed of quickly and could damage the company’s reputation if not carefully controlled.

In either case, it is important for a company to decide up front what its overall business strategy is going to be, based in part on counsel’s informed input. Once management makes that initial business decision, counsel must determine the game plan they will use to achieve the desired result. For instance, if the endgame is settlement, the company must decide whether to commence informal negotiations right away with the plaintiffs’ counsel, suggest a formal mediation, or take a strong litigation position in the hope of settling at a later time when the plaintiffs’ resources have been depleted. Conversely, if the company decides to vigorously contest the lawsuit, immediate steps must be taken to craft a long-term litigation and public relations strategy.

The company should ask outside counsel to develop an initial budget estimate for achieving the goals it has established. This initial budget should be reevaluated as the case progresses to determine whether counsel’s fees are on track, whether the work being done is geared toward achieving the company’s goals, and whether those goals have changed as a result of developments in the litigation or at the company.

Concentrate on Denial of Class Certification and Early Dismissal

In most litigation, resources are geared toward preparing for summary judgment or a trial on the merits; however, the defense of consumer class action litigation is most often focused on the class certification stage. According to Seventh Circuit Judge Richard A. Posner, class certification can be the “death knell” for either side to a class action. If class certification is denied, the class representative’s claim may be too small to justify the expense of further litigation. Conversely, if class certification is granted, it puts “considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight.”

Because of the importance of the plaintiffs’ class certification motion, early litigation strategy should focus not so much on the merits of the company’s defenses, but on how best to defeat class certification. This makes sense not only from the standpoint of strategy, but also from a cost-savings perspective. For instance, a defendant may be able to limit the scope of the initial discovery to
class rather than merits issues. A streamlined plan to defeat class certification generally will be more cost-effective than a trial-based strategy in consumer class action cases.

This does not mean that the merits of the case should be ignored, however. A successful early dismissal motion might be the most effective weapon in a defendant’s arsenal. If there is a basis to dismiss or narrow your opponent’s claims on a threshold motion—such as lack of personal jurisdiction or failure to state a claim—that should be the initial focus of your efforts. Moreover, even an unsuccessful motion to dismiss or for summary judgment can help defeat class certification by forcing the named plaintiff to raise individualized facts about his or her own claim. For example, a corporate defendant might move to dismiss the named plaintiff’s consumer fraud complaint on the ground that the defendant’s representations did not “cause” the plaintiff’s injury. To avoid dismissal, the plaintiff likely will point to disputed facts to demonstrate that he or she did rely on the defendant’s representations. The defendant could then use these plaintiff-specific facts to argue that a similar factual determination would need to be performed for each individual putative class member, thereby precluding a class-wide resolution of the issue. In this way, an early dismissal or summary judgment motion can help streamline the case, whether or not it is ultimately successful in knocking out the claim.

**Consolidate Your Counsel and Your Cases**

It is generally more efficient and cost-effective to use a single firm as lead defense counsel on all related class action cases. This is a particularly good idea when multiple cases of the same type are pending in different jurisdictions. In such instances, removal and consolidation of these cases through a federal court multidistrict litigation (MDL) proceeding is much more efficient than defending each case on its own. A single nationwide coordinating counsel can most effectively accomplish this MDL consolidation from multiple jurisdictions, with the assistance of qualified local counsel.

Even when case consolidation is not possible, however, it still makes sense to use a single lead defense firm to coordinate all related class cases pending in different jurisdictions. Companies also may want to use that same counsel to defend single-plaintiff cases involving the same substantive issues as in a pending class action lawsuit. Even a court ruling in an individual case can significantly impact related class lawsuits involving the same facts or legal theories.

When choosing a firm to be lead counsel, a company should look for proven expertise and a successful track record in the specific types of cases at issue. Although the firm need not be the most expensive firm on the market, a company cannot afford to skimp on the quality of counsel in a “bet the company” class action lawsuit. Retaining experienced counsel who know how to properly defend (or settle) these cases can be critical to the company’s bottom line. Selecting a small number of firms to compete in a “beauty contest” for the litigation may lead to cost savings that might not otherwise be available if a firm does not have to compete for the retention. Moreover, having more than one law firm in mind is always a good idea in case conflicts arise that prevent your first choice from taking the case.

**Explore Alternative Fee Arrangements**

Because multiple law firms often compete for a client’s business, this may create opportunities for corporate counsel to propose alternative fee arrangements, such as a single blended rate or caps on annual rate increases. These types of arrangements are regularly negotiated by insurance companies when they agree to defend their insureds from third-party liability claims. These same principles sometimes can be applied outside the insurance context, when the size of the class action, or the repetitive nature of these cases, justifies such a bulk discount. Another possibility is to couple a reduced hourly rate with a bonus payment to defense counsel in the event certain litigation goals are achieved, such as a final dismissal with prejudice or a final judgment denying class certification.

**Try Triggering Insurance Coverage**

Many companies hesitate to report class action claims to their insurers. There are a variety of reasons for this reluctance, including a risk of increased premiums and the perception that the insurer never covers class action claims. We have found, however, that often the attorney fees and costs of defending a class action lawsuit are covered by an errors-and-omission professional liability or commercial general liability policy, depending on the specific claim being brought and the particular policy language at issue. If the potential exposure is high, and any potential for coverage exists, we recommend that you review all insurance policies for possible coverage and report the claim as soon as possible. In addition, the company may wish to hire qualified coverage counsel to review the policy for possible coverage arguments.

Procuring insurance coverage at the outset of litigation can have a profound effect on the tactical defense of a class action case. For example, if the insurer provides coverage, or even defends under a reservation of rights, a company may try to achieve an early settlement at the insurer’s expense, resulting in little or no cost to the company and limiting negative publicity. Alternatively, a company may relish the availability of insurance resources to fight unwarranted allegations or allegations that may damage the company’s reputation and bottom line.

**Procuring insurance coverage at the outset of litigation can have a profound effect on the tactical defense of a class action case.**
Even if only cost-of-defense coverage is triggered, a company can defend itself vigorously in an attempt to knock out the litigation on the merits or by opposing class certification. On the other hand, if no coverage is available, a company may be forced to settle defensible and unwarranted claims based solely on an estimate of the cost of defense, without regard to other important factors such as deterring similar claims in the future. Thus, insurance can be a very important factor in the class action defense calculus.

**Set Expectations and Maintain Regular Communication**

It is important at the outset of a case to give outside counsel clear expectations about the company’s billing and staffing guidelines. Communicating with a firm up front about its expected use of associates and paralegals, for instance, will prevent any confusion that may later arise in the firm’s invoices.

Some in-house lawyers like to hold regular telephone conferences with their outside counsel at set times, such as each week, every other week, or once a month, to discuss a large or particularly active case. These regularly scheduled meetings prevent the problem of having to coordinate busy schedules on an ad hoc basis, as well as the inevitable “fire drills” that arise when deadlines are not communicated sufficiently in advance to allow for proper staffing and preparation. This is especially important in the time leading up to the class certification phase, when a number of briefing and discovery deadlines arrive all at once.

Topics that might be discussed at these regularly scheduled meetings include setting internal deadlines for review and turnaround of draft pleadings, “big picture” strategy issues, and any budget concerns. Regular communication between client and counsel is critical to an effective and cost-efficient defense.

**Don’t Reinvent the Wheel**

Chances are that any class action case filed against your company already has been filed against various other defendants. It is worthwhile to research those other complaints and to locate the defense counsel in those cases, either for the purpose of retaining them or just to find out some useful information that might help your defense. The key is to see if they are willing to share their strategies, insights, and experiences so you don’t have to create your own defense strategy from scratch.

Westlaw and other online search engines also are useful tools for finding published opinions and briefs filed in similar cases. Perusing briefs filed by similarly situated defendants will give you a head start on the arguments for dismissal and against class certification. Many sophisticated defense firms have their own electronic “brief banks” that contain the accumulated knowledge of their lawyers on particular issues. You also may be able to view your opponents’ briefs online to get an idea of the arguments they intend to make against your company, as well as the quality of their lawyering.

**Make Use of E-Discovery Efficiencies**

The single greatest strategy for preventing costly e-discovery disputes is the creation and implementation of a good document retention and destruction policy. “absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good faith operation of an electronic information system.”

Another important cost-saving measure is to develop an internal process for efficient preservation and collection of electronically stored information (ESI) for possible future production. Setting up such a protocol requires input from internal information technology (IT) personnel or an outside vendor as to the easiest and cheapest way to preserve and collect the targeted data. Consolidating all e-discovery information using a uniform process also allows the company to negotiate a discounted rate in advance with one or more outside vendors that specialize in processing, collecting, and preserving ESI. Vendors often give bulk-rate discounts, and the competition is fierce.

In addition, companies should set up an internal e-discovery team, headed by a single point of contact (either an in-house or outside attorney). The team should include one or more IT employees to help coordinate all e-discovery requests. Having such a team in place allows for greater control and organization of e-discovery collection efforts and prevents unnecessary duplication of work and the disruption that undoubtedly will occur with multiple e-discovery requests from various outside counsel defending different legal proceedings.

Last, it is important to understand that e-discovery is something that can and should be negotiated with the plaintiffs’ counsel very early in litigation to try to limit costs. For example, rather than producing all of the company’s electronic data (which may contain privileged or out-of-date materials), the company should try to negotiate the use of targeted searches of collected data as a better and cheaper way to get to the most relevant documents. Another possible savings strategy is to negotiate a cost-sharing agreement with the plaintiffs to produce the data in a more readily accessible format, such as portable document format or tagged image file format. The more reasonable a company’s
negotiating position, the more likely the plaintiffs’ counsel will be to cooperate, and the more likely a court will side with the company in any discovery disputes.

Use Your Internal Resources
Depending on the size of a company’s legal department, certain tasks may be performed more efficiently in-house than by an outside law firm. Examples include collecting and organizing production documents and reviewing them for privilege. An experienced in-house paralegal or junior lawyer may be able to do this just as efficiently (if not more efficiently) than an outside paralegal or associate, and at great cost savings for the company. Another approach is to pair an in-house paralegal with an outside paralegal or associate so that the work can be coordinated between them, rather than farming out the entire project to the law firm.

If All Else Fails, Settle Cheaply
At some point in a class action case, if the defendant does not obtain an outright dismissal or class certification denial, the question of settlement will arise. Certain time-tested strategies for settlement cost savings should be explored with the plaintiffs’ counsel.

The first is the concept of reversion. Rather than simply agreeing to pay a set amount to each class member, the company may instead agree to (i) create a common fund of X dollars, (ii) require class members to affirmatively return proof-of-claim forms confirming that they want to receive a share of the settlement, and (iii) retain a reversionary interest in the portion of the settlement fund not claimed by class members. Although such reversions to the defendant have been approved by a number of federal courts and commentators, the general rule still is that moneys remaining from a class fund should be distributed as a cy pres award to one or more charities. Ultimately, it will be up to class counsel and the judge, who act as fiduciaries for the absent class members, to determine whether a reversion to the defendant is feasible in any particular case.

A second option, which has fallen out of favor recently, is the use of coupon settlements in which a company gives class members the right to redeem coupons for its products or services, and class counsel collects a hefty fee based on the supposed value of those coupons. Although such a practice may still be viable in certain state courts, the Class Action Fairness Act of 2005 contains specific provisions that restrict class counsel’s attorney fees in federal court coupon settlements to “the value to class members of the coupons that are redeemed.” Because of the relatively low percentage of coupons actually redeemed by class members, this coupon settlement option is now less attractive to class counsel when the case is settled in a federal district court.

Conclusion
As demonstrated above, a number of opportunities exist for potentially significant cost savings in class action cases. Either alone or in combination, these techniques may help take some of the sting out of the substantial resources that must be devoted to defend (and hopefully defeat) these claims.

Henry Pietrowski, Gary S. Caplan, and David Z. Smith are partners in Reed Smith LLP’s Financial Services Litigation Group. Each of them has handled a wide variety of consumer class action cases in the financial services, insurance, and real estate industries.

Endnotes
1. Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (“Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.”).
2. The line between class and merits discovery often is blurry and may be challenged by plaintiffs’ counsel. Moreover, a company want may to expand discovery to the merits so long as it actually helps establish individual factual variations to defeat the predominance and superiority elements under Federal Rule of Civil Procedure 23(b)(3).
3. For more information, see Angela C. Zambrano, Successfully Managing Multijurisdictional Litigation, In-House Litigator, Vol. 21, No. 4 (Summer 2007).
4. The plaintiffs’ attorney fees and class notice and administration costs often will be paid from the common fund before the remainder reverts back to the defendant.
5. See, e.g., Mangone v. First USA Bank, 206 F.R.D. 222, 230–31 (S.D. Ill. 2001) (upholding reversion provision and stating, “Courts have broad discretion in distributing unclaimed class action funds, and where the parties agree on the distribution of unclaimed class funds, the court should defer to that method of distribution.”); Kronfeld v. Transworld Airlines, Inc., No. 83 Civ. 8641, 1989 WL 140341, at *1 (S.D.N.Y. Nov. 13, 1989) (“[R]ecapture clauses are common in class action settlements and are not inherently unfair; the provision affects only what defendants will pay and not what class members who file claims will receive.”); see generally 3 Newberg ON CLASS ACTIONS § 10:15 (4th ed. 2002) (In a settlement context, subject to court approval, counsel for the parties have great flexibility in negotiating an agreement concerning how any unclaimed balance of an aggregate class recovery should be distributed. These parties may agree that any surplus funds revert to the defendant. . . .

Practice Tip for Young In-House Lawyers

“Responsiveness. That’s what your in-house clients expect and deserve. No doubt you are brilliant strategists and excellent counselors. As I’m often told—that’s what we’re paid for. However valuable those traits, your clients may not recognize them if you’re perceived as unresponsive. We’re all busy! We can’t get to everything now! Your clients understand and will appreciate a simple and prompt acknowledgment of their requests (by quick email or phone call), telling them when they can expect an answer. Meet your promised deadline and you’ll maintain your reputation for professionalism.”

By Stewart M. Gisser, Associate General Counsel, Schindler Elevator Corporation
A year has passed since the effective date of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure. In that time, some of the rules, such as Rule 26(b)(2)(B) (information from sources “not reasonably accessible”), have been heavily represented in the decisions, but others, such as Rule 26(b)(5)(inadvertent waiver of privilege) and Rule 37(f),1 have not. The year 2007 also brought the second edition of The Sedona Principles, with important commentary on the rules and with some adjustments in key principles in sympathetic response. In this article, we will take a look at how e-discovery law has shaped up over the past year, some of the trends that we are seeing, and what we might expect in the months to come.

Rule 34(a) and Rule 37(f): Columbia Pictures

One of the most interesting cases of the year was Columbia Pictures v. Bunnell.2 In this copyright infringement case, the district court upheld a magistrate judge’s ruling that data stored only temporarily in the defendant’s website’s random access memory (RAM) was discoverable as “electronically stored information” for purposes of Rule 34(a). Importantly, the court also upheld the magistrate judge’s ruling that, under the circumstances, no duty to preserve had existed because the requesting party had not raised the issue and the producing party could not have known that it had a duty to preserve the information. A forward-looking preservation order was affirmed because the information was relevant and could be preserved without undue burden, and there were no other available means to obtain it.

Columbia Pictures is one of several cases that have applied the “safe harbor” provision in Rule 37(f). Although both courts held that the defendants had an obligation to preserve the RAM data in the future, the magistrate judge had held that the failure to retain the data until a motion was filed was not sanctionable based on a good-faith belief that preservation of the RAM data was not required.3 Rule 37(f) has also been cited in United States v. Krause, Doe v. Norwalk Community College, and Disability Rights Council of Greater Washington Metropolitan Transit Authority,4 although none of these cases applied the provision. These last two cases remind us that Rule 37(f) “does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation.”5 In Doe, defendants also did not appear to have one consistent, “routine” system in place.

However, the impact of Rule 37(f) can be indirectly seen in the emerging line of cases that increasingly put the onus on the parties to confer about the format of the electronic discovery being produced.11 Rule 26(f) sets out distinct areas that parties must discuss at the outset of a case, including any issues relating to the preservation of both hard copy and electronic information. But the rule also requires a broader discussion of “any issues relating to disclosure or discovery of electronically stored information” (emphasis added). Indeed, district courts in Arkansas, New Jersey, Delaware, Kansas, Ohio, and Wyoming have adopted local rules or guidelines to help parties identify exactly what issues to cover. However, in 2007 the District of Maryland has trumped them all by issuing a comprehensive “Suggested Protocol for the Discovery of Electronically Stored Information” (Maryland’s Discovery Protocol) prepared by a group of lawyers, judges, and information technologists. As Judge Paul Grimm, chief magistrate judge for the District of Maryland, and Michael D. Berman, Esq., stated in their introduction to the protocol, “The lynchpin to the new rules is the expectation that counsel will confer ‘as soon as practicable’ to ‘discuss a discovery plan’”; thus, Maryland’s Discovery Protocol provides “a framework of topics to discuss at the conference.”12

Rule 26(b)(2)(B): Information Not Reasonably Accessible Due to Undue Burden or Cost

The most discussed provision so far this year—and arguably the signature reform of the 2006 amendments—has been Rule 26(b)(2)(B). Prior to its adoption, the focus seemed to be on the rule’s “not reasonably accessible” language, with commentators trying to figure out what type

By Thomas Y. Allman and Courtney Ingraffia Barton

E-Discovery Case Law—Since the New Rules

Speedway, LLC v. NASCAR,9 a motion to compel production of metadata for documents produced in hard copy was denied because it had not been discussed at the Rule 26(f) conference. In In re Seroquel,10 the court explained, while admonishing the parties, that there is a heightened need for the parties to confer about the format of the electronic discovery being produced.11
of data would be implicated and whether a pure “media-based” approach would be automatically applied. For example in *Zubulake v. UBS Warburg*, the court held that “whether electronic data is accessible or inaccessible turns largely on the media on which it is stored.” However, the case law since the new rules has shown a refreshing focus on the “undue burden or cost” that is involved and whether good cause has been shown for production despite that fact. The undue cost and burden analysis is instructed by two sets of criteria: the considerations listed in the Committee Notes to the rule, and the limitations set forth in Rule 26(b)(2)(C), often considered the “proportionality factors.”

Only in one reported case has a court refused to order the production of information it identified as not reasonably accessible. In a companion case to the preceding case, a court felt that good cause was not shown where discovery requests were not narrowly tailored. By far more typical is the almost automatic imposition of cost shifting. For example, in *Haka v. Lincoln County*, the court held that because the potential damages in the case were low, the costs of searching for relevant electronic information among four terabytes of data should be ordered in proportion to the available recovery. Plaintiff was required to narrowly tailor his searches, and the costs were equally divided among the parties. To take advantage of the provisions in Rule 26(b)(2)(B), however, it is very important that practitioners raise the argument early by objection or motion and clearly establish that the rule applies in their particular case.

**Rule 34(b): Form of Production—Few Cases but an Evolution in Sedona Principle 12**

Surprisingly, there were not very many cases over the past year that discussed form of production. Perhaps this is an indication that Rule 26(f) is having the desired effect—that parties are discussing form of production at the meet and confer. In *Auto Club Family Insurance Co. v. Ahner,* the court held that the fact that information stored electronically was produced in hard copy does not in and of itself excuse a party from producing the requested information in electronic form. In *Schmidt v. Levi Strauss & Co.* and in *In Re Payment Card*, however, parties were not required to reproduce information once produced.

As part of the revisions to *The Sedona Principles* (second edition 2007), the Sedona Conference modified Principle 12 to reinforce the nuanced aspects of Rule 34(b). Principle 12 now suggests that, absent an agreement or a court order, the form of production should include metadata that enable the receiving party to have the same ability to access, search, and display as the producing party where it is appropriate or necessary in light of the nature of the information and the needs of the case.

**A Word about Privilege**

Although only one reported case mentioned new provision 26(b)(5) this year, there were a few important developments in other areas related to privilege. Most notably, Proposed Rule of Evidence 502 made its way through the Advisory Committee on Evidence Rules and the Standing Committee on Rules of Practice and Procedure and was referred, on September 27, 2007, to Congress for action. The proposed rule, which would, inter alia, provide protection in all federal and state courts for inadvertent production of information in federal proceedings, requires congressional enactment to become effective.

Several courts have provided guidance on how and when email is privileged in the working context of large corporations, especially in regard to when and how it should be handled on a privilege log. In the case of *In re Vioxx Products Liability Litigation,* excerpts from a special master’s report provide a provocative and fascinating insight into the topic. In *Muro v. Target Corp.*, the court dealt with email chains in a practical manner. While recognizing the labor and expense involved in itemizing, the court held that the privilege log must identify each communication that has been withheld from production because of the assertion of privilege—whether that communication is the entire strand or only one part of the strand. If only one part of the strand is privileged, the rest must be produced. The court suggested that parties agree in the

**Admissibility Issues**

One area not directly addressed in the new rules is the admissibility of electronic evidence over objection. In *Lorraine v. Markel,* Judge Paul Grimm provided what is in essence a treatise on the admissibility of electronic evidence. For those concerned about the use of that evidence at trial and the steps needed for admissibility also to be considered, Judge Grimm gives a good overview on how to do just that.

**Conclusion**

One year later it remains to be seen whether the rules have accomplished their goal of streamlining the e-discovery process. It is clear that those who have taken advantage of the collaborative nature of the rules are coming out ahead. But many have also noted that the rules have often raised more questions than they have answered, especially as new and emerging technologies continue to drive the process and the case law.

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**Endnotes**

1. On December 1, 2007, unless Congress acts affirmatively, many of the Federal Rules will be renumbered and restyled. For example, Rule 37(f) will become Rule 37(e).


3. 2007 U.S. Dist. LEXIS 72706 (S.D. Tex. Sept. 29, 2007) (Sanctions were not appropriate under Rule 37(f) because evidence was destroyed as part of routine operation of computer system and in light of the 5th Circuit’s requirement of bad faith for severe spoliation sanctions.).


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have caused politicians to become increasingly concerned about corporate governance, corporate accounting practices, and accountability to company shareholders. As a result, politicians now demand increased government oversight of in-house lawyers. Moreover, highly publicized corporate scandals and the increased visibility and compensation of in-house lawyers have caused the public to become more distrustful of corporations and supportive of criminal and enforcement actions against corporate executives as well as corporate lawyers.

**Gatekeeper expectations.** Like it or not, government regulators now view in-house lawyers as “gatekeepers” whose job is to ensure compliance with the law and to ferret out improper corporate activity. Unlike their counterparts 20 years ago, many general counsel these days participate in corporate meetings and business decisions and often serve roles beyond the legal function. Therefore, government regulators assume that general counsel are knowledgeable of any corporate misconduct. In other words, no longer are regulators tolerant of in-house lawyers’ attempt to distance themselves by proclaiming “All I did was give legal advice.”

**A shift in focus.** Prior to Sarbanes-Oxley, government oversight of in-house lawyers had been limited to misconduct such as insider trading or activities where in-house lawyers clearly participated in the criminal conduct. Since the passage of Sarbanes-Oxley, regulators have shifted their focus to roles that lawyers play within corporations and to conduct related to corporate accounting practices and options plans.

**Best Practices for the Heightened Regulatory Era**

Given the rising number of SEC investigations and DOJ prosecutions, some believe that the SEC is, in essence, attempting to deputize general counsel to serve as prosecutors within their companies. As today’s general counsel try to balance their dual role of serving as enforcement officers and trusted company advisors, tension often mounts between general counsel and their clients. The general counsel panelists at the roundtable program provided the following advice to reduce that tension and to avoid potential liability.

**Establish credibility.** It is more important than ever to establish credibility with board members, corporate officers, audit committee members, and other influential members of the company. This is critical to ensure that the general counsel is included in discussions of potentially problematic issues and that the general counsel’s advice is taken seriously. To do so, general counsel must deliver value by suggesting practical and creative solutions that fit the client’s need.

**Have in place internal processes.** Establish a process at the outset for decision making and for identifying potential problems and risky behavior. This will enable general counsel to later demonstrate that he or she acted in good faith and that the intended action was appropriate.

**Hire the right staff.** Increased scrutiny means general counsel must hire the right staff. It is important to hire lawyers with moral compass, character, and smarts, who can help ensure that the company complies with the required code of conduct and the law. Those hired must have “intestinal fortitude” because 90 percent of what in-house lawyers do tends to fall in the gray area. It is important to train the lawyers to adeptly spot risky behavior and eliminate problems at an early stage.

**Hire the right outside counsel.** A strong relationship with outside counsel is essential these days. A second opinion from outside counsel is invaluable to address unfamiliar issues and to overcome resistance from the board or senior management. Moreover, even though obtaining advice from outside counsel will not always exculpate an in-house lawyer, it can provide the comfort level needed to make an informed decision and can serve as a mitigating factor if that decision later comes into question. The panelists suggest the following steps when hiring outside counsel: have in place several experienced, highly qualified lawyers who can advise on various issues of law; go
beyond the usual suspects—hire independent outside counsel who can provide objective advice; and hire lawyers who truly understand the company’s business so they can quickly provide practical advice on specific issues.

**Follow up.** When an in-house lawyer suspects that the advise is not being followed, the lawyer has an obligation to follow up and to remedy any improper behavior. Simply providing advice without a proper follow-up will not insulate counsel from corporate bad acts. General counsel should establish a process of checks and balances involving auditors, compliance officers, financial officers, and the company’s legal department to prevent and remedy improper behavior.

**Be ready to walk.** When aware of improper behavior, general counsel must stand his or her ground, even if met with resistance by corporate executives. General counsel has significant power to make certain that the company takes appropriate actions. If necessary, general counsel must report any noncompliance issues to the CEO, chairman of the board of directors, or to any other appropriate corporate entity. When improper conduct persists, general counsel’s ultimate weapon is to report the matter to the board of directors and resign from the company. Although an extreme measure, general counsel’s resignation will send a clear message and will likely forestall the problematic conduct.

In this heightened regulatory era, there are many risks and pitfalls that general counsel must avoid to protect themselves and their clients from liability. At the end of the day, however, given the increased importance of today’s general counsel in Corporate America and the extraordinary opportunity they have to contribute to the success of their companies, general counsel agree that, more than ever, being the top lawyer is rewarding and desirable. ■

(Continued on page 18)

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<tr>
<th>Company</th>
<th>Lawyers Involved</th>
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| Tyco International Ltd.        | Mark Belnick, former Chief Corporate Counsel                                    | • In September 2002, the SEC filed civil fraud charges against Mark Belnick for failing to disclose to shareholders the multimillion dollar low-interest or interest-free loans that the company provided to the corporate executives and Belnick.²  
• In September 2002, Belnick was indicted by a Manhattan grand jury on fraud charges arising out of the same conduct.¹ He was acquitted on the fraud charges, following a jury trial.⁵  
• In May 2006, Belnick consented to being permanently enjoined from violating provisions of the federal securities laws.⁶ He was barred from serving as an officer or a director of a public company for five years, and ordered to pay $100,000 in civil penalties.⁷ |
| Comverse Technology, Inc.      | William F. Sorin, former General Counsel                                        | • In August 2006, the SEC filed a civil fraud and injunctive action against William F. Sorin for his alleged involvement in the fraudulent backdating scheme.⁸  
• In September 2006, the DOJ charged Sorin with conspiracy to commit securities fraud, mail fraud, and wire fraud in connection with an allegedly fraudulent options backdating scheme.⁹  
• In November 2006, Sorin pleaded guilty to a one-count felony information charging conspiracy to commit securities fraud, mail fraud, and wire fraud.¹⁰ He was subsequently sentenced to one year and a day in prison and ordered to pay $51.8 million in restitution.¹¹  
• In November 2006, Sorin consented to being permanently enjoined from violating provisions of the federal securities law.¹² He was suspended from appearing or practicing before the SEC as an attorney, barred from serving as an officer or a director of a public company, and ordered to pay over $3 million in civil penalties.¹³ |
| McAfee, Inc.                   | Kent H. Roberts, former General Counsel                                         | • In May 2006, Kent H. Roberts was terminated as general counsel of McAfee.¹⁴  
• In February 2007, Roberts was indicted by a federal grand jury in connection with the fraudulent dating of stock options grants.¹⁵  
• In February 2007, the SEC charged Roberts with securities fraud for wrongfully re-pricing stock option grants.¹⁶  
• The SEC action and DOJ investigation are pending. |
| Enron Corporation              | Jordan H. Mintz, former General Counsel of the Global Finance Group              | • In March 2007, the SEC charged Jordan H. Mintz and Rex R. Rogers with securities fraud and related violations in connection with an alleged fraudulent scheme to make material misrepresentations in, and to omit material disclosures from, Enron’s public filings.¹⁷  
• The SEC charges are pending. |
|                                | Rex R. Rogers, former Associate General Counsel                                |                                                                                             |
arbitrators, including summary judgments. Indeed, simulation research may work better for identifiable decision makers (e.g., specific arbitration panels or a judge) than for future jury because the personal backgrounds of mock decision makers can be closely matched to those of the individual decision makers (e.g., the arbitrator or the judge). With single decision makers, theme testing with multiple surrogates usually identifies one or more who reflect the outlook of the presiding judge or arbitrator.

Creative use by law departments of decision research in both nonjury and jury contexts can reduce litigation costs and risks. This article outlines the management benefits to in-house counsel of decision research and explains emerging techniques for simulating motion practice, bench trials, and arbitrations.

Management and Evaluation Benefits of Simulations

Jury simulations have long been recognized as uniquely valuable exercises for testing settlement value while improving advocacy, and similar benefits can be obtained in a much wider range of cases by using simplified techniques to simulate motion practice, bench trials, or arbitrations. Surprisingly, outside counsel are often resistant to all types of simulations, citing expense, distraction from trial preparation, and limited utility outside the traditional jury-trial setting. In-house lawyers should be skeptical of these reactions.

Simulations often reveal outside counsel’s lack of focus, inexperience, or incomplete preparation and cast doubt on case evaluations that may have been made without adequate basis. We are aware of cases in which simulations led to replacement of outside counsel after clients were not pleased with the performance of their advocates in the mock trials. Because many outside counsel have limited actual trial experience and even less exposure to decision research, they often resist the challenge of learning new techniques. The burden often rests on in-house counsel, therefore, to insist on decision research.

Bringing in a second law firm to assist with a simulation can overcome objections by trial counsel in a tactful way. One approach is for the second firm to prepare the opposing case; experienced co-counsel may also eliminate the need for a jury consultant. Trial counsel would then prepare and present a simplified version of the client’s case. Most experienced trial counsel welcome the chance to “play themselves” by presenting their core arguments to a live audience and testing reactions. If necessary, however, a second firm can prepare both sides of the mock case, requiring trial counsel merely to review argument scripts. This “outsourcing” approach allows trial counsel to continue preparing for trial without distraction and alleviates concerns that the simulation may create embarrassment for anyone.

When research is properly designed and conducted, it should give the client a reasoned basis for setting settlement value and formulating the most effective arguments for use in motion hearings, arbitrations, or trials. Often the results are also useful in framing arguments for mediation. No other technology, the authors believe, can do as much to avoid tactical miscalculations and improve the outcome in complex hearings or trials. If in-house lawyers had more exposure to decision research and experience with these benefits, we believe that simulations outside the traditional jury-trial context would become more common, potentially promoting settlements or more efficient adjudication proceedings.

Simulation Design

In-house counsel should have an active role in the design of any simulation to ensure that it will achieve the client’s objectives, which may differ from those of a consulting research firm or outside counsel. Well-planned simulations have the potential to predict and shape the behavior of a specific arbitration panel, arbitrator, or judge with amazing effectiveness. They can also be used to evaluate or improve the performance of outside counsel. The tool must fit the job, of course, and the first question is whether the case will support the cost of a simulation exercise.

Starting with Cost-Benefit Analysis

Simulation research adds incremental expense, and cost-benefit analysis should be the first step when deciding whether to undertake the effort. Settlement probability is the most critical single factor in this equation. Obviously, there is little need for a simulation study if a case or arbitration can be settled efficiently without this expense. The vast majority of civil cases—well over 90 percent in virtually all American jurisdictions—are resolved by settlement. Moreover, some disputes carry so much risk that they must be settled at the best price that can be achieved; a sure loser can often be identified without the need for extensive study. Even when settlement is likely to be the ultimate outcome, however, a simulation study probably constitutes the best tool for predicting the likely outcome, thus greatly enhancing a party’s confidence in its valuation of a dispute during negotiations. Simulating dispositive motions can also refine settlement strategy by suggesting whether settlement before or after a ruling is likely to be more favorable. In our experience, mediation arguments have often benefited from insights gained in simulations.

Simulation studies may be especially useful for cases that turn on unique issues. For example, few insurance companies spend money to simulate workers’ compensation cases because a body of actual experience allows statistical prediction of jury behavior in these recurring cases. Likewise, experienced trial lawyers understand the arguments that have worked well when they try cases that are similar to those they have tried in the past. The same may be true for repetitive motion practice or arbitration patterns, such as those in employment cases or broker-dealer disputes with investors. Far fewer precedents are available, however, to evaluate the likely outcome or enhance the advocates’ themes for complex arbitration proceedings, such as purchase price adjustments or disputes based on prolix contract language. Differences between the perspectives of the decision maker and the advocates can be an
additional factor that favors decision research. Issues of cultural perception or prejudice may be especially difficult to evaluate in international arbitrations, for example. Simulations can, for these reasons, have particular value when legal issues present matters of first impression.

**Understanding Group Dynamics**

In-house lawyers need to be aware that management and evaluation benefits of simulations are no longer limited to cases that will be resolved by jury trials. Adaptations of the traditional approach also permit effective simulation research for panels of arbitrators or appellate courts as well as for judges or single arbitrators. Group dynamics facilitates pre-trial jury research because the actual identities of the jurors are not known, and observation of mock deliberations has become a major tool for extracting information about the mental processes of mock jurors. That historical accident may lead to the incorrect assumption that simulations are not appropriate unless a jury will decide the case.

Simulation studies actually work better for arbitration or appellate panels than for anonymous jurors. Jury research rests on the social science premise that groups of consumers or jurors will behave in predictable ways when they are drawn from a known demographic sample and presented with a uniform stimulus. Random variations can, of course, cause the actual jury to differ substantially from the generic panels that were used in research. When three neutral arbitrators or appellate judges will discuss the issues and reach a majority vote, group dynamics can be simulated in precisely the same ways that have been used for jury research. Indeed, once the actual arbitrators or appellate judges can be identified, the attitudinal backgrounds of mock panels of arbitrators or judges can be matched more closely to the actual decision makers than can generic groups of jurors selected in advance of a jury trial. Deliberations of a group of neutral surrogate arbitrators (or a panel of mock appellate judges) can be observed using the same techniques that work well in jury research, such as observation through one-way mirrors in a consumer research facility. Group interaction can also be simulated with three-member arbitration panels in which each party selects one arbitrator and those two party-appointed arbitrators select a third “neutral.”

Even if group dynamics will not play a major role in the decision process, simulation studies may still be designed to produce valuable insights. For single decision makers, a panel of surrogates can be presented jointly with the case background (known as the “stimulus” in jury research), but information on responses must be gathered from each individual. Various techniques have been developed to “calibrate” each surrogate with the actual judge or arbitrator, allowing greater weight to be given to reactions of those surrogates who appear to reproduce most reliably the perspective and attitudes of the actual trier of fact or law. The entire panel can then be allowed to discuss the outcome, much like a jury deliberation, to promote further development of useful arguments.

**Tailoring Design to Emphasize Valuation, Advocacy, or Counsel Testing**

In-house counsel should forcefully dictate what they need to learn from a simulation study rather than leaving that issue to outside counsel or the research firm. Design of a simulation study can emphasize reliable outcome evaluation, maximum advocacy improvement, testing of counsel’s performance, or other goals. A balance can also be sought among several objectives. The best valuation results occur, for example, when a balanced presentation of the most likely case for each side is repeated before a number of panels. Greatest enhancement of arguments can be achieved if an opponent’s presentation is held constant while the sponsor of the simulation varies its themes in a series of one-day studies to produce the best result. A hybrid approach can also be constructed, with part of the presentation held constant for several panels (such as the opening statement), followed by variations in the simulated evidence or closings to test different themes. Counsel may be tested more effectively if different lawyers are assigned to specific parts of the case and pointed questions are asked to the surrogate decision makers to evaluate each lawyer’s performance (i.e., persuasiveness, clarity, passion, and articulateness).

Although many outside counsel prefer to use a simulation primarily to seek the greatest chance for victory at trial, the client may have a greater need to set a settlement value or decide whether a change of counsel is needed. Use of a second law firm to support or conduct the research may contribute to the objectivity of these evaluations. In any event, the legal department must define the objectives and review the blueprint for the study to be sure the client receives the most value for any investment in simulation research.

**Research Implementation**

Once a sound design for the simulation is created, certain fundamental principles of social science research should be observed when implementing the plan. First, the attitudes and biases of the simulated decision makers should be matched as closely as possible to those of the actual decision makers. Factors that affect attitudes, rather than demographics alone, are particularly important. Matching the career patterns, ages, and political inclinations of mock arbitrators or judges with those of actual decision makers is particularly critical. Lawyers who spent most of their career with small law firms do not have the same outlook as those who have worked only at large firms. Personal injury lawyers do not have the same world view as transactional lawyers or business litigators. An arbitrator who has repeatedly failed in his or her attempts to achieve political office may carry insecurities that should be carefully replicated in the group of surrogates who will be tested. Judicial experience seems to shift attitudes, so a panel with former judges

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When possible, the simulated arbitrators should come from the same city, or at least the same country, as the actual arbitrators.
should be simulated, if possible, by a surrogate group that includes the same number of former judges with the same general tenure on the bench. Regional and geographic attitudes are also important, particularly with international arbitrations. When possible, the simulated arbitrators should come from the same city, or at least the same country, as the actual arbitrators. If nonlawyers are included on the actual panel, simulated arbitrators with the same type of education and employment history as those individuals should be sought. When excellent matches are found, the predictive results are sometimes uncanny.11

A second research goal is to keep the simulated arbitrators from knowing which party sponsored the research. We often tell the simulated arbitrators that our law firm arranged for the simulation, but we do not tell them—at first—which party we represent. Interestingly, simulated arbitrators often guess incorrectly when they try to determine which party is paying for the exercise. Even if they suspect the probable sponsor, however, the lingering uncertainty will make them more objective.

Finally, any decision research study should be designed to extract information as the stimulus unfolds. This can usually be accomplished with questions that the mock arbitrators are asked to answer individually after each module is presented, such as following an opening statement, after witnesses (or video deposition excerpts) are seen, and following the closing.

Practical Simulation Techniques Each simulation must be tailored to the specific case, of course, but certain methods are consistently effective in a number of situations. In-house counsel may wish to consider some of these approaches as a checklist during the design phase. Some proven simulation techniques are discussed below that can apply in any simulation.

Testing Argument Themes with “Clopenings”
The classic format for jury research—known as the half-day “clopening”—works relatively well for arbitrations, bench trials, and motions. In a typical “clopening” study, the plaintiff’s case is presented in a narrative of less than an hour in length that combines elements of the opening statement and closing argument. Defendant’s case is presented next, also in a “clopening” format. The plaintiff is allowed a short rebuttal, then the simulated decision makers are given simplified instructions and asked to deliberate. With luck, all these steps can be accomplished in about four or five hours of simulated hearing time.

A “clopening” study produces a large volume of information at affordable cost. Frequently, jury cases are simulated by “clopening” studies and followed by full-day mock trials (including video deposition excerpts) and then by actual jury trials. More often than not, the results of the “clopening” studies were consistent with the more extended studies and with the actual jury results. Yet the “clopening” uses less lawyer time and generates much lower consulting fees than a full-day mock trial approach. Similar results appear to hold with arbitration simulations, based on disputes that have been simulated and then actually tried to an arbitration panel. For trials to judges, including appellate or motion simulations, the mock decision makers are often asked to read briefs to prepare for the “clopening” arguments.

The “clopening” exercise can also show the evolution of the decision process. A snapshot of individual attitudes can be taken at the end of a “clopening,” and a baseline established on the attitudes of individual mock panel members, allowing for experimentation with subsequent argument variations. An illustration may be helpful here. Assume, for example, that three surrogate panels are recruited to study the probable behavior of an actual arbitration panel. If identical “copenings” are presented to all three mock panels, the attitudes of each surrogate arbitrator can then be tested. In this hypothetical study, assume that the actual arbitration panel consists of a retired judge, an engineer with no legal training, and a tax lawyer. Each simulated panel should have a nearly identical mix of individuals. If the three retired judges (one on each mock panel) all strongly favor the plaintiff at the end of three identical “copenings,” that consistent response suggests that the elements of the “clopening” stimulus have a predictable effect on the member of the panel who is a retired judge (assuming other factors are controlled correctly).

If the study is extended to include simulated witness testimony and further argument, the post-“clopening” evidence of the party conducting the study can then be varied for each of the three mock hearings to see whether attitudes shift. By way of illustration, if an excerpt from a video deposition is edited in one mock hearing to show aggressive cross-examination of the plaintiff, attitudes of the surrogate panelists who favored the plaintiff can be tested after that additional stimulus to see whether their leanings change from those they expressed at the end of the “copenings.”

Sometimes the “clopening” phase suggests that study results are not likely to be reliable or predictive. In the hypothetical panel described above, if the three engineers had different reactions when presented with supposedly identical “copenings,” much less confidence can be ascribed to the shifting views of one of those mock panelists who changes his or her vote after seeing a particular video excerpt or hearing a new argument. “Copenings” can also be followed by focus group sessions. Traditional jury researchers prefer to have focus discussions occur before any votes are taken in a mock deliberation, but most jury consultants will concede that many benefits of a focus exercise can still be obtained after a “clopening” deliberation has occurred. In our view, the value of focus groups is limited, even under ideal conditions, and most of that value can be obtained by including a short focus period (usually about 30 minutes) after each simulated arbitrator or judge concludes his or her analysis process. After individual
responses are elicited, the entire panel can then be combined, even if that will never happen in a bench trial or arbitration, to observe the discussion by the panel. Thus, eliminating a threshold focus group study and moving directly to simulations can save substantial cost without causing substantial loss of value.

In summary, a “clopening” module is a traditional foundation for almost any simulation. Whether additional features are tested must depend on the nature of the controversy and the goals of the client. Even though the process is abbreviated for a half-day “clopening” exercise, the benefits may be substantial.

**Using the Full-Day Format**

Some additional data—at increased cost—can be obtained by expanding to a full-day mock hearing format with simulated witness testimony and additional arguments. This is obviously not necessary for a mere motion simulation, but it works well for a jury trial or bench trial. Hearing testimony is normally composed of excerpts from video depositions. If video depositions do not exist, videotaped or live “testimony” can still be created using witnesses under the control of the party conducting the study. Even adverse witnesses can be portrayed using actors if necessary. In this approach, each side makes opening statements, some form of testimony is presented to the surrogate panelists, closing statements are made, and mock deliberations are conducted. Individual attitudes of each mock juror, arbitrator, or judge are tested repeatedly during the session to track shifts. This process usually requires a full day.

Theoretical benefits of the full-day approach are extensive. The mock hearing format allows testing of reactions after each witness has spoken, to rate the credibility of that particular witness and to gauge the shifting leanings of individual arbitrators as the evidence unfolds. In theory, this input allows lawyers to decide which witnesses they wish to showcase at the hearing and which they prefer to relegate to minor roles. The credibility scores may also inject a dose of humbling reality into a client’s confidence in the persuasive powers of a particular spokesperson for the client’s case. Finally, the results of these studies can facilitate witness enhancement.

In reality, the theoretical advantages of mock evidentiary hearings over mere “clopening” sessions may fall short in practice. The ability of a lawyer to control the role of particular witnesses, for example, is frequently limited by the opponent’s tactics. Often the information provided by witness evaluations is little more than the conclusions that experienced trial lawyers had already drawn themselves (e.g., bad witnesses are certified as bad witnesses). The greatest value of full-day mock trials arises from the greater credibility that clients seem to attach to the results from these exercises. In a major case, the full-day format is often worth the extra cost, particularly for case evaluation on the eve of a dispositive motion hearing or trial if settlement remains a realistic option.

**Using Simulations to Select the Most Favorable Panel**

When the budget permits, simplified “clopening” studies may be conducted at the stage when arbitrator candidates are known but the final panel has not been selected. Assume, for example, a construction dispute between the property owner and the general contractor in which the list of potential arbitrators consists of architects, lawyers, and real estate developers. The owner might wish to conduct research to see whether one type of professional responds in a particularly favorable or unfavorable way to the owner’s themes. A series of simulations may provide empirical evidence to confirm or refute the owner’s expectation that architects will favor its position while developers will tend to side with the general contractor.

Although they are valuable, preselection studies are difficult to achieve. The window for selection of arbitrators from a specific list of candidates is usually narrow, making it necessary to recruit surrogate arbitrators in a very short period of time and arrange the simulated hearing, all before selections are due. Some preplanning is possible, but the process is inherently hectic. Further, the results of this study will probably have little value in testing the attitudes of the final panel. In major matters, however, the information acquired from a preselection study may produce the winning edge.

**Adding Value Through Measurement Devices**

For relatively little cost, additional measurement devices can increase the information obtained from the surrogate panelists. Opinion meters, for example, are useful persuasion-measurement devices derived from advertising research. Mock decision makers (whether jurors or panelists) are given dials or keypads connected to a computer and asked to twist the knobs (or punch a specific key) as they feel more persuaded. Some practice is usually conducted with radio or television commercials to teach the panelists to use the dials. Computer graphs of the meter readings can be correlated with videotapes of the “clopenings” to show the effects of certain arguments on each mock decision maker. Results of these tests can help lawyers focus their themes or avoid arguments that offend particular individuals.

Ranking of key facts is another useful exercise. One method, for example, presents pairs of facts to decision makers and asks them to select the fact that is more important to them in each pair. Each fact is presented in several combinations. Using statistical techniques, researchers can then rank these facts to tell the trial lawyers which ones are most important. The statistical ranking is often surprising and always useful. Jury consultants rarely promote this ranking process, however, because the effort and technical competence required are substantial. Despite that resistance, lawyers may wish to insist on the necessary tests. In nonjury
A well-designed simulation exercise helps to eliminate irrational factors that could skew results unfairly, including poor advocacy.

jurors immediately agreed, and the estoppel question was answered “yes.” The focus exercise after any mock deliberation can be used to draw out analogies or metaphors that support the positions of your client. The resulting suggestions can be used in arguments to “empower” favorable jurors, as the consultants like to say.

Finally, much can be learned by watching a surrogate decision maker’s attempt to agree on a simplified award. Damage findings, in particular, should usually be included on a simplified award form to force quantification. Jury consultants resist verdict forms because mock jurors want to leave promptly, and long forms may cause the mock juries to disperse before they complete the deliberation phase. When simulating motions, arbitrations, or bench trials, however, deliberations often move more quickly, and compromising behavior may be clearly articulated.

Several other techniques may be employed to extract particular types of information to meet specific needs. After the substantial investment of time and money to assemble and “stimulate” a surrogate panel of judges or arbitrators, every effort should be made to get as many useful measurements as possible from the perishable resource of that panel’s perceptions.

**Improve Fairness**

We believe that decision research promotes fairer results and may reduce costs. There is nothing inherently manipulative about the use of social science techniques to study the reactions of decision makers. Whether dealing with jurors, arbitrators, or judges, decision research merely formalizes procedures for accomplishing tasks that have traditionally been achieved in other ways. Every advocate must identify issues, frame the most persuasive arguments, organize the evidence, and evaluate a case. Traditionally, these steps were completed without the benefit of psychologists and surrogate decision makers, but the result is the same.

Lawyers may have more difficulty in detecting the knowledge, cultural biases, and attitudes of arbitrators or judges than of jurors. For example, in a technical arbitration over alleged breach of a German gene patent, a Houston lawyer may have a more limited understanding of the perspective of a French biochemist on a panel in Frankfurt than that lawyer would have for a typical Texas juror in Dallas. Such gaps in shared assumptions can be greatly reduced when the lawyer attempts to explain his or her case to another French biochemist—or, better yet, to three surrogate panels that each contains a French biochemist.

A well-designed simulation exercise helps to eliminate irrational factors that could skew results unfairly, including poor advocacy. By sensitizing advocates to cultural differences or linguistic challenges, for example, the simulation process should improve the efficiency with which key concepts in a case are communicated. More reliable communication should ensure that results are likely to turn on the merits of a controversy. Otherwise, decisions may be distorted by translation errors, cultural bias, or other extraneous factors. Clear communication with the decision maker is particularly crucial when appeal rights are limited, as in arbitrations or bench trials. In-house counsel can also ensure that they are getting the best possible advocacy for their positions. With only one chance to get it right, simulation studies improve the chances that a party can take its best shot when it matters most. Moreover, if both sides conduct simulations, the overall quality of advocacy should improve in the proceeding, and settlement valuations may converge. If seeing ourselves “as others see us” in a simulation study saves us from only one “blunder” or “foolish notion,” that alone may make the gain greater than the pain.

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**Endnotes**


2. Anthony J. Bocchino et al., *What Juries Want to Hear II: Reverse Engineering the Verdict*, 74 TEMP. L. REV. 177, 198 (2001) (Jury simulations can provide lawyers “accurate jury reaction to their case and the ability to improve their trial theory and presentation strategies on many levels.”).

3. If possible, trial counsel should be encouraged to observe the research sessions, which typically consist of observing the surrogate decision makers explain their thought processes behind one-way glass mirrors in a focus-group facility. Both videotapes and audiotapes are usually made of these sessions, however, and trial counsel may review the tapes while traveling if they cannot spare time from trial preparation for a day to observe the mock trial or hearing. In addition, reports to analyze the research results are usually prepared by the research sponsor, and these can be reviewed quickly by trial counsel and clients.

4. One frequent finding from decision research is that arguments, metaphors, or visual aids favored by trial counsel are offensive or counterproductive. Surrogate decision makers may also embrace arguments that trial counsel or the client feel are not especially persuasive. This prioritization guidance alone often justifies the cost of the exercise.

5. The major cost in most arbitration simulations is the cost of the surrogate arbitrators. This differs from jury research, where
the mock jurors are often a relatively small part of the cost. If an outside consultant is used, minimal costs are likely to exceed $30,000 for the consultant’s fee alone. Substantial incremental lawyer time is also required to prepare, conduct, and analyze any simulation exercise.


7. Empirical studies of simulation effectiveness are particularly difficult to conduct for arbitrations because the outcomes are usually confidential, and variations in arbitration formats are substantial. In theory, actual arbitration panels can be matched more closely with simulated panels than can generic juries. Users of such simulations at Weil Gotshal have found arbitration studies to be highly predictive, but these observations are inherently anecdotal.

8. Jury research often adds value to the jury selection process, of course, by identifying those types of jurors who are most likely to be favorable to the sponsor’s case. We have conducted similar research before an arbitration panel was selected to find the most favorable arbitrators. Most simulation research at the trial level is conducted after substantial discovery has occurred, however, which is a time when the actual identities of judges or arbitrators are usually known.

9. Although popular with some transactional lawyers, the party-selected-arbitrator format has many drawbacks that extend beyond the difficulties it creates for simulation studies. Most trial lawyers dislike the inability to observe and counteract any advocacy that may occur in private if one party-appointed arbitrator proves more strident than the other during deliberations. Further, there is no international consensus regarding the degree of neutrality that party-appointed arbitrators should observe, and the party who selects the more ethical designee may suffer if an opponent appoints a blatant advocate.

10. The stimulus is normally presented to an entire group at once for two reasons: First, most of the expense is in the presentation phase, and doing it once is obviously cheaper. Second, having all the surrogates observe one “show” ensures that variations in attitudes are being tested rather than changes in the presentation. In appropriate cases, several versions of the stimulus can be used, as is often done in jury research, to find the most effective way to structure a motion or nonjury case. For example, a defendant may wish to devote one day of research to a mock trial in which both liability and damages are contested and then contrast those results with a second day of research in which liability is admitted but the defense concentrates on reducing damages. 11. A real-world experience illustrates this point: An arbitrator on an actual panel of three neutrals had a lackluster record of attendance at third-rate schools, bouncing from small firm to firm, losing a race for a minor political office, and finding that only arbitrations could provide regular work. A good match with a similar undistinguished record was found for the simulation, including a loss in running for a different minor political office. This mock arbitrator asked a question, drawn from an inapposite metaphor with insurance law, that reflected a complete misunderstanding of the legal issues. At the actual arbitration, the real arbitrator asked precisely the same inane question. Fortunately, the simulation had provided practice on the way to correct the confusion and direct the arbitrator back to the path of relevance.

12. Care must be taken, of course, to ensure that conflicts are cleared for simulated arbitrators who are lawyers. This can be accomplished by asking the mock panel members to clear conflicts for both parties in all capacities, ensuring that they can become counsel for the sponsoring party at the conclusion of the exercise. As in jury research, an initial privilege should be created by having the surrogate arbitrators agree to serve as consultants to the sponsoring law firm, even if they do not know the identity of that firm’s client at first.

13. One of the entertaining parts of a typical arbitration simulation occurs when each of the panelists is asked, after they have concluded all their deliberations, “Who do you think is paying for this exercise, and why do you think they are doing it?” Sometimes, for example, the simulated panelists speculate that the simulation is a mediation tool being conducted by both parties to promote settlement. Often they disagree on the probable sponsor. Usually, however, a majority will see some clue that gives away the identity of the sponsor.

14. For example, if one engineer strongly favored plaintiff, a second strongly favored defendant, and a third was undecided after presentations of “clopennings” that were intended to be identical, some doubt would be cast on the predictive value of the exercise. This type of inconsistency may result from failure to obtain good attitudinal matches for the surrogate panelists, from unintended variations in the “clopennings,” or, alas, from a close case on which reasonable engineering minds can differ. In any event, varied results obviously suggest more risk to a party than consistent victories but hold more hope than consistent losses.

15. Once a mock juror has “voted” before his or her peers, many jury researchers feel that individual is less likely to express narrative opinions freely. In theory, a mock juror who has taken a strong position during simulated deliberations will express only those views in a subsequent “focus” discussion that are consistent with his or her “vote.” If so, this phenomenon should limit research insights that might otherwise be obtained by “focusing” the mock jurors before they express individual opinions. Whether arbitrators feel the same theoretical need for perceived consistency is debatable, but this postulated tendency to demonstrate consistency before one’s peers does not appear to constrain discussion by simulated arbitrators at the end of the exercise. At the end of the study, many lawyers, for example, seem delighted to outline arguments that would directly contradict the position they took during mock deliberations.

16. If, for example, a video deposition was taken of the defendant but not the plaintiff, lawyers representing plaintiff can create a simulated video deposition of plaintiff to be used as a foil for the excerpts from the defendant’s deposition. Care must be taken, however, not to create a witness statement that must be disclosed to the opponent.

17. In one arbitration simulation, for example, the general counsel for petitioner had met extensively with respondent’s principal during mediation. A simulation was conducted before the panel was selected to determine whether lawyer or nonlawyer arbitrators would tend to favor one side. At the time of this early study, no depositions had been taken, so the general counsel played the role of the opposing principal, attempting to restate the contentions made by that individual in negotiations. The simulation was later repeated using excerpts from the real witness’s video deposition. The lawyer’s acting produced questionnaire responses by mock panelists that were strikingly similar to those obtained in the later simulation when excerpts from the actual deposition of respondent’s principal were shown to other surrogate arbitrators.

18. In the “witness enhancement” ritual, jury consultants purport to change the image that key witnesses project by person-to-person therapy with the witnesses. Executives who seem harsh, for example, may be softened by sessions that practice changes in their vocabulary, body language, and dress. This process, like most therapy, faces hurdles of denial by the patient, and reactions of mock jurors or surrogate panelists can assist the consultants in persuading the witness that an image issue exists. This process probably has less value with panels composed of well-educated arbitrators than in trials before typical jurors, who may be more visceral than intellectual.

19. These facts need not have any logical relation to each other for ranking to work. For example, one pair might ask “Is it more important to you that defendant is a large corporation or that plaintiff is an American citizen living in Bolivia?” A later pair might inquire “Is it more important to you that plaintiff is an American citizen living in Bolivia or that defendant failed to perform the structural tests on its own checklist?”
Yuri Mikulka is a cochair of the ABA Section of Litigation’s Committee on Corporate Counsel and is a partner at the Irvine, California, office of Howrey LLP. She specializes in securities and complex commercial litigation. Alexis Hunter is an associate in the Securities Litigation, Government Enforcement, and White Collar Defense Group in the New York office of Howrey LLP.

Endnotes


2. Id.


IN-HOUSE TOP 10

By Theodore K. Whitfield Jr.

The In-House Top 10 provides insightful comments from the ranks of in-house counsel put in David Lettermanesque list form. This edition’s Top 10 comes from Theodore K. Whitfield Jr., vice president, general counsel, and secretary, Chattem, Inc.

Top 10 Tips for Managing a Small Legal Department

10. Understand the expertise and strengths of the various outside counsel firms and attorneys with whom you work to ensure you have the right team in place for a specific matter.

9. Delegate appropriate matters to outside counsel so that your time can be effectively focused on issues that have a material impact on your company.

8. The demands of litigation can overwhelm a company. Make your outside counsel aware of the need for them to anticipate and manage these demands and to prevent litigation surprises whenever possible.

7. For quick and cost-effective response, insist that your outside counsel firm(s) provide you with several attorney contacts in multiple practice areas. If your primary contact person at your outside counsel firm does not trust other attorneys in his or her firm to have direct contact with you, then your trust in this firm might not be well placed.

6. Hire a well-trained, motivated, and capable administrative assistant or paralegal to keep the department running smoothly.

5. Consider moving compliance functions outside the legal department to conserve the department’s resources, avoid conflicting roles, and preserve legal privileges.

4. To avoid receiving inconsistent information or directives, consider appointing a single point of contact on legal issues for each business unit or department.

3. Have regular and frequent status meetings with your company’s senior leadership.

2. Do not separate yourself from your company by thinking of the company as “the client.” Instead, think of yourself as a collaborative problem-solver for the company.

And the number one way to manage a small legal department:

1. Learn your company’s business from the ground up and choose outside counsel firms that are committed to understanding your company’s business with you.

If you are on the inside and would like to submit your own Top 10, please contact Christopher Akin, coeditor, at (214) 855-3081 or by email at cakin@ccsb.com. Topics can be instructive, humorous, or anything of interest to the committee’s membership.
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