KCMBA
Kansas City Metropolitan Bar Association

Annual Business Litigation Seminar

Sponsored by the KCMBA Business Litigation Committee

Thursday, August 6, 2020 • 8:30 AM – 3:10 PM

Live webinar/Access link sent upon registration

Credit: Missouri – 7.0, incl. 2.0 ethics / Kansas – 7.0, incl. 2.0 ethics

Cost: KCMBA Member - $220 / Non-Member - $320

DESCRIPTION

This program will feature presentations in multiple areas affecting business litigation (e.g., class action personal jurisdiction and settlements). The program will also include sessions on COVID-19 including sessions on creative use of demonstrative evidence, conflicts of interest and ethics issues.

SCHEDULE

Moderators: R. Todd Ehlert, *Rouse Frets White Goss Gentile Rhodes, P.C.*
Chris C. Tillery, *Seigfreid Bingham, PC*

8:30 AM **Covid 19 Class Actions Plaintiff and Defense Perspectives**
Ashlea G. Schwarz, *Paul LLP*
Timothy E. Congrove, *Shook, Hardy & Bacon L.L.P.*

9:20 AM **Class Action Personal Jurisdiction**
Mark A. Olthoff, *Polsinelli PC*

10:10 AM *Break*

10:20 AM **COVID-19 Municipal Update**
Mayor Quinton Lucas, *Kansas City, Missouri*
Sean Cooper, *Paul LLP*

11:10 AM ***Lunch break***

11:40 AM **Class Action Settlements**
Brian C. Fries, *Lathrop GPM LLP*

KCMBA WEBINAR ACCESS LINK WILL BE SENT PRIOR TO THE PROGRAM

4 WAYS TO PRE-REGISTER:

1. **Online** at **kcmba.org**
2. **Mail** completed registration form with payment to KCMBA, Two Pershing Sq., 2300 Main St., Suite 100, Kansas City, MO 64108.
3. **Fax** (816) 474-0103
4. **Phone** (816) 474-4322

Cancellations received 48 hours or more prior to the start of an event may receive a refund minus a $25 processing fee, or a credit voucher in the full amount of the fees paid which will be valid for one year from the date of the event.

Hon. Jay Daugherty, *Jay Daugher*

Substitutions for paid registrations are accepted. Credit vouchers are transferable.

No shows will not receive a refund or credit voucher. A request for refund due to emergency or hardship must be received in writing no more than 30 days after the event date.

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Hon. Paul C. Gurney, *10th Judicia*

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12:30 PM **Conflicts of Interests, Ethical Issues and Dilemmas in the Representation of Entities, Constituent Groups – Civil Perspectives**
Julie Parisi, *Seigfreid Bingham, PC*
Frederick 'Fritz' H. Riesmeyer, *Seigfreid Bingham, PC*

1:20 PM Break

1:30 PM **Creative Use of Demonstrative Evidence**
Douglas R. Dalgleish, *Stinson LLP*

2:20 PM **Ethics Issues for Attorneys Dealing with COVID-19**
Whittney A. Dunn and Christian A. Stiegemeyer, *The Bar Plan Mutual Insurance Co.*

3:10 PM Adjourn

***Course materials will be emailed prior to the event.**

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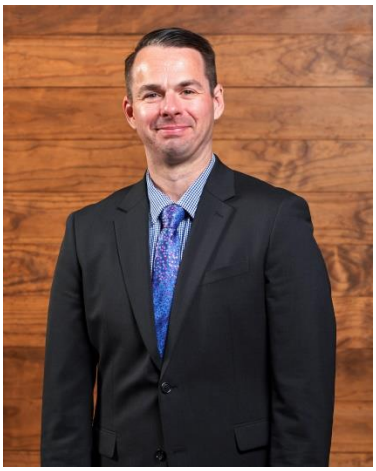
Biographies

Timothy E. Congrove, *Shook, Hardy & Bacon L.L.P.*

Tim defends businesses in multidistrict litigation, class actions and other complex cases. He is highly regarded for his innovative thinking and common sense approach to problem solving by his clients, which include national and international companies in the tobacco, consumer goods, retail and chemical industries, among others. Tim has successfully and efficiently managed large-scale, high-stakes cases involving a variety of claims and liability theories, including product liability, toxic tort, medical monitoring and consumer fraud.

Tim serves as national product liability counsel to Philip Morris USA. He has coordinated the defense and pre-trial management of mass filings of individual tobacco cases in a number of jurisdictions, including Florida, Louisiana, New York and Iowa. He was involved with the landmark Castano national tobacco class action that the Fifth Circuit decertified on appeal in 1996, and he worked with the team that developed and implemented the strategy that led to the subsequent defeat of numerous statewide tobacco class actions. For the past several years, he has been part of Shook's national coordinating counsel team working closely with in-house counsel to manage the defense of more than 5,000 individual cases pending in Florida. His work has included deposing plaintiffs and fact witnesses; coordinating pre-trial strategy and the work-up of hundreds of cases; deposing and defending expert witnesses; arguing numerous substantive and procedural motions, both pre-trial and trial; and serving in support roles at multiple trials.



Sean Cooper, *Paul LLP*

Sean focuses his practice on complex commercial litigation, class actions, wrongful death and catastrophic injury, antitrust litigation, mass torts and wage and hour litigation. He joined Paul LLP in 2017.

Sean earned his J.D. from the University of Kansas School of Law in 2013. During law school, Sean was an Associate Editor of the Kansas Law Review and won CALI Excellence for the Future Awards in KU's Immigration and Asylum Clinic and International Human Rights Law. Before law school, Sean earned a B.A. in English from Truman State University and graduated summa cum laude. Sean also received his M.A. in English from Truman State, where he was graduate student of the year in the English program. Sean was a four-year varsity tennis player at Truman State, posting one of the winningest records in school history. After receiving his M.A., Sean taught English as a second language in Bangkok, Thailand.

Douglas R. Dalgleish, *Stinson LLP*

Doug's enthusiasm for his work as a trial lawyer allows him to constantly learn new things and to develop relationships with his clients to resolve complex disputes. Steeped in all aspects of trial work, Doug has successfully worked with his clients in high stakes commercial, shareholder derivative, personal injury, wrongful death, toxic tort, products liability and class actions claims.
Doug is a Fellow in the American College of Trial Lawyers and is Vice Chair of its Complex Litigation Committee. Recognized by Chambers USA as a top commercial litigator, Doug brings more than three decades of experience in trial work to a variety of settings and jurisdictions, including specialized work in the transportation, railroad, technology and manufacturing industries.

Whittney Dunn, *The Bar Plan Mutual Insurance Co.*

Whittney Dunn is a Risk Manager at The Bar Plan Mutual Insurance Company in St. Louis, Missouri. In this role, she presents continuing legal education courses throughout the state and nation on ethics, professionalism, and malpractice avoidance and provides one-on-one ethics guidance and law practice management assistance to attorneys in Missouri and beyond. Dunn also serves the legal community in numerous leadership roles in local, state, and national bar associations, including a stint as the Chair of the ABA Young Lawyers Division Ethics & Professional Responsibility Committee and serving in an on-going role as a St. Louis County representative on the Missouri Bar Young Lawyers Section Council. Dunn is a double alumna of the University of Missouri in Columbia, where she received a J.D. and a Bachelor of Journalism degree.

R. Todd Ehlert, *Rouse Frets White Goss Gentile Rhodes, P.C.*

Todd is an accomplished and experienced trial attorney. Throughout his nearly twenty-five year legal career, he has tried approximately 350 trials to verdict; has substantial experience trying large, complex cases in arbitration; and has successfully argued multiple cases on appeal before appellate courts. His practice focuses on representing businesses and individuals as both plaintiffs and defendants in a wide variety of disputes, with a concentration in business litigation. To date, total damages in the cases he has been involved with exceed $675 million.

Brian C. Fries, *Lathrop GPM LLP*

Brian Fries focuses his practice on class actions and complex litigation, and he leads the firm's Class Action group. He has extensive trial practice, arbitration, and mediation experience in a variety of litigation matters throughout the United States.

His experience includes disputes arising from general business transactions, class actions, single plaintiff claims, healthcare litigation, business torts, accounting negligence claims, real estate transactions, business ownership disputes, banking related claims, personal injury claims, and a variety of tort, breach of contract and fraud claims.

Brian knows there is no one-size-fits-all approach to litigation, and he excels at working with clients to achieve their goals.

Brian also provides general outside legal counsel and advice to privately owned businesses.

Mayor Quinton Lucas, *Kansas City, Missouri*

Quinton Lucas, “Mayor Q,” was sworn in as the 55th mayor of Kansas City on August 1, 2019. As mayor, Quinton has prioritized making Kansas City’s neighborhoods safer, creating more accessible and affordable housing and public transportation, fostering a healthier community and improving basic services. Quinton created and chairs the City’s Special Committee on Housing Policy.

Born and raised in Kansas City, Quinton has spent most of his life in the city’s urban core. As a child, he moved often and experienced homelessness, sometimes staying with family or friends, or residing in a motel. Despite these challenges, Quinton remained focused on his schoolwork, earning academic scholarships to high school, college and Cornell Law School before returning home to Kansas City.

Since 2012, Quinton has been a member of the University of Kansas Law School faculty, where he served as one of the youngest tenure-track law professors in the country. He is active in the Kansas City community and volunteers extensively in area schools and organizations, including providing mentorship in local prisons.

Mayor Quinton Lucas lives in the Historic 18th and Vine Jazz District, which he previously represented on the City Council.

Mark A. Olthoff, *Polsinelli PC*

Mark A. Olthoff is a shareholder in the Polsinelli law firm in Kansas City, Missouri where he is a member of the Commercial Litigation Practice Group and chair of the commercial litigation class actions practice area. He routinely represents clients in a variety of complex commercial suits, including class actions. Mark's practice involves federal and state statutory claims, such as FCRA, FDCPA, and TCPA, as well as a variety of business and commercial claims. He is a frequent author and speaker on various topics concerning class actions, piercing the corporate veil, business torts, and various financial litigation and regulatory issues. Mark also serves as chair of the Financial Services Litigation SLG for the DRI Commercial Litigation Committee.

Julie Parisi, *Seigfreid Bingham, PC*

Julie Parisi was raised by a community of attorneys. Being surrounded by positive role models in the legal profession has greatly influenced how Julie approaches her practice. This example of passionate legal representation and dedication to community involvement leads her to approach all disputes with the understanding that there is humanity and reason in the legal profession.

Litigation is by nature adversarial and often times unavoidable, but Julie believes that real progress is made when all parties – attorneys, clients, third parties – exercise that reason to reach resolution, rather than unnecessary and expensive fighting. She enjoys working with all types of clients, from those who look to her for creative ideas of possible resolution, to those who approach litigation as a collaborative process.

Julie's clients appreciate her availability to calmly navigate them through the litigation process, which can be tough and hard to understand. She finds that communication goes a long way to ease uncertainty, and strives to make every client feel like they have been heard. Julie loves the opportunities to meet so many interesting, smart, funny and creative people, and enjoys how her clients give her motivation to constantly push herself to be the best attorney she can be.

Outside of practicing law, you might find Julie running, playing trivia, cheering on the Royals and Jayhawks, and spending time with her husband and daughters.

Frederick 'Fritz' H. Riesmeyer II, *Seigfried Bingham, PC*

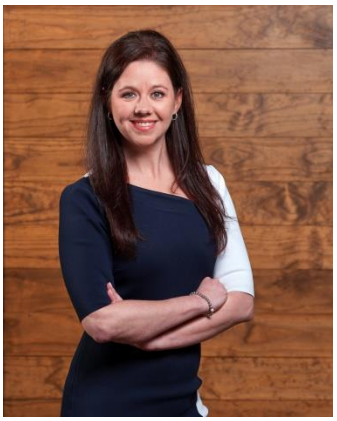
Although Fritz Riesmeyer is relatively new to the Seigfreid Bingham team, he has been practicing law for 30 years. He joined Seigfreid Bingham so he could better serve his clients and also because the firm has a strong reputation in Kansas City and the Midwest. He formerly lead the firm's Litigation Practice Group and spends a lot of his time working with and mentoring other attorneys. He especially enjoys working with businesses that are seeking a litigation partner that can help the business to figure out its legal issues

Fritz's primary focus is business and commercial trial and dispute resolution. This includes all phases of dispute resolution, settlement negotiations, mediations, arbitrations, jury trials, trials to the court, and handling appeals. His experience with trials in a wide variety of business disputes, paired with his knowledge, means he is always willing and ready to go to trial when that is in the best interest of the client.

He also advises small and medium-sized businesses on a wide range of legal issues and concerns, including how businesses operate day-to-day. This experience helps to give Fritz a more holistic view of a business' operations.

Fritz enjoys the intellectual aspects of law and likes advocating for clients in the courtroom or through an alternative dispute resolution process. He prides himself on spending a lot of hands on time with his clients, and being attentive, responsive, and thorough in his communication.

When he's not practicing law, Fritz spends time teaching in the legal community. He was an instructor with National Institute of Trial Advocacy-Chicago and Kansas City and is the Founder and Master of the KCMBA Trial Academy. In 2012-2013 he chaired the KCMBA on rewriting the rules of civility.



Ashlea G. Schwarz, *Paul LLP*

Ashlea's practice is driven by the complexity of matters and a rigorous devotion to detail. Spanning numerous practice areas, her cases involve multi-faceted, multi-jurisdictional commercial litigation—most often with multiple parties. Ashlea excels at fact-intensive, meaningful cases, such as toxic tort actions arising out of community chemical exposure, particularly those involving migrant farmworkers, agricultural laborers, and other vulnerable populations; large-scale products liability litigation, representing hundreds and thousands of people against multi-national corporations to recover for personal injuries, property damage, or financial losses; high-stakes business disputes, such as claims for breach of contract, breach of fiduciary duty, intellectual property and trade secrets, fraud, and misrepresentation; adversary actions to recover money for bankruptcy estates to pay back creditors after corporate malfeasance has defrauded a mass group of individuals, including claims for fraudulent transfers, aiding and abetting, breach of fiduciary duties, conspiracy, re-characterizing debt instruments as equity, equitable subordination, and director/officer liability; wrongful death actions caused by negligence, complacency, and a failure to care; often the victims of these atrocious acts are those most in need of our protection.

Many of Ashlea's cases are nation-wide litigations where she works with teams of highly regarded co-counsel in multi-district litigations in both state and federal court. Ashlea specializes in cases involving highly complex, often novel scientific and medical issues. She has managed the day-to-day responsibilities of over 60 mass action suits.

In 2014 Ashlea was named one of Missouri Lawyers' Weekly's Up and Coming Lawyers, an award that recognizes litigators under age 40 who demonstrate excellence in the legal profession and in their commitment to their communities. Ashlea has been named a Rising Star by the Kansas City Business Journal every year since 2015.

Christian A. Stiegemeyer, *The Bar Plan Mutual Insurance Co.*

Christian A. Stiegemeyer is the Director of Risk Management for The Bar Plan Mutual Insurance Company where he helps lawyers arrive at practical solutions to a wide variety of ethical and legal malpractice issues. He received his J.D. from Saint Louis University School of Law in 1992.

Chris C. Tillery, *Seigfreid Bingham, PC*

Chris Tillery is a trial lawyer and business litigator. He represents a variety of business and commercial clients in jury trials, bench trials, class actions, arbitrations, administrative hearings, and mediations, primarily in the areas of business and commercial litigation, employment litigation, construction litigation, products' liability, and premises liability. For over a decade, Chris has successfully tried or arbitrated cases throughout Kansas, Missouri and the United States for a wide-array of clients, including small, mid-size and large businesses, publicly-traded companies, and private and public organizations and individuals. His broad and extensive litigation background encompasses a wide-range of both simple and complex cases, including commercial contract disputes, construction defect and design errors, discrimination and retaliation claims, fraud, tortious interference and other business tort actions, personal injury defense, wrongful death, medical malpractice, mechanics liens, commercial property disputes, landlord-tenant disputes, landowner liability claims, commercial lending disputes, regulatory and administrative actions and investigations, intellectual property disputes, tax disputes, and actions between public officials. Chris fully understands and appreciates the challenges, risks and expense that litigation poses for his clients. He makes it a priority to be attentive, responsive, and thorough in his communications with clients, while his skill, preparation and dedication allow them to focus on their business and family knowing that their case is well in hand. Above all, he is a problem solver who prides himself on finding innovative legal solutions that yield effective results and limit his client's costs and exposure as much as possible.

KCMBA Annual Business Litigation Seminar
COVID-19 Class Actions: Plaintiff and Defense Perspectives

Ashlea Schwarz, Partner

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Tim Congrove, Partner

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Overview: COVID-19 Related Class Actions

- Business Interruption Insurance Coverage Litigation
- PPP (Paycheck Protection Program) Claims against Lenders
- Refund Litigation (airline tickets, college tuition, concert tickets, etc.)
- Workplace Exposure Claims
- Class Actions against Cruise Ships
- Suits Against Senior Living Facilities
- Employment Claims
- Cases Involving Consumer Goods

Additional cases of interest

- Privacy and Cybersecurity
  - *Cullen v. Zoom Video Communications, Inc.* (N.D. Cal. March 30, 2020)
- Price Gouging
  - *Armas v. Amazon.com Inc.,* Case No. 104631782 (11th Circuit Court in and for Miami-Dade County, FL) (alleging price gouging related to toilet paper and hand sanitizer)
- Actions against People's Republic of China
  - *Bella Vista LLC et al v. The People's Republic of China et al* (D. Nev. March 23, 2020) (alleges China covered up COVID-19 pandemic)
  - *U.S. Aharon et al v. Chinese Communist Party et al* (S.D. Fla. April 07, 2020) (alleges China hoarded PPE)

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Business Interruption Insurance Cases

- Plaintiffs allege state-mandated closures, stay-at-home orders, and lack of customer demand are covered under "Business Interruption" coverage and standardized policy language.
  - Insurance Services Office (ISO)
- *Planet Sub Holdings Inc. et. al. v. State Farm Auto Property & Casualty Company Inc.,* 7/22/2020 4:20 cv 577 (Wimes) (Kansas City).
  - Defendants refuse to provide insurance coverage to plaintiffs, whose businesses suffered after they were forced to close their dining rooms due to the Covid-19 pandemic
- Complaints typically plead claims both for Declaratory Judgment under 23(b)(2) and Breach of Contract under 23(c)(3).
- Complaints allege blanket and uniform denial of coverage.

Business Interruption Insurance Cases

- Insurers contend that claims are not covered (not “direct injury or loss”) and/or are excluded.
- Numerous class actions filed across the country.
- JPML is Considering MDL Motions.
- Class Certification Issues
  - mandatory arbitration?
  - variations in state laws and policy language
  - variations between insured’s businesses models and nature of loss
  - individualized defenses
  - variations in triggering events, e.g. closure orders
- National Legislative Solution?

PPP Claims

- Paycheck Protection Program guarantees loans to businesses, on certain conditions
- Designed to combat widespread unemployment – businesses applied for low-interest (government-backed) loans
- Small businesses allege failure to process on a first-come, first-serve basis and favoritism for making larger loans
- Funds quickly exhausted

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PPP Claims

- Multiple class actions filed across the country against the big banks, many in California
- Motion to transfer and consolidate Chase actions pending before JPML (MDL 2944)
- Motion to transfer and consolidate Bank of America cases to W.D. Tex. (MDL 2952)
- Motion to transfer and consolidate Wells Fargo cases (MDL 2954)

Refund Claims: Tickets, Memberships, etc.

- Travel Insurance
  - *Gustafson v. Travel Guard Group, Inc*. (D. Kan. May 29, 2020)
- Airline tickets
  - *Sweet et al v. Frontier Airlines* (D. Co. May 12, 2020)
- Concert and Event tickets
  - MDL pending vs. StubHub
- Season tickets and Annual passes
  - *Leon v. Disney Destinations, LLC* (M.D. Fla. July 10, 2020)
- Gym Memberships & Other Monthly Dues/Subscriptions
  - *Labib v. 24 Hour Fitness USA Inc.* (N.D. Cal. March 27, 2020)
  - *Vodden v. WW International, Inc.* (S.D.N.Y. May 18, 2020)

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Refund Claims: College Tuition and Fees

- Plaintiffs claim they were promised an on-campus education experience that relied heavily on social contact and extracurricular activities.
- Seek recovery for tuition ***and*** user fees.
- Causes of action include breach of contract, quasi-contract and violations of consumer protection laws, e.g. MMPA.
- Numerous class actions have been filed throughout the country against public and private institutions.
- Removable under CAFA?

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Refund Claims: College Tuition and Fees

- Educational Malpractice Doctrine
- Class Certification Issues
  - (b)(2) versus (c)(3) certification
  - Commonality/Predominance
  - Typicality
  - Damages models and expert testimony

Workplace Exposure Claims

- "Essential" worker lawsuits against employers for failure to provide a safe work environment
- E.g., *Rural Community Worker's Alliance et al v. Smithfield Foods, Inc. et al,* 20-cv-06063, (W.D. Mo. Apr. 23, 2020)
- Meatpacking employees in Milan, MO recently sought an order to force the company to comply with guidance from the Centers for Disease Control and Prevention (CDC) and state public health officials

Workplace Exposure

- Judge Kays dismissed on Primary Jurisdiction (and other) grounds
- Individual claims, e.g. *Benjamin v. JBS SA*, 200500370 (Philadelphia County, May 2020) (wrongful death claim from alleged work exposure at meatpacking plant)
- Worker Compensation as potential defense
- Specific Causation challenges

Senior Living Facilities

- Multiple long-term care facilities have been targeted, including nursing homes, assisted care facilities, and acute rehabilitation facilities.
- Cases typically include “upstream” entities and seek to pierce corporate veil.
- Most filings so far have been individual wrongful death suits, but a handful of class actions have been filed.
- Wide gamut of COAs alleged including negligence and med mal, but also claims for breach of contract, consumer protection statutes, and assertions that facilities violated a host of federal and state laws such as the ADA, AHCA, and Civil Rights Act.
- Plaintiffs allege senior living facilities failed to take adequate protective measures to prevent spread of COVID-19; inadequate staffing and quality of care; and contractual claims under residential agreements.

Senior Living Facilities

- PREP Act (removal and exclusive remedy).
- State Immunity Legislation – didn't pass in MO at end of session, but indications it might come up in a Special Session.
- Other Potential Procedural and Merits Defenses
  - Arbitration clauses
  - Lack of Forseeability?
  - Causation issues
  - Compliance with Law
- Class Certification Issues
  - Injury
  - Causation
  - Proof of Reliance

Cases Involving Consumer Goods

- FTC sent joint letters with the FDA to many companies making coronavirus-related claims, likely leading to "tag-along" or "copycat" private civil class actions.
- *David et al. v. Vi-Jon Inc*., Case No. 20-cv-424, complaint filed, 2020 WL 1082551 (S.D. Cal. Mar. 5, 2020) (alleging germ-X made false statements about its effectiveness against COVID-19)
  - Similar lawsuits against Target and Purell manufacturer

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To Certify or Not to Certify?

- Which cases are more amenable to class treatment?
- Which cases are less?

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PERSONAL JURISDICTION IN CLASS ACTIONS PRESENTATION

August 6, 2020

By: Mark A. Olthoff

PERSONAL JURISDICTION BASICS

- Personal jurisdiction exists when the defendant has “certain minimum contacts” with the forum such that “traditional notions of fair play and substantial justice” are not offended.
- *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (“minimum contacts”).
- *Hanson v. Denckla,* 357 U.S. 235 (1958) (“purposeful availment”).
- *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) (“stream of commerce”)
- *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984) (“related to” or “arises out of” defendant’s forum contacts).
- *Calder v. Jones,* 465 U.S. 783 (1984) (“expressly aimed “ and “intentionally directed”).
- *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) (“substantial and continuing relationship”).
- *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102 (1987) (“purposely directed”).

PERSONAL JURISDICATION BASICS

- Liability and jurisdiction are independent concepts. *See Sher v. Johnson,* 911 F. 2d 1357 (9th Cir. 1990); *Tuttle v. Lorillard Tobacco Co.,* 118 F. Supp. 2d 954 (D. Minn. 2000); *Creech v. P.J. Wichita, L.L.C.,* 2017 WL 914810 (D. Kan. Mar. 8, 2017).
- Personal jurisdiction can sometimes be established by alter ego allegations. *See Thomas Global Group, LLC v. Watkins,* 2016 WL 3946774 (D. N.J. July 19, 2016); *Boley v. Commercial Carriers, Inc.,* 1996 WL 118280 (E.D. Mo. Feb. 23, 1996); *MeterLogic, Inc. v. Copier Solutions, Inc.,* 126 F. Supp. 2d 1346 (S.D. Fla. 2000); *Allstate Motor Club, Inc. v. SHL Systemhouse, Inc.,* 1998 WL 575279 (N.D. Ill. Sept. 3, 1998); *Jorgensen v. Wright Medical Group, Inc.,* 2018 WL 6250606 (D. Utah Nov. 29, 2018).
- It is not enough that jurisdiction exists over a corporation to also sweep in officers and directors; nor is it sufficient that jurisdiction exists as to a subsidiary to also assert jurisdiction over a parent company. *See Alki Partners, LP v. Vatas Holding GmbH,* 736 F. Supp. 2d 478 (S.D. N.Y. 2011); *Karabu Corp. v. Gitner,* 16 F. Supp. 2d 319 (S.D. N.Y. 1998); *Jazini v. Nissan Motor Co.,* 148 F. 3d 181 (2nd Cir. 1998); *Velez v. Portfolio Recovery Assoc., Inc.,* 881 F. Supp. 2d 1075 (E.D. Mo. 2012).

PERSONAL JURISDICATION BASICS

- An “agency theory” or “conspiracy theory” of personal jurisdiction may not be recognized where inconsistent with due process. *See, e.g., Mongler v. Knight,* 2017 WL 2931369 (E.D. Mo. July 10, 2017); *Wallach v. Whetstone Partners, LLC,* 2016 WL 3997080 (E.D. Mo. July 26, 2016).
- Personal jurisdiction can sometimes be “nationwide,” such as where a statute permits nationwide service of process, *e.g.,* antitrust laws, RICO, ERISA. *See Budicak, Inc. v. Lansing Trade Group, LLC,* 2020 WL 758801 (D. Kan. Feb. 14, 2020); *RightCHOICE Managed Care, Inc. v. Hospital Partners, Inc.,* 2019 WL 302515 (W.D. Mo. Jan. 23, 2019); *Sitzer v. Nat’l. Ass’n of Realtors,* 420 F. Supp. 3d 903 (W.D. Mo. 2019); *Jennings v. Bonus Bldg. Care, Inc.,* 2014 WL 1806776 (W.D. Mo. May 7, 2014); *Pincione v. D’Alfonso,* 506 F. Appx. 22 (2nd Cir. 2012); *Wordtech Sys., Inc. v. Programmers Paradise, Inc.,* 1997 WL 6384444 (N.D. Cal. Oct. 8, 1997); *Boilermaker-Blacksmith Nat’l Pension Fund v. Gendron,* 96 F. Supp. 2d 1202 (D. Kan. 2000).

TYPES OF PERSONAL JURISDICTION

- Two types of personal jurisdiction: specific (“case-linked”) or general (“all purpose”)
- General personal jurisdiction: under current precedent, a foreign defendant must have such persvasive contacts with the forum to render it essentially “at home.”
- For corporations, the entity is “at home” if it is organized under the laws of the forum or if its principal place of business is located there.
- Specific personal jurisdiction requires an affiliation between the defendant, the forum, and the underlying controversy.
- For specific jurisdiction to hold, the defendant’s actions in the forum, not the plaintiff’s conduct, is what matters.

RECENT SUPREME COURT PRECEDENT

- *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (general jurisdiction).
- *J. McIntyre Mach., Ltd. V. Nicastro,* 564 U.S. 873 (2011) (specific jurisdiction).
- *Daimler AG v. Bauman,* 571 U.S. 117 (2014) (general jurisdiction).
- *Walden v. Fiore,* 571 U.S. 277 (2014) (specific jurisdiction).
- *BNSF Ry Co. v. Tyrell,* 137 S. Ct. 1549 (2017) (general jurisdiction).
- *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773 (2017) (specific jurisdiction).

MISSOURI CASES

- *Ingham v. Johnson & Johnson,* 2020 WL 3422114 (Mo. App. June 23, 2020).
- *State ex rel. LG Chem, Ltd. v. Laughlin,* 599 S.W. 3d 899 (Mo. 2020).
- *State ex rel. Key Ins. Co. v. Roldan*, 587 S.W. 3d 638 (Mo. 2019).
- *State ex rel. Cedar Crest Apts, LLC v. Grate*, 577 S.W. 3d 490 (Mo. 2019).
- *State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W. 3d 888 (Mo. 2018).
- *State ex rel. Norfolk So. Ry. Co. v. Dolan*, 512 S.W. 3d 41 (Mo. 2017).

KANSAS CASES

- *Matter of Marriage of Williams*, 417 P. 3d 1033 (Kan. 2018).
- *Bob Bergkamp Constr. Co. v. Double T. Evacuation, Inc.*, 432 P. 3d 695 (Kan. App. 2019).
- *Kearns v. New York Community Bank*, 400 P. 3d 182 (Kan. App. 2017).

ILLNOIS CASE

- *Rios v. Bayer Corp.*, 2020 IL 125020 (Ill. June 4, 2020).

ARKANSAS CASE

- *Lawson v. Simmons Sporting Goods, Inc.*, 569 S.W. 3d 865 (Ark. 2019).

KEY TAKEAWAYS

- A corporation must be “at home” to be subject to general jurisdiction, meaning its state of incorporation or principal place of business in the forum state.
- Stream of commerce theory cannot serve as a basis for general jurisdiction.
- A defendant’s contact must be with the forum itself, not merely with persons who reside there. That is, the plaintiff cannot be the only link between the defendant and forum.
- For specific jurisdiction, there must be a connection between the forum and the specific claims at issue; a defendant’s unrelated contacts with a forum are irrelevant to the specific jurisdiction analysis.

BRISTOL-MYERS SQUIBB (“BMS”)

- Mass tort case in California. Nearly 700 plaintiffs from 34 states.
- Plaintiffs asserted state law claims.
- Plaintiffs were non-California residents that sued a pharmaceutical company which was neither incorporated nor had its principal place of business in California.
- The defendant’s conduct did not occur in California. Injuries occurred where plaintiffs resided.
- Trial court found general jurisdiction based on BMS’s “extensive activities” in California.
- California appeals court and supreme court disagreed but found there was specific jurisdiction over both the resident and non-resident claims due to the company’s extensive forum related activities.
- Supreme Court found that the California state court’s exercise of personal jurisdiction was improper.
- Supreme Court emphasized that specific jurisdiction requires a connection between the forum and the specific claims at issue.

CLASS ACTION APPLICATIONS

- Because the Court in *BMS* found personal jurisdiction lacking where non-resident plaintiffs were suing a defendant with no connection to the state (*i.e.,* no general jurisdiction and no specific jurisdiction as to those non-resident claims), there is an argument that the *BMS* holding applies to restrict nationwide classes.
- The argument goes that non-resident putative class members cannot "create" specific jurisdiction over a non-resident defendant when their claims do not arise in the jurisdiction where the non-resident defendant is being sued. Rule 23 and the Rules Enabling Act do not authorize ignoring constitutional requirements. It is not appropriate to bring a non-resident defendant into court merely because of class allegations. An unnamed "plaintiff" should not be allowed to obtain a judgment she could not obtain as a named plaintiff. The mass tort v. class action distinction is one without a difference.
- Most courts have rejected *BMS* in the class context. The location of absent class members is irrelevant. The named plaintiff is what matters. Unnamed class members are not "parties" for jurisdictional purposes. Rule 23 provides sufficient due process protections. There is a "single claim," it is just made on behalf of all class members.
- Three cases that may shed further light on the issues; *Mussat v. IQVIA, Inc., 953 F. 3d 441 (7th Cir. 2020)*; *Molock v. Whole Foods*, 952 F. 3d 293 (D.C. Cir. 2020); *Cruson v. Jackson Nat'l Life Ins. Co.,* 954 F. 3d 240 (5th Cir. 2020).
- Strategic considerations: (1) successful argument could decrease potential class size and lead to more reasonable resolution, but (2) could result in plaintiffs refiling where the company may be subject to general jurisdiction or multiple class actions where non-resident plaintiffs live.

ADDITIONAL CLASS ACTION APPLICATIONS

- No Personal Jurisdiction Exists:
  - *White v. Steak N Shake, Inc.,* 2020 WL 1703938 (E.D. Mo. April 8, 2020) (Perry, J.)(analogizing FLSA collective action to mass tort action in *BMS); Rafferty v. Denny's, Inc.,* 2019 WL 2924998 (N.D. Ohio July 8, 2019)(same).
  - *Carpenter v. PetSmart, Inc.,* 2020 WL 996947 (S.D. Cal. Mar. 3, 2020).
  - *Pilgrim v. General Motors Co.,* 408 F. Supp. 3d 1160 (S.D. Cal. 2019).
  - *Gazzillo v. Ply Gem Indus., Inc.,* 2018 WL 5253050 (N.D. N.Y. Oct. 22, 2018).
  - *Peroutka v. Yeti Coolers, LLC*, 2020 WL 1283148 (E.D. N.Y. Mar. 17, 2020)(transferring case due to likelihood of no jurisdiction over class members).
- Personal Jurisdiction Found:
  - *Harrison v. General Motors,* 2018 WL 67066697 (W.D. Mo. Dec. 20, 2018).
  - *Moore v. Compass Group USA, Inc.,* 2019 WL 4723077 (E.D. Mo. Sept. 26, 2019)(White, J.).
  - *Krumm v. Kittrich Corp.,* 2019 WL 6876059 (E.D. Mo. Dec. 17, 2019)(Perry, J.).
  - *Schertzer v. Bank of Am., N.A.,* 2020 WL 1046890 (S.D. Cal. Mar 4, 2020).
  - *McCurley v. Royal Seas Cruises, Inc.,* 2019 WL 300469 (S.D. Cal. July 10, 2019).
  - *Sotomayor v. Bank of Am., N.A.,* 377 F. Supp. 3d 1034 (C.D. Cal. 2019).
  - *Labrecque v. NewRez LLC,* 2020 WL 3276699 (D. Ariz. June 16, 2020).
  - *Progressive Health and Rehab Corp. v. Medcare Staffing, Inc.,* 2020 WL 3050185 (S.D. Ohio June 8, 2020).
  - *Knotts v. Nissan N. Am., Inc*., 346 F. Supp. 3d 1310 (D. Minn. 2018).

WAIVER?

- Even though the majority of courts have concluded *BMS* does not apply in the class action context, the Supreme Court has yet to weigh in.
- *Cruson* decision suggested that the jurisdictional defense is not waived as to absent class members because they are not parties.
- Best practice is to preserve in an Answer, raise in a motion to strike, and raise in class certification briefing.
- Related: Arbitration and putative class members. *See In re Checking Account Overdraft Litigation,* 780 F. 3d 1031 (11th Cir. 2015); *Forby v. One Technologies, LP,* 2020 WL 4201604 (N.D. Texas July 22, 2020).

City of Kansas City, Missouri COVID-19 Information

https://www.kcmo.gov/city-hall/departments/health/coronavirus-covid-19-kcmo-information-and-response/reopen

https://www.kcmo.gov/home/showdocument?id=5225

https://www.kcmo.gov/city-hall/departments/health/coronavirus-covid-19/local-businesses-guide

http://thinkkc.com/docs/default-source/default-document-library/final-safereturn-guide.pdf

https://www.kcmo.gov/Home/Components/News/News/388/625

KCMBA Business Litigation CLE

Class Action Settlements

August 6, 2020

Brian C. Fries

Lathrop GPM

Lathrop GPM

Brian Fries

Partner

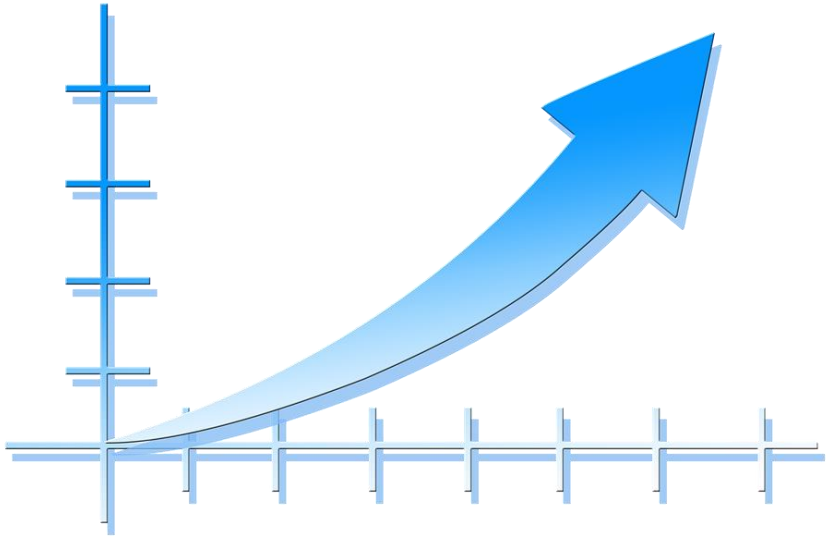
- Leads Lathrop GPM's Class Action group. Former head of Litigation for several years.
- Extensive litigation experience in several industries. General business litigation, some tort, and many class actions, including MDL cases. Recognized by The Best Lawyers in America®, Banking Lawyer of the Year in Kansas City (2020) and Benchmark Litigation Leading Litigators.
- COVID news: Went from empty nesters to having three 20-somethings "working from home." Bed time has gotten much later.

Lathrop GPM

Introduction

Trends in Class Actions

- Antitrust
- Consumer Protection
- Product Defect
- Medical Monitoring
- ERISA
- Wage and Hour
- Securities (some decline)



SCOTUS History

- Summary Judgement
- *Daubert*
- *Iqbal and Twombly*
- Arbitration
- Personal Jrd--*Bristol-Myers Squibb*
- Class Actions

SCOTUS Class Action Cases

- *AT&T Mobility* and Other Arbitration Cases
- *Wal-Mart v. Dukes*—focus on commonality; look to facts; rigorous analysis
- *Amchem*-For settlements must still satisfy Rule 23
- *Comcast*-focus on predominance; individualized damages
- Others

Recent SCOTUS Cases with Roberts Court – Not Always What You Expect

- Not Always What You Expect
  - Same-Sex Marriages
  - Affirmative Action
  - Obamacare
- BUT: Business Cases
  - CFPB
  - Campaign Finance
  - Climate Change
  - Labor Union
  - Class actions/arbitration

Legislative Actions

- CAFA (2005)
- Federal Rules (Settlement 2018)
- Reform efforts (stalled)

Changed/Changing Issues

- Rigorous Analysis of Rule 23
  - Consider facts/merits; not just pleading
- Predominance
- Article III Standing
- B(2) Injunctive/Declaratory relief
- Arbitration
- Considering *Daubert* at Class Certification
- Approach on discovery
- Ascertainability
- BMS Personal Jurisdiction application to class
- *Earlier analysis of settlements at Preliminary Approval Stage*

What About State Cases?

- Most states mirror or look at Federal Rule 23
  - Numerosity
  - Commonality
  - Predominance
  - Settlement
- But will they continue to look with recent SCOTUS cases and amendments to Federal Rules?
- And not all follow Federal Rule 23 exactly

Venue Matters

- Difference between state and federal
- Difference between Circuits in Federal Court

Venue Matters!

- Example: Medical Monitoring
  - *Hood v. Gilster-Mary Lee Corp.:* popcorn packing plant in Jasper County, MO
  - State Court, removed to federal court
  - Judge Harpool:

"For the reasons set forth herein, it is clear to this Court that Plaintiff would prevail in her request for class certification of a medical monitoring claim under the Missouri Supreme Court's analysis. This case is very similar to class action cases on medical monitoring decided by both the Missouri Supreme Court and the Court of Appeals. See, *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409 (Mo. Ct. App. 2015), reh'g and/or transfer denied (Apr. 28, 2015), transfer denied (June 30, 2015); and *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007). As more fully discussed herein, in each circumstance class action certification of classes seeking medical monitoring benefits was found to be valid. **However, the law of the Eighth Circuit is not nearly so welcoming of class actions seeking medical monitoring rights.** See e.g., *In re St. Jude Med., Inc.*, 425 F.3d 1116 (8th Cir. 2005); and *In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008).

As a result, Plaintiff's request for class certification seeking medical monitoring rights under the federal Class Action Fairness Act presents a difficult question. This court must evaluate Plaintiff's request for class certification in light of overwhelming support under state law, but in the shadows of concerns regarding class certification of medical monitoring cases clearly expressed in Eighth Circuit precedent."

Overview

- In 2018, the FRCP was amended to address and update issues related to class action settlements. Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

- This CLE will provide an overview of the changes to the text of the FRCP and also give an update on how courts are addressing these changes.

Changes

- Frontload review process into Preliminary Approval Process
- Clarification of final settlement criteria
- Notice by electronic means
- Limitations on objectors

Settlement Overview

- Court Approval Required
- Amendments to Federal Rules
- Closer Scrutiny (even prelim approval)
- Notice changes
- Objector limitations
- Administration
- Claims Made
- *Cy Pres*
- Reporting of Settlements

Class Settlements Generally

- (1) Settlement Agreement
- (2) Motion for Preliminary Approval
- (2) Certification of a Settlement Class
- (3) Notice to Class (and regulators) of Proposed Settlement
- (4) Opportunity for Class Members to Object/ Opt Out
- (5) Court Conducts Final Settlement Hearing (Fairness Hearing)
- (6) Attorney's Fees
- (7) Implementation of Settlement

FRCP 23(a)

- Numerosity—joinder not practical
- Commonality– common questions of law or fact
- Typicality—claims or defenses of class rep are typical of the class
- Adequacy Class Rep—fairly and adequately protect interests of class

FRCP 23(b) Text:

- **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
  - **(1)** prosecuting separate actions by or against individual class members would create a risk of:
    - **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
    - **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
  - **(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final **injunctive relief or corresponding declaratory relief** is appropriate respecting the class as a whole; or
  - **(3)** the court finds that the questions of law or fact common to class members **predominate** over any questions affecting only individual members, and that a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
    - **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
    - **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
    - **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
    - **(D)** the likely difficulties in managing a class action.

Class Notice Requirements: A Changing of the Times

- 2018 amendments to Rule 23 recognize that new methods for giving notice to class members have emerged since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)
- First class mail is no longer *required* as the method to give notice in every case.
- Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members “the best notice that is practicable.”
- *Must consider likely class members’ access to electronic notice*

Class Notice—Rule 23(c)(2) Notice (not settlement)

- (A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.
- (B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:
- *(Cont'd)*

Class Notice—Rule 23(c)(2) Notice (not settlement) (Cont'd)

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Federal Rule of Civil Procedure 23(e) Text: (Settlement)

- **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised ***only with the court's approval***. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
  - **(1)** ***Notice to the Class.***
    - **(A)** *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
    - **(B)** *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
      - **(i)** approve the proposal under Rule 23(e)(2); and
      - **(ii)** certify the class for purposes of judgment on the proposal.
- *Cont'd…….*

FRCP 23(e)(2) Approval of Proposal—*frontloading the process*

- ***(e)(2)*** *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other. *(cont'd)*

FRCP 23(e)(2) Approval of Proposal—*frontloading the process*

- **(e)(3)** *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal

- **(e)(4)** *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Areas the Court and Counsel Should Focus on For Notice

- Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court.
  - Who is in the class?
    - Sophisticated, known members, etc.
  - In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.
  - Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language."
  - Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.
  - There are models available (e.g., Federal Judicial Center)

Administrators

- Access to other notice plans
- Prior court approvals of notice plans
- Cost considerations

What is “frontloading”?

- The factors look essentially like final approval.
  - Arm’s length negotiations
    - Respected Mediator (avoid risk of collusion)
  - No conflicts of interest
  - Maturity of litigation
  - Absence of significant objections
  - Amount of information may depend upon amount of settlement
  - Attorney’s fees (timing and amount)
  - *Duke Law School Best Practices Report*
- Likely to approve?
  - But more lenient than final approval standard
- Trying to save time and resources by identifying issues earlier.

FRCP 23(e)(5) Objectors

- *Class-Member Objections.*
- (A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
- (B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
  - (i) forgoing or withdrawing an objection, or
  - (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
- *Cracking down on "professional objectors"*

FRCP23(e)(1) Considerations for Approval of a Proposed Settlement Notice: Class Certification

- If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted.
- But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record.
- The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

FRCP23(e)(1) Considerations for Approval of a Proposed Settlement Notice: Extent and Type of Benefits the Settlement Confers

- Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

FRCP23(e)(1) Considerations for Approval of a Proposed Settlement Notice: Likely Range of Litigated Outcomes

- The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

FRCP23(e)(1) Considerations for Approval of a Proposed Settlement Notice: Attorneys' Fees Considerations

- The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

- Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

FRCP23(e)(1) Considerations for Approval of a Proposed Settlement Notice :“Fair, Reasonable, and Adequate”

- The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Fair, Reasonable and Adequate Factors

- The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

- A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors--perhaps many--may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

Advisory Committee and “Fair, Reasonable, and Adequate”

- The Advisory Committee acknowledges that courts have established and applied similar factors that reflect these considerations. The 2018 amendment does not displace any factor but instead focuses the court's analysis on due process and fairness concerns for the unnamed class members. The amended rule aims at streamlining a court's consideration of settlement proposals, particularly at the preliminary approval phase, unifying the federal courts' approach to approval, and increasing predictability for the parties. The changes also aim to reduce forum shopping and inconsistency in settlement approvals across jurisdictions, as ***all federal courts must now consider the same factors in approving class settlements. Most consequential for parties considering class settlements, the rule contemplates increased judicial involvement in and scrutiny of class settlements, including scrutiny of the manner in which relief is distributed to class members and whether the parties have made sufficient efforts to identify class members.***

Heightened Judicial Scrutiny of Proposed Settlements?

- Parties cannot gloss over the equities of the settlement's terms until the final approval hearing. Rather, the rule forces the parties to consider the equities early in the litigation and during the settlement negotiation stage to ensure they can justify the proposed class settlement when they present it to the court for preliminary approval.
- Parties must make a robust showing to warrant the court's preliminary settlement approval.
- The Advisory Committee tells courts to consider the nature and amount of discovery conducted to determine whether class counsel had sufficient information as a basis for settlement. Courts may also consider the involvement of a mediator or settlement facilitator in determining whether the settlement terms resulted from real arm's-length negotiations rather than solely through direct negotiations by the parties' counsel (where collusion could potentially occur).

CAFA Reporting Requirement

- 28 USC sec. 1715
  - No later than 10 days after proposed settlement submitted to Court
  - Defendant shall provide to US AG (or if financial institution, the primary regulator) and appropriate State Officials (primary regulator of Defendant):
    - Complaint
    - Notice of any hearing
    - Proposed final notice to Class Members
    - Proposed Final Settlement
    - Any settlement agreement
    - Any agreement between class counsel and defendants
    - Any final judgment or notice of dismissal
    - Names of class members and proportionate share of the claims if feasible, and if not, a reasonable estimate
    - No Final Approval until 90 days after this notice is provided

Northern District of California Settlement Rules as Guidance

- The Northern District of California has issued its own guidance for class action settlements.
- https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/

Updated November 1, 2018 and December 5, 2018

> ***NOTE:*** *This updated guidance, first published November 1, 2018, was modified December 5, 2018 to include the following clarification: the first sentence of the guidance has been revised to reflect that even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Northern District of California Settlement Rules as Guidance: Preliminary Approval

- 1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:
- If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.
- If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.
- If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.
- If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.
- The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.
- The proposed allocation plan for the settlement fund.
- If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.
- In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

Northern District of California Settlement Rules as Guidance: Settlement Administration

- In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

Northern District of California Settlement Rules as Guidance: Notice

- The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the date of the final approval hearing and clearly state that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

- Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

- The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Northern District of California Settlement Rules as Guidance: Notice Language

- Below is suggested language for inclusion in class notices:
  - This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at www._____.com, by contacting class counsel at _____, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, [insert appropriate Court location here], between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.
  - PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

Northern District of California Settlement Rules as Guidance: Opt-Outs

- The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.

Northern District of California Settlement Rules as Guidance: Objections

- Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Northern District of California Settlement Rules as Guidance: Attorneys' Fees

- The court will not approve a request for attorneys' fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel's lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys' fees.
- Increasing Federal Scrutiny of "claims made" not exceeding attorneys' fees. *Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269* (6th Cir. 2016).

Northern District of California Settlement Rules as Guidance: Final Approval of Attorneys' Fees

- All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court's order.

- Regardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.

Northern District of California Settlement Rules as Guidance: Cy Pres Awardees

- If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.

- *Frank v. Gaos,* 139 S.Ct. 1041 (U.S. 2019): The Supreme Court held that judgment affirming approval of cy pres-only settlement would be vacated, and case would be remanded for determination of whether any named plaintiff suffered concrete and particularized injury, as required for injury-in-fact element for Article III standing.

- The case is currently on remand. *See In re Google Referer Header Litigation*, Case No. 10-cv-04809-EJD, 2020 WL 3035796. On remand from the U.S. Supreme Court, a California federal judge has ruled that the lead plaintiffs in a user privacy suit have standing to sue over Google's practice of sharing search terms with third-party websites.

Northern District of California Settlement Rules as Guidance: Post-Distribution Accounting

- 1) Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:
  - The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.
  - In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

- Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases. *(cont'd)*

Northern District of California Settlement Rules as Guidance: Post-Distribution Accounting, Continued

- 2) Within 21 days after the distribution of the settlement funds and award of attorneys' fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.
- 3) The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

Northern District of California Settlement Guidance Applied

- In re: Roundup Products Liability Litigation, 3:16-md-02741-VC
- Judge Vince Chhabria of U.S. District Court in San Francisco warned in an order Denying a Motion to Alter Schedule on Motion for Preliminary Class Settlement Approval, saying he "is skeptical of the propriety and fairness of the proposed settlement, and is tentatively inclined to deny the motion." (Doc. 11182).
- **"To the extent the plaintiffs and Monsanto suggest that it would be no big deal to wait until the final approval stage before fully considering objections to this settlement agreement, they are wrong."**

In re: Roundup Products Liability Litigation, 3:16-md-02741-VC, Preliminary Settlement Concerns

- Even with the consent of both sides, it's questionable whether it would be constitutional (or otherwise lawful) to delegate the function of deciding the general causation question (that is, whether and at what dose Roundup is capable of causing cancer) from judges and juries to a panel of scientists.

- Even if it were lawful to delegate this function to the panel, it's unclear how the delegation proposed here would benefit a class of Roundup users who either have cancer but have not yet sued Monsanto or have not yet developed cancer. Thus far, judges have been allowing these cases to go to juries, and juries have been reaching verdicts in favor of the plaintiffs, awarding significant compensatory and punitive damages. Why would a potential class member want to replace a jury trial and the right to seek punitive damages with the process contemplated by the settlement agreement?

In re: Roundup Products Liability Litigation, 3:16-md-02741-VC, Preliminary Settlement Concerns

- In an area where the science may be evolving, how could it be appropriate to lock in a decision from a panel of scientists for all future cases? For examine, imagine the panel decides in 2023 that Roundup is not capable of causing cancer. Then imagine that a new, reliable study is published in 2028 which strongly undermines the panel's conclusion. If a Roundup user is diagnosed with NHL in 2030, is it appropriate to tell them that they're bound by the 2023 decision of the panel because they did not opt out of a settlement in 2020?

In re: Roundup Products Liability Litigation, 3:16-md-02741-VC, Preliminary Settlement Concerns

- Given the diffuse, contingent, and indeterminate nature of the proposed class, it seems unlikely that most class members would have an opportunity to consider in a meaningful way (if at all) whether it is in their best interest to join the class. There's nothing wrong with certifying a class of people who are candidates to suffer harm in the future when the class is narrow and readily identifiable—for example, NFL players who have not yet developed CTE. In a case like that, it's relatively easy to ensure that the class members are notified and given meaningful chance to consider their options before deciding whether to opt out of the settlement. A class that includes all Roundup users who will get cancer in the future is very different. For example, the idea that a migrant farmworker or someone who is employed part time by a small gardening business would receive proper notification (much less the opportunity to consider their options in a meaningful way) is dubious.

In re: Roundup Products Liability Litigation, 3:16-md-02741-VC, Moving Forward

- At the end of its Order, the Court instituted the following procedure at the preliminary approval stage

Accordingly, the following procedure will apply to the motion for preliminary approval. The hearing will take place, as scheduled, on July 24. With respect to the filing deadline on July 13, the Court will only consider filings from potential class members titled "preliminary opposition" or "preliminary objections." Any such filing must be in the form of a letter brief, not to exceed two pages, single-spaced. (Counsel can be listed on a third page to avoid taking up space on the first two pages.) Anything longer will not be considered and will be stricken from the docket. If the Court's views begin to evolve after the hearing on preliminary approval, it will issue an order inviting full briefing. Filing a letter brief will not be a prerequisite to filing a longer brief if one is invited after the hearing, nor will the longer brief be limited to the issues raised in the letter brief. The plaintiffs may file a reply to the letter briefs by the previously specified deadline.

The Court will not consider amicus briefs at this time. If the Court orders full briefing from potential class members, it will permit amicus filings then.

Judge rejects Harvey Weinstein's $19 million class action settlement with accusers

- Geiss et al v. The Weinstein Company Holdings LLC et al, 1:17-cv-09554-AKH (S.D.N.Y.) (Doc. 353)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUISETTE GEISS, et al.,	:	**ORDER DENYING MOTION FOR PRELIMINARY APPROVAL**
Plaintiffs,	:	
v.	:	
THE WEINSTEIN COMPANY HOLDINGS LLC, et al.,	:	17 Cv. 9554 (AKH)
Defendants.	:	

ALVIN K. HELLERSTEIN, U.S.D.J.:

As stated on the record at today's hearing, the motion for preliminary approval of the class action settlement (ECF No. 333) is denied. A memorandum decision will follow setting out reasons. Furthermore, the motions regarding the regulation of the preliminary approval process (ECF Nos. 334, 344) are denied as moot. The Clerk is directed to close the open motions (ECF Nos. 333, 334, 344).

SO ORDERED.

Dated: July 14, 2020
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

In re Hyundai and Kia Fuel Economy Litigation, Nos. 15-56014, 15-56025, 15-56059, 15-56061, 15-56064, 15-56067(9th Circuit)

- The U.S. Environmental Protection Agency found flaws in Hyundai's and Kia's testing procedures, prompting the automakers to lower fuel efficiency estimates for about 900,000 vehicles from the 2011, 2012 and 2013 model years.
- By an 8-3 vote, the Ninth Circuit restored a $210 million nationwide class-action settlement for hundreds of thousands of owners of Hyundai Motor Co and Kia Motors Corp vehicles whose fuel economy estimates were inflated.
- Link to Opinion: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/06/06/15-56014.pdf

In re Hyundai and Kia Fuel Economy Litigation, Nos. 15-56014, 15-56025, 15-56059, 15-56061, 15-56064, 15-56067(9th Circuit)

- Primary Holdings
- Concerning the objectors' challenges to the settlement approval, the en banc court held that: the notice to class members provided sufficient information; the claim forms were not overly burdensome; and there was no evidence of collusion between class counsel and the automakers.
- The en banc court held that the district court properly exercised its discretion in calculating the fee award using the lodestar method. The en banc court held that the district court did not abuse its discretion in denying fees to objector's counsel James Feinman because he did not meaningfully contribute to the class settlement.

In re Hyundai and Kia Fuel Economy Litigation, Nos. 15-56014, 15-56025, 15-56059, 15-56061, 15-56064, 15-56067(9th Circuit)

- Dissent
- Judge Ikuta dissented because she would hold that the district court certified a multistate class action under Fed. R. Civ. P. 23 without determining what law applied to the plaintiffs' claims, in violation of Rule 23 and Supreme Court precedent, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).
- Judge Ikuta also stated that the majority erred in upholding the district court's award of attorneys' fees, because the district court failed to determine the value of the benefit the class derived from the settlement.

Practice Points for Attorneys Pushing for Settlement Approval

- For plaintiffs, provide information to the court that realistically describes the risks of the case, which will help the court evaluate the reasonableness of the settlement (but use caution in describing potential impediments to class certification, as the class will still need to be certified for settlement purposes). One panelist described a class settlement negotiation in which the parties agreed that the preliminary approval package would include information about how often plaintiffs lose TCPA cases. All agreed that the judge believed the plaintiffs' counsel would get a windfall if counsel received a typical percentage of the settlement amount. Providing the judge with information about the risks that plaintiffs' counsel take bringing TCPA cases increased the likelihood that the judge would grant preliminary approval.

- From the defense side, consider the likelihood that the judge will reject the settlement amount, no matter what it is. One panelist suggested that defendants in California are withholding amounts that might otherwise be provided as part of preliminary settlements to leave some room to increase the settlement amount if the judge refuses to approve the original amount.

Practice Points for Attorneys Pushing for Settlement Approval

- Highlight Positives and Negatives of Each Side's Position: Be creative about how you might educate the court about the weaknesses of the parties' positions. For example, the plaintiffs' might offer to share the results of jury exercises *in camera*. A defendant might be willing to reveal sensitive financial information suggesting a very limited ability to pay to the court and class representatives, while not wanting to make that information available more widely. One panelist expressed concern that courts would not ultimately be able to keep the information from the public in the face of a request from absent class member or the press. She suggested using that concern to your advantage, asking the judge to trust the parties' judgment and not requiring them to disclosing sensitive information, even if that information is initially accepted under seal.

- Notice Programs: Consider creating a notice program that is geared not just toward due process but also toward claims stimulation. Courts are often concerned about low class claims rate, which they believe suggest that the settlement benefited the lawyers substantially more than the class and should not be approved. Work proactively to create a notice plan that has a marketing component to overcome this potential downfall.

Practice Points for Attorneys Pushing for Settlement Approval

- Maintaining Credibility: The recent rejection of the settlement in the Yahoo data breach litigation is a good example. There, the court rejected a proposed settlement—at the preliminary approval stage, no less—for a number of reasons, including seeking attorney fees for attorneys that the court had not approved to work on the case and inadequate disclosures to absent class members about the size of the settlement and the release of claims. The tenor of the opinion makes clear that the court was unsatisfied with the information supplied by the parties. Ensuring that reviewing courts consider the parties and their counsel to be credible is key to ensuring that settlements make it through the approval process.

Practice Points for Attorneys Pushing for Settlement Approval

- Using a Mediator Effectively: Using a Mediator Effectively: In a recent case alleging fraudulent marketing practices of online wine, a New Jersey federal court rejected a proposed settlement that was fairly opaque in calculating the recovery to class members, while awarding $1.7 million to attorneys in fees. The settlement drew numerous objectors—including both the U.S. Department of Justice and from state regulators. The court was not satisfied that it had the information it needed to evaluate the fairness of the settlement, and even commented that it was not certain that class counsel had adequate appreciation of the merits of the case before negotiating the settlement.

Missouri and Kansas Class Action Settlements

- Mo. S. Ct. R. 52.08(e) and K.S.A. 60-223(e) govern class action settlements:
- MO Rule Text: **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
- Settlement Adequacy Under Missouri Law:
  - When determining if a class action settlement is fair, reasonable, and adequate the court must consider: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members. *Ring v. Metropolitan St. Louis Sewer Dist.*, 41 S.W.3d 487 (Mo. App. E.D. 2000)

- KS Rule 223(e): *Settlement, voluntary dismissal or compromise.* The claims, issues or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal or compromise:
  - (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal;
  - (2) if the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable and adequate;
  - (3) the parties seeking approval must file a statement identifying any agreement made in connection with the proposal;
  - (4) if the class action was previously certified under subsection (b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion, but did not do so; and
  - (5) any class member may object to the proposal if it requires court approval under this subsection (e); the objection may be withdrawn only with the court's approval.

Applying *Bristol Myers Squibb* to Class Actions

- The Supreme Court's opinion in *Bristol-Myers Squibb Co. v. Superior Court* (*BMS*), 137 S.Ct. 1773 (2017) curtailed the reach of litigation tourists in multi-plaintiff litigation, it did not expressly state that its holding applies to class actions.
- Naturally, the question now is: how will District Courts apply *BMS* to unnamed, non-resident plaintiffs in class actions?
- The Answer: Courts remain divided

Other issues

- Individual Settlements
- Insurance for Claims made
- Court modification of Settlement?
- Interlocutory Appeal for class certification decision in Rule 23(f)

Conclusion

- Class Action Settlements require more thought and preparation of appropriate materials for courts to consider in the Preliminary Approval Stage

KCMBA ANNUAL BUSINESS LITIGATION SEMINAR

August 6, 2020
12:30pm

CONFLICTS OF INTERESTS, ETHICAL ISSUES AND DILEMMAS IN THE REPRESENTATION OF ENTITIES, CONSTITUENT GROUPS <u>CIVIL PERSPECTIVE</u>

Presented By: Frederick Riesmeyer, II and Julie Parisi

SEIGFREID BINGHAM

RULE 4-1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 4-1.8: CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, including medical evaluation of a client, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 4-1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing Rule 4-1.8(a) to (i) that applies to any one of them shall apply to all of them.

RULE 4-1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 4-1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 4-1.7 or 4-1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule 4-1.10 may be waived by the affected client under the conditions stated in Rule 4-1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 4-1.11. Rule 1.11 Special Conflicts (Govt.) and Rule 1.12 (Neutrals)

RULE 4-1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with Rule 4-1.13(b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 4-1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 4-1.7. If the organization's consent to the dual representation is required by Rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

RULE 4-1.4: COMMUNICATION

(a) A lawyer shall:

(1) keep the client reasonably informed about the status of the matter;

(2) promptly comply with reasonable requests for information; and

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 4-1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent death or substantial bodily harm that is reasonably certain to occur;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(4) to comply with other law or a court order; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.

SCENARIO #1

Counsel for an inner city safety net hospital is asked by a new CEO of the hospital to address a key doctor group's (Orthopedic Group), lease of substantial space, in a hospital owned building and is 6 months delinquent in lease payments. The hospital is in serious need of cash from all sources, including the Group's referrals and lease payments.

Counsel, in confronting the Orthopedic Group about the delinquent lease payments learns the following:

- leases with all doctor groups were approved by and administered by the hospital's long time CFO;
- the CFO is particularly close with the Chair of the Board of the hospital who is also the CEO of the Orthopedic Group;
- the lease with the Orthopedic Group is for 5 years and has another year to run;
- the Orthopedic Group's CEO is threatening to not renew the lease and move to other space not located on the hospital's campus;
- the lease with the Orthopedic Group is substantially under fair market rate and probably was when entered into;
- the local US attorney has been vocal about Stark law, antikickback statute and other healthcare compliance issues;
- prior counsel to the hospital also advised its key officers (including the CEO and CFO) in billing compliance matters; and,
- the hospital's CFO, in response to current counsel's request for copies of leases with physician groups, tells counsel that he has received a message from an FBI agent asking for a meeting.

Questions

- Who is your point of contact at the hospital?
- Who is/are your clients, in addition to the hospital?
- Can you warn the Board, CEO, CFO, senior staff about the issues, the possible investigation?
- Are communications with the following privileged?
  - CEO of hospital;

- CFO of hospital;
- Individual board members of the hospital;
- CEO of the Orthopedic Group

- To what parties, individuals are owed the duties of loyalty, confidentiality and disclosure? Do you initiate/recommend an internal investigation? Using inside or outside counsel? What is the scope of the investigation?

SCENARIO #2 - INVESTOR

Inventor Smith conceives, develops, and patents unique firewall software and incorporates "Firewall Software Inc." Inventor meets with Law Firm to discuss intellectual property protection, development of the software for sale, ownership structure and raising venture capital. Law Firms works with Inventor Smith with respect to a number of legal issues, including patent issues, SBA loan issues, the transfer of Smith's shares of Firewall Software Inc. to Smith's wife, (for minority owned business status) and related issues. Inventor Smith then retains Law Firm to provide legal representation for Firewall Software Inc. and Law Firm sends an engagement letter to Inventor Smith, confirming Law Firm's representation of Firewall Software Inc. There was no engagement letter between Law Firm and Inventor Smith.

Law Firm handled additional patent applications for Firewall Software Inc., appointing Law Firm attorneys as agents to prosecute the new patent and the assignment of Smith's initial patent to Firewall Software Inc.

Law Firm prepared an Invention Rights Agreement setting out the rights of Smith and Firewall Software Inc. to the patents and the assignment the rights to the patents to Firewall Software Inc. Inventor Smith proved difficult to work with and refused to accept the ideas and suggestions of the investors, who now had a controlling interest in Firewall Software Inc.

Inventor Smith is forced out of Firewall Software Inc. as an employee, officer and director.

- Who did Law Firm represent?
- Was there a conflict in representation?
- Significance of the engagement letter?
  What disclosures, waivers would have been required?

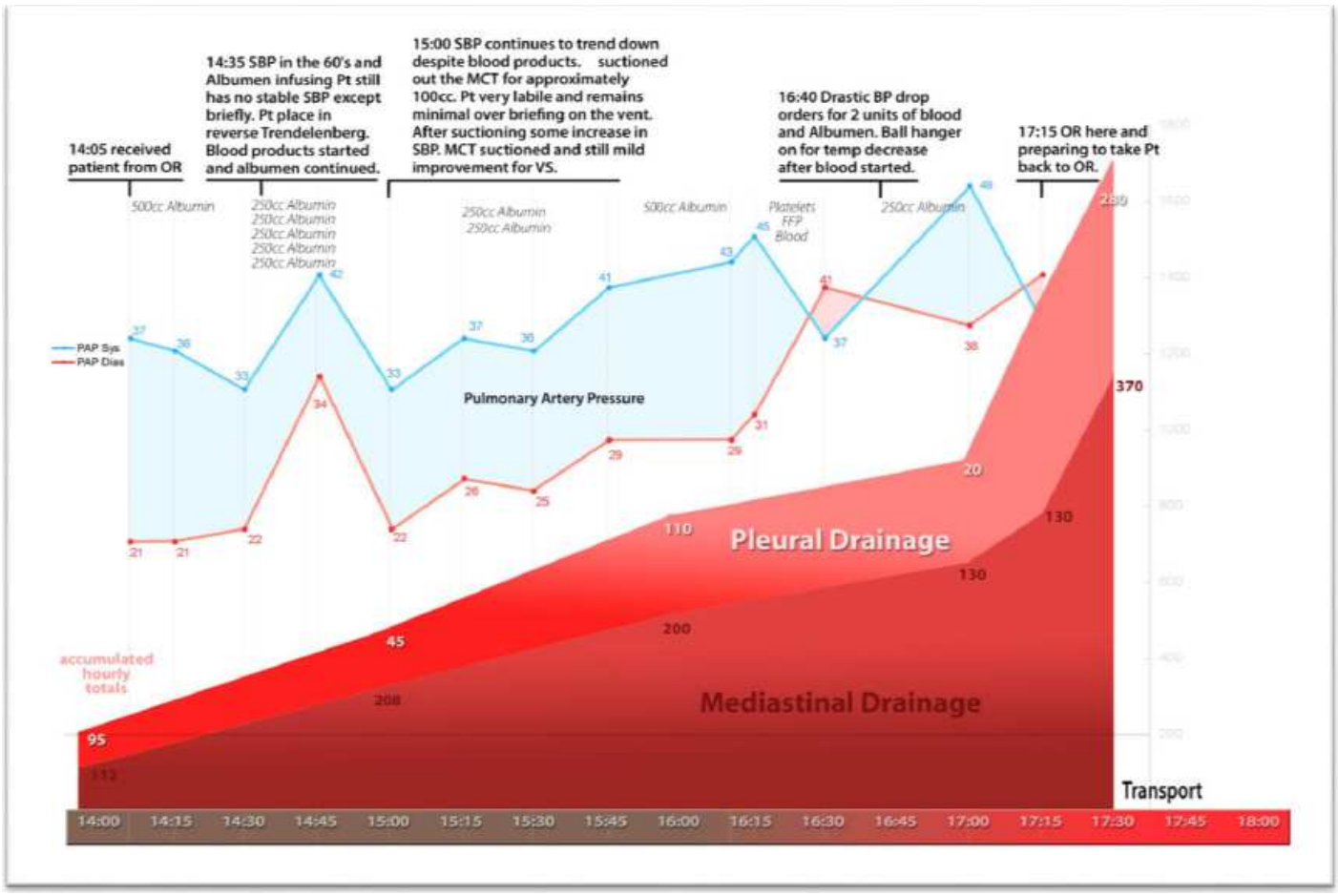
SCENARIO #3

Missouri corporation ("Company") with two shareholders. Shareholder 1 holding 70% of outstanding shares and Shareholder 2 holding the remaining 30%. Shareholder 1 is president and CEO and Shareholder 2 works in the company, as vice president, primarily in sales.

Shareholder 1 hires Law Firm to do clean up corporate work, meeting minutes and later to prepare a Shareholders' Agreement, dealing with restrictions on transfer of shares, value of shares and buyout of a shareholder upon leaving the employment of Company. During this time Shareholder 2 hires Law Firm to represent Shareholder 2 in unrelated legal matter. Law Firm did not represent Shareholder 1 on any individual matters. There are no engagement letters or writings confirming Law Firm's representation of Company or Shareholders.

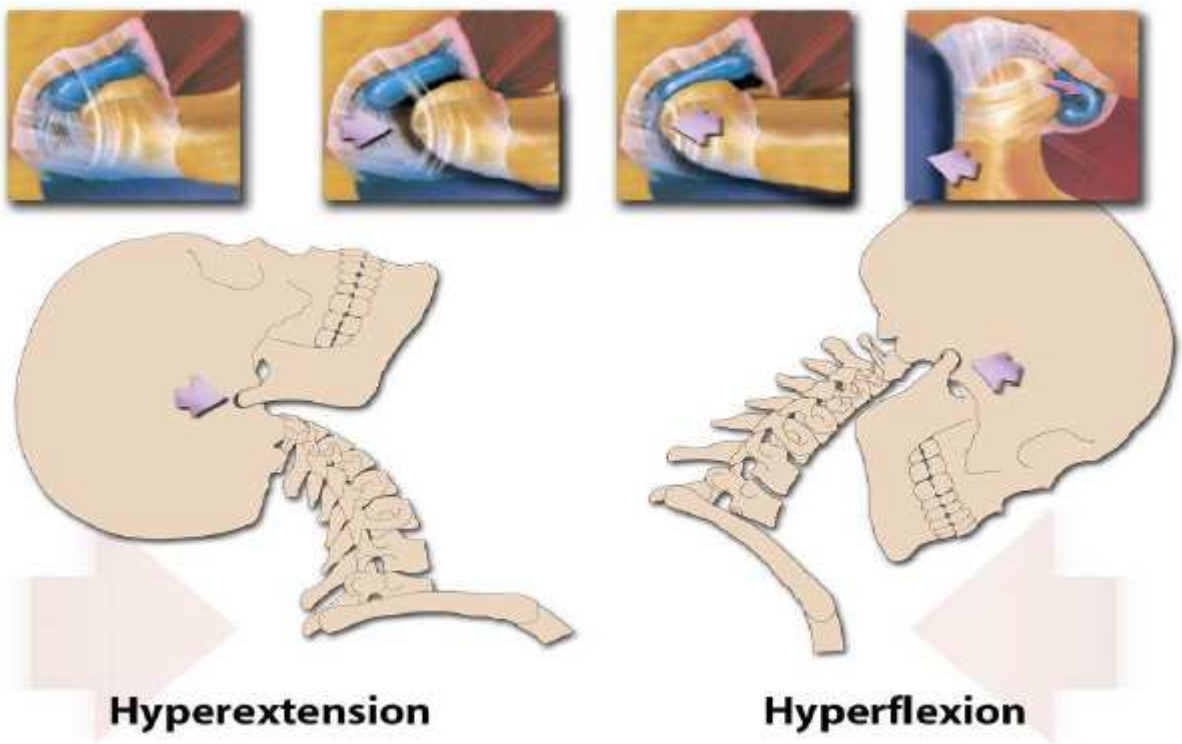
Shareholder 2 is terminated from the Company by the CEO and litigation insures over payment of Shareholder 2's Company shares and various provisions of the Shareholders' Agreement. Shareholder 2 alleges that the Shareholders' Agreement was written to favor Shareholder 1.

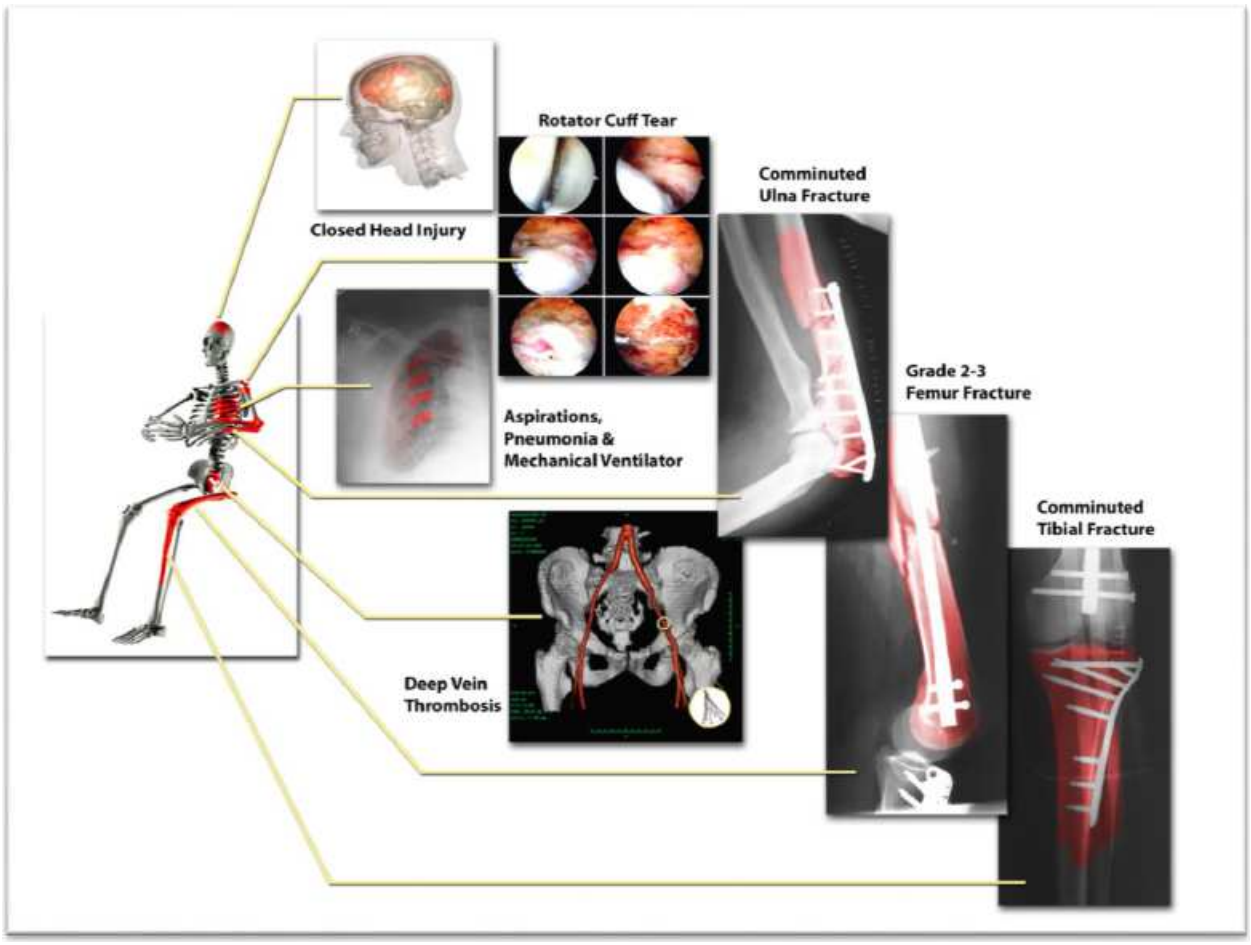
- Law Firm's clients?
- Constituent members?
- Law Firm's representation of Company, Shareholders?
- Conflict? Waiver of conflict possible?



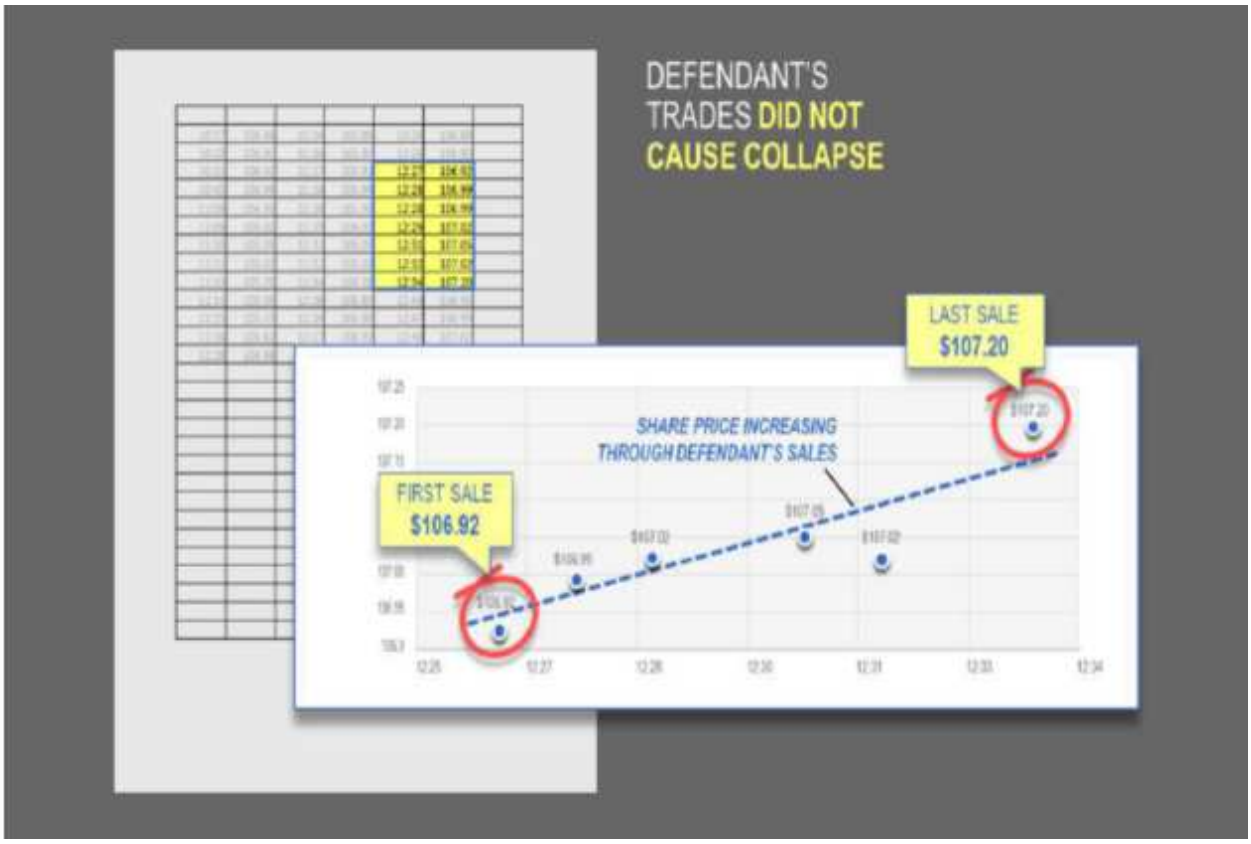
Using very detailed medical records over a crucial time period one can build an understanding of each
measurement and event presenting a clear story.

C. Anatomical Depictions





A summary exhibit to help clarify the total injuries suffered


DEFENDANT'S
TRADES DID NOT
CAUSE COLLAPSE
LAST SALE
$107.20
SHARE PRICE INCREASING
THROUGH DEFENDANT'S SALES
FIRST SALE
$106.92

L. Using Analogies

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Ethics Issues for Attorneys Dealing with COVID-19

- Christian A. Stiegemeyer | Director of Risk Management
- Whittney A. Dunn| Risk Manager

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Program Overview

Ethics Issues for Attorneys Dealing with COVID-19

- Ethics concerns for attorneys working remotely:
  - confidentiality / cybersecurity
  - client communication / diligence
  - supervisory duties
- Stress and well-being issues
- Succession planning / disaster recovery
- Practicing law in an uncertain economy
- Ethics concerns when lawyers leave firms
- Resources

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Ethics Concerns for Attorneys Working Remotely
Confidentiality

Ethics Issues for Attorneys Dealing with COVID-19

RULE 4-1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b)…

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.

Comment [3]
…The confidentiality rule…not only applies to matters communicated in confidence by the client, but also to all information relating to the representation, ***whatever its source***.

- There is no "public records" exception to the duty of confidentiality!
- What about "generally known"? ***Very*** limited exception.

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Ethics Concerns for Attorneys Working Remotely

Confidentiality

Ethics Issues for Attorneys Dealing with COVID-19

- Be cautious with the confidentiality of physical client files and other client information.
- If possible, attorneys working from home should have an entirely separate workspace from any shared family common areas to make sure that a client's file is not viewed or compromised by:
  - a family member,
  - house guest,
  - cleaning crew, or
  - any other third party.
- Client files should be kept locked away when not in use, even in an attorney's home.

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Ethics Concerns for Attorneys Working Remotely

Cybersecurity

Ethics Issues for Attorneys Dealing with COVID-19

- Tell all attorneys and employees to only use private and secure WiFi networks to access your system.
- Make sure all security firewalls and virus blockers are updated and implemented on all devices used to access your computer system and any confidential client information.
- Utilize multi-factor authentication for each new device accessing your firm's email accounts, matter management system, calendar, etc.
- Inventory and monitor firm laptops, phones and other devices.
- Implement appropriate back-up procedures.

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Ethics Concerns for Attorneys Working Remotely

Cybersecurity

Ethics Issues for Attorneys Dealing with COVID-19

- COVID-19-related phishing scams are likely. Properly train staff to spot and respond appropriately.
- Provide virtual solutions to problems wherever possible – e.g., e-signing documents, virtual approval procedures, etc.
- Develop a clear procedure for attorneys and employees to follow in the event of a cyberbreach and provide proper training to ensure the procedure is followed.
- Consider restricting access to certain sensitive information if necessary.
- Remember that free services may not be secure.

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Ethics Concerns for Attorneys Working Remotely

Client Communication

Ethics Issues for Attorneys Dealing with COVID-19

- Remember that clients may become especially needy during this crisis. Make sure someone is available to respond to all reasonable requests for information in a timely manner.
- Consider whether a phone meeting can appropriately replace a client meeting you would normally do in person. Hold a video meeting instead if possible.
- Confirming client directives in writing may be more important now than ever.
- Ensure all attorneys and employees working remotely have access to voicemail, email, direct messaging systems, and any other means of contact between attorneys, clients, firm staff, the courts, other lawyers, and vendors.

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Ethics Concerns for Attorneys Working Remotely

Client Communication

Ethics Issues for Attorneys Dealing with COVID-19

- All attorneys and essential staff should be accessing these inboxes, voicemail boxes, etc. regularly during business hours.
- Update your website, automated email responses and outgoing voicemail messages to inform anyone attempting to contact your firm of the best way to do so. Include a note that walk-ins are not currently welcome if your office previously allowed this.
- Develop an office procedure for handling incoming mail, keeping the safety and health of your staff in mind.
- Consider suspending lesser-used methods of client contact such as text messages or non-email electronic communications until the crisis is over – but ensure client has been notified of this suspension.

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Ethics Concerns for Attorneys Working Remotely

Diligence

Ethics Issues for Attorneys Dealing with COVID-19

- Ensure all attorneys and essential staff can remotely access and update the central office calendar.
- Develop a procedure for how dates will be placed on the calendar when they come into the office, particularly for dates that arrive through the mail.
- Preparing an adequate succession plan to guarantee continued diligent client representation – more on this later!

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Ethics Concerns for Attorneys Working Remotely

Supervisory Duties

Ethics Issues for Attorneys Dealing with COVID-19

- Make yourself more available than usual to respond to inquiries from associates and employees.
- Facilitate video meetings where possible.
- Determine which associates and employees, if any, normally require additional supervision to ensure their duties are completed. Contact these individuals more regularly than employees who seem to work well without prompting.
    - Consider daily or weekly task lists with a check-in close to due dates.
    - Ask employees who are less likely to take initiative to provide a list of what they did each day or week.
    - Take care not to cross the line with these supervisory steps – protect your staff's health and well-being.

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Ethics Concerns for Attorneys Working Remotely

Stress and Well-Being Issues

Ethics Issues for Attorneys Dealing with COVID-19

- Build routines and stick to them.
  - Clearly delineate a beginning and end to your work day. Unplug when the day is through.
  - Use time blocking for onerous tasks.
  - Do you find yourself missing your commute? Take that amount of time to decompress between work and family time.
- Cut yourself some slack.
- Disconnect from news and social media.
- Acknowledge and accept your feelings.
- Engage in self-care practices.
  - Seek advice from a professional – MOLAP offers free counselling and crisis intervention to attorneys and their family members.
  - Meditate
  - Connect with friends and family on a regular basis using FaceTime, Google Hangouts, Zoom, Snapchat, etc.
- Use this free time to learn a new marketable skill or practice area.

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Ethics Concerns for Attorneys Working Remotely
Technological Competence

Ethics Issues for Attorneys Dealing with COVID-19

- **4-1.1. Competence -** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **Comment [6] - Maintaining Competence.** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

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Ethics Concerns for Attorneys Working Remotely

Technological Competence

Ethics Issues for Attorneys Dealing with COVID-19

- **Basic Communication Competence**
  - Must be able to communicate securely with all necessary individuals to accomplish the client's goals.
  - Consider that all written communications (even electronic) must be able to be archived as part of the client file.
- **Basic Research Competence**
  - Do you have the tools necessary to complete legal research from your home?
  - Do you conduct legal research exactly the way you were taught in law school?
- **Basic Discovery Competence**
  - Is e-discovery necessary in a client matter, and do you have the requisite level of knowledge to send and respond to those requests without assistance?
  - Consider co-counseling or contracting with an expert if not.
  - See *New York County Bar Opinion 749 (2/21/17)* and *Cal. State Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-193.*

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Succession Planning

Ethics Issues for Attorneys Dealing with COVID-19

•Missouri's Rule 5.26 provides for a trustee to be appointed by a court to "protect the interests of the clients and other affected parties" and take whatever action deemed necessary to protect those interests, including:

•Inventory active files/make reasonable efforts to distribute to clients;

•Deliver undistributed active and inactive files to the chief disciplinary counsel for action as required by this Rule 5;

•Take possession of and review the lawyer trust and business accounts;

•Make reasonable efforts to distribute identified trust funds to clients or other parties (other than the lawyer);

•After obtaining an order of the court, dispose of any remaining funds and assets as directed by the court; and

•Initiate any legal action necessary to recover or secure any client funds or other property.

•Focus on the processes and procedures necessary for accomplishment of those duties.

•Are active client files organized properly to permit them to be inventoried and distributed?

•Are trust account and billing records complete and up-to-date so as to facilitate reviewing, distributing and securing client funds and property?

•**5.26 (g) Immunity**. All trustees appointed pursuant to this Rule 5.26 shall be immune from liability for conduct in the performance of their official duties in accordance with Rule 5.315.

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Ethics Issues for Attorneys Dealing with COVID-19

Disaster Recovery

•Goal - Quickly resuming the business of the law firm.

•Purpose of recovery plan is twofold:

- 1) protect the firm against revenue and business loss while minimizing potential malpractice liability to clients resulting from disaster related business interruptions, and
- 2) identifying key systems and anticipate the manner in which the law firm may resume and continue in business should these systems fail or become unavailable.

•Develop contact information and notification trees for all partners, associates, office personnel, clients, courts and adverse lawyers.

•

•Prioritize business processes (e.g., document preparation, depositions, research, case management, calendar and docket control, accounts payable and receivable and payroll).

•Determine how long a process can be down without an appreciable adverse impact to the practice, the maximum downtime for a process before there is significant impact to your practice, what systems are critical for performing the process, such as hardware, software and personnel, and any key entities necessary to carry out the process such as physical facilities (e.g., the office and communications and utilities), vendors (couriers, court reporters, IT software and/or hardware), supplies (forms, files).

•

•It may be helpful when planning a disaster response to categorize the affect on these processes into two general interruption events:

- 1) Catastrophic Interruptions (Fire, flood, earthquake, tornado, lawyer death/disability), and
- 2) System Interruptions (power outages, small fires, illness outbreaks, computer viruses, bomb threats, HVAC problems, employee sabotage, accidents blocking access to building, equipment failure)

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Practicing Law in an Uncertain Economy

Ethics Issues for Attorneys Dealing with COVID-19

- SECURITY
- BUDGET
- STRENGTHENING CURRENT AND FORMER CLIENT RELATIONSHIPS
- CULTIVATE NEW CLIENTS
- BEWARE OF SCAMS!
- EXPANSION INTO NEW PRACTICE AREAS
- IMPORTING NEW PRACTICE AREAS
- SHARPEN FIRM RISK MANAGEMENT PROCEDURES
- EXTRA VIGILANCE ON THE TRUST ACCOUNT
- RISK MANAGEMENT HELP

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Ethics Concerns When Lawyers Leave Firms

Ethics Issues for Attorneys Dealing with COVID-19

In the Matter of Cupples, 952 S.W.2d 226 (Mo. 1997)

ABA Formal Opinion 489 12/4/19, Obligations Related to Notice When Lawyers Change Firms

MRPC 4-5.6 Restrictions on Right to Practice

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Ethics Issues for Attorneys Dealing with COVID-19

Ethics Concerns When Lawyers Leave Firms

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Dear CLIENT,

I will be leaving [LAW FIRM NAME] on [DATE OF LEAVING]. I will begin employment with [NEW LAW FIM NAME] on [DATE OF NEW EMPLOYMENT]. I can be reached there at [CONTACT INFORMATION].

You have a decision to make regarding the continuity of your representation. Your choices are to:
1) Remain as a client with [CURRENT LAW FIRM NAME]. If choosing this option, I will cease to be your attorney effective on [DATE OF LEAVING] ;
2) Transfer your matter to me at [NEW LAW FIRM NAME]. If choosing this option [CURRENT LAW FIRM NAME] will cease to be your attorney[s] effective [DATE OF NEW EMPLOYMENT];
3) Transfer your matter to another lawyer or law firm of your choosing. If choosing this option [LAW FRIM NAME] and I will cease to be your attorneys effective on the date of transfer.

Until we are notified by you of your decision regarding the continuity of your matter, your client file, [TRUST ACCOUNT FUNDS as appropriate] and responsibility for your representation will remain at [CURRENT LAW FIRM NAME].

Please contact [LEAVING LAWYER NAME or LAW FIRM REPRESTATIVE NAME as appropriate] at [CONTACT INFORMATION (phone, email address, etc.) or return the enclosed form within [REASONABLE TIME FRAME]. When we are informed of your choice regarding the continuity of your representation we will follow-up with you further regarding the specific details of the transfer.

If you have any questions regarding the status of your matter please don't hesitate to call [LEAVING LAWYER NAME or LAW FIRM REPRESTATIVE NAME as appropriate] at [CONTACT INFORMATION (phone, email address, etc.)].

Sincerely,

WARNING AND DISCLAIMER: The information herein was prepared by The Bar Plan Mutual Insurance Company for general information purposes, and should not be construed as legal advice or legal opinion with regard to any specific circumstance or set of facts. The reader must conduct independent research and analysis to determine all possible and appropriate legal and ethical issues that might apply to a specific situation and the best way to address these issues in the jurisdiction where the reader is located.

CONTINUITY OF REPRESENTATION

I, CLIENT NAME, understand that [LEAVING LAWYER NAME] is leaving [LAW FIRM NAME] on [DATE OF LEAVING] and I may choose to:

1) Remain a client with [CURRENT LAW FIRM NAME]. I understand that if I choose this option [LEAVING LAWYER NAME] will cease to be my attorney effective on [DATE OF LEAVING];
2) Transfer my matter to [LEAVING LAWYER NAME] at [NEW LAW FIRM NAME]. I understand that if I choose this option [CURRENT LAW FIRM NAME] will cease to be my attorney[s] effective [DATE OF NEW EMPLOYMENT];
3) Transfer my matter to another lawyer or law firm of my choice. I understand that if I choose this option [LAW FRIM NAME] and [NAME OF LEAVING LAWYER] will cease to be my attorneys effective on the date of transfer.

I choose to:

☐ Remain as a client with [CURRENT LAW FIRM NAME].

☐ Transfer my matter to [LEAVING LAWYER NAME] at [NEW LAW FIRM NAME].

☐ Transfer my matter to [OTHER LAW FIRM NAME].

_____ _____

Client Signature Date

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Resources

Ethics Issues for Attorneys Dealing with COVID-19

Missouri Lawyers Assistance Program

https://mobar.org/molap/

The Missouri Bar Coronavirus Resource Center

https://mobar.org/site/content/Lawyer-Resources/Coronavirus_Resource_Center_for_Lawyers.aspx?WebsiteKey=dd54fe1d-87c8-4d7e-9547-e59fcd729541

ABA Committee on Disaster Response and Preparedness

https://www.americanbar.org/groups/committees/disaster/

The Bar Plan Coronavirus Resource Center

https://www.thebarplan.com/coronavirus-resources-for-lawyers/

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Thank you!

The Bar Plan Mutual Insurance Company

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