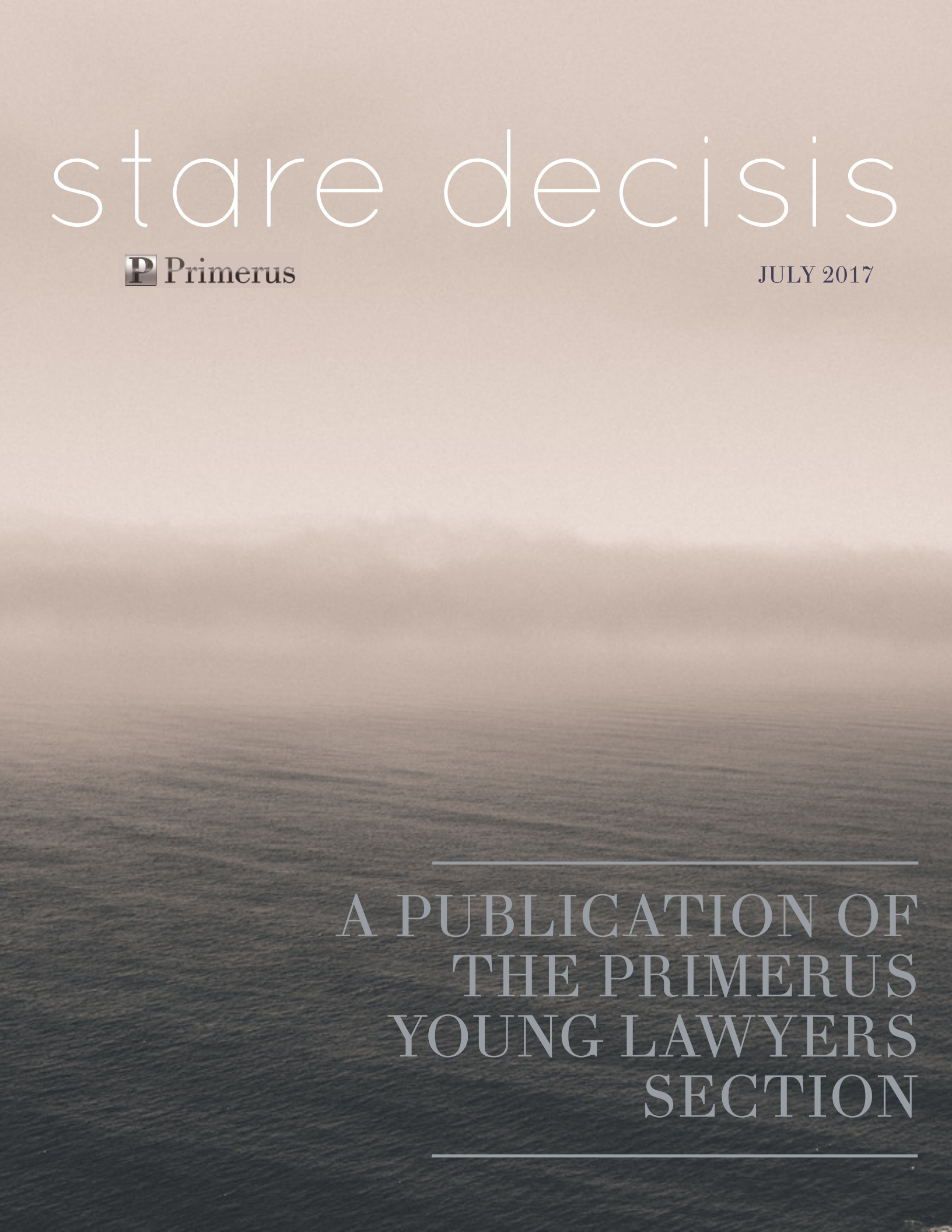
stare decisis

Primerus

JULY 2017



A PUBLICATION OF THE PRIMERUS YOUNG LAWYERS SECTION

chair column

by john m. hemenway

John M. Hemenway is a founding partner of Bivins & Hemenway, P.A. John's educational background included substantial coursework in computer programming and systems design at both the undergraduate and graduate levels. His interests include Florida homestead law, computer technology and its role in business organizations, and digital property rights. John's practice focuses on real estate transactions, business law, and estate planning and probate.

Great things are brewing in the Young Lawyers Section. Our signature event, the annual Boot Camp, continues to develop. The fundamental idea remains the same: gather members of the Young Lawyers Section to network with their peers while learning from a faculty of experienced Primerus member attorneys and outside experts. In the last few years, the Boot Camp has really hit its stride.

Starting two years ago in San Diego, we refocused the educational component on marketing and business development topics that our members can take back to their firms and implement as part of their own professional development. Beginning last year in Orlando, we leveraged Primerus' sponsorship of the Association of Corporate Counsel to gain access to in-house counsel as panelists for our educational portion and also as guests for a networking social. This year, word clearly got around, as we had our highest attendance ever.

The great thing that simple attendance counts do not reveal is the growing number of regular attendees. There are a number of young lawyers who have now established an annual tradition of meeting with their peers, and who are as warm and welcoming of new attendees as they are of longtime friends. It has been described as a magnetic core. And that culminated this year in nightly dinners with nearly every attendee at the table. We are laying a foundation for professional relationships that will only grow with time. Friendships are being made, networks are being enhanced, and business is being referred within the Young Lawyers Section.

We could not accomplish the Boot Camp without the efforts of our Executive and CLE Committees, whose members plan the event over many months. Thank you to Matt Jett (Donato Minx Brown & Pool, PC) who led the CLE Committee this year. A special thank you also goes to Chris Dawe (Primerus), and Amber Vincent (Alyn-Weiss and Associates), who have been instrumental in our planning efforts and have been fixtures at the Boot Camp.

There is, however, more to the Young Lawyers Section than the Boot Camp. We are pleased to bring *Stare Decisis* back to active publication. Under the leadership of Emily Campbell (Dunlap Codding), a newly assembled Newsletter Committee – a team built at the Boot Camp – has produced this edition. Thank you to each of them for taking time from their busy schedules to bring this edition together.

The best news is that plenty of opportunity remains to get involved with the Young Lawyers Section. We continue to hold bi-monthly membership calls with guest speakers and networking opportunities. We are also actively seeking the next generation of leadership to join our member committees and help shape the future of the Section. To those of you who are leaders of Primerus firms, I encourage you to secure the benefits of Section membership for your firm by asking your young lawyers – those who are under age 40 or have been admitted to practice for seven years or less – to engage in the section. To those young lawyers who are not active in our section, I encourage you to take advantage of the unique opportunities it offers. Take the next step toward building your network of peers from across the Primerus network, and, as the Primerus saying goes, get to know some “good people who happen to be good lawyers.”

words to the wise

by laura daly & kathryne baldwin

For this edition of Words to the Wise, Laura Daly of Leman Solicitors in Dublin, Ireland returns and teams up with Kathryne Baldwin of Wilke, Fleury, Hoffelt, Gould & Birney, LLP in Sacramento, CA. This edition focuses on litigation attorneys in the Primerus network from a variety of firms across the globe: Jan Dop of Russell Advocaten in Amsterdam, Korissa M. Zickrick from Roberts Perryman in St. Louis, MO, and April Luria from Roeca Luria Shin, LLP in Honolulu, HI. Below, these three attorneys provide practical advice for new attorneys.

HOW DID YOU BECOME A LAWYER? HAS THE PRACTICE OF LAW MET YOUR EXPECTATIONS?

Mr. Dop: I became a lawyer because I've always had a strong sense of justice. As the practice of law is very diverse, it has absolutely met my expectations.

Mrs. Zickrick: In school, I enjoyed reading, writing, and research. After graduating, I was unsure exactly what I wanted to do. I knew that I enjoyed crafting arguments and I was lucky enough to find a great mentor who specialized in insurance defense. That eventually evolved into defending clients in the trucking industry. I am glad I had that opportunity because it has been very rewarding.

Ms. Luria: Originally, I worked in criminal defense. I became an attorney because I wanted to help people. The United States Constitution guarantees everyone the right to a defense. It was important to me that individuals who were charged with a crime got the opportunity to assert those rights. Additionally, the work has always been intellectually challenging, which I enjoy. Now that I work in civil defense, it can be frustrating when the law allows for frivolous claims, but I still feel good about helping clients. I can always look for ways to make civil suits as painless as possible for clients and that is satisfying.

WHAT ARE SOME OF THE IMPORTANT THINGS AN ASSOCIATE SHOULD KNOW ABOUT MANAGING AND LIVING UP TO PARTNER EXPECTATIONS?

Mr. Dop: To me the most important things are: be yourself, have and show passion and concern for your profession. And knowledge!

Mrs. Zickrick: First of all it is important that associates review a file, pull out key issues and don't miss deadlines. Associates should be good with time management and not procrastinate. If you are assigned a file, do everything it is you need to do on that file – put in the hard work. Take charge as much as and to the extent you can. Ask important questions when you need to.

Ms. Luria: The main thing is do not ever hesitate to ask questions. Something that can be challenging for new attorneys, but is always beneficial, is to present your thoughts on a case. Even though you are new, everyone sees a case differently and you might see something a partner does not. Letting partners know your thoughts is helpful for everyone.

HOW HAVE YOU DEVELOPED BUSINESS? WHAT DO YOU LIKE OR EXPECT TO SEE FROM AN ASSOCIATE IN TERMS OF BUSINESS DEVELOPMENT?

Mr. Dop: We have developed our business by taking a sincere interest in our clients and the state of the art of the area of expertise.

Mrs. Zickrick: You need to be knowledgeable about your area of the law and be confident in what you bring to the table and how you can benefit someone. You have to just get out there and network. For me, going to professional conferences in our trade area of transportation has helped me get to know people within the industry and develop client relationships. I think that is also a good thing for an associate to do. It can be intimidating to go to a professional or trade event, but, if you make the commitment to go the first time, you will meet some people and form connections. Then, when you go to the next event, you will know those people and you will meet new people. Making those connections is what helps get your name and your firm's name out there.

Ms. Luria: With respect to developing business in my practice, Hawai'i is a unique jurisdiction. Because our clients are referred to us primarily from insurance companies, and the majority of those companies are on the mainland, we have less opportunity to interact with the claims specialists. However, my philosophy is that if you do good work, this will be circulated within the insurance community and this will generate business. For associates, I would like to see them doing that good, quality work and provide timely evaluations with realistic options for favorable resolutions.

WHAT MAKES AN ASSOCIATE A STAR IN YOUR MIND?

Mr. Dop: Knowledge is very important, but in the first place, commitment to the clients and dedication to resolving their problems are key qualities.

Mrs. Zickrick: For me, I like to see associates really analyze a file and determine what appropriate actions we need to take to defend the case. I like associates who do not procrastinate and get things to me before the deadline. A star associate will look at the file as a whole and will not just do the bare minimum. They will take full and complete care of the file.

Ms. Luria: An associate that is a star is someone excited about the work they are doing. They have a genuine interest in the work and tackle problems that they did not, themselves, create. If you communicate and you enjoy the work, that will show. Be sure people know that you are there and you want to be a productive member of the partnership.

WHAT ARE SOME OF THE THINGS ASSOCIATES SHOULD AVOID?

Mr. Dop: Avoid taking too big of steps - and don't be hasty!

Mrs. Zickrick: Associates should avoid spending too much time on an activity without having any product or end result to show for it. For example, if you research an issue, have a memorandum on what you found, include it in a status report to a client or use it in support of a motion. Make sure you are handling a file and doing everything you need to do to successfully defend the client. Also, again, procrastinating should be avoided and do not miss deadlines.

Ms. Luria: Avoid getting embroiled in the minutia of a case. It is good to notice details, but better to look at how the case will be presented to a jury or fact-finder. If you're noticing those details, be sure that they are not just secondary issues that will get you side tracked. Identify the big issues in a case and deal with those. Law school teaches you to identify and address every issue. That is a good lesson, but, practically speaking, in my experience, jurors are looking at the bigger picture.

DESCRIBE YOUR PHILOSOPHY ON CLIENT CARE. WHAT ARE SOME OF THE THINGS AN ASSOCIATE CAN DO TO HELP MAXIMIZE THE RELATIONSHIP WITH A CLIENT?

Mr. Dop: Our philosophy is to resolve our clients' problems in a way they would like them to be solved. This means prompt service, no long and complicated comments and cost-efficiency. This is often easier said than done. Sometimes clients come to us with an issue and then it turns out there are underlying issues or there might even be a completely different problem. By knowing our clients well, taking a sincere interest and listening closely, we manage to resolve problems in an efficient and sustainable way.

Mrs. Zickrick: Everything involving the client is important, especially in this day and age where clients expect constant communication and updates on cases. Being able to deliver on those expectations will benefit your relationship with the client. Younger associates should practice keeping those lines of communication open. Do not come to your clients on the eve of trial and try to have that be your main communication.

Ms. Luria: A great piece of advice I got when I was a young attorney is to conduct a thorough and complete evaluation of the claim as soon as possible. If we, as attorneys, can get a suit resolved sooner, rather than later, frequently this can alleviate any issues moving forward. For new attorneys, I would recommend executing on whatever the client's goals are. Do they want to go the route of alternative dispute resolution? Or do they want to go to trial? Be sure to be honest with your clients about what they can expect; let them know what the good and the bad points of their case are.

WHAT IS THE ONE PIECE OF ADVICE YOU WOULD GIVE YOUR 26 YEAR-OLD SELF?

Mr. Dop: Enjoy the cases you handle, it's not only work, it is fun too!

Mrs. Zickrick: I would say be confident in what you are doing whether that be at the office in preparing reports, in arguing a motion or negotiating a settlement. Understand that you will make mistakes, but it is important to learn from them and do better the next time. It's all about experience – the more you do it, the better you will become.

Ms. Luria: I work in litigation, so, the one piece of advice I would give myself is to work on a personal/work-life balance. Had I practiced that more earlier in my life, I might be better at it by now. I would recommend practicing this balance as early as possible, so that it's a skill you master as you advance in your career.

Mr. Jan Dop handles advising national and international companies in all aspects of daily operations. He specializes in corporate law and employment law at Russell Advocaten. Russell Advocaten is a full service firm assisting businesses, large and small, in both transactional and litigation matters.

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Mrs. Korissa Zickrick is a graduate of Drake University Law School in Iowa. She specializes in counseling trucking and transportation clients and even went to truck driving school to obtain her CDL to better understand the issues her clients face. Mrs. Zickrick has two young daughters and, when she is not at the office, enjoys running, the outdoors, and spending time with her family. Roberts Perryman is a Primerus firm which focuses on assisting clients in the trucking and transportation industry, as well as insurance defense. It has been ranked as one of the Nation's Best Law Firms by U.S. News.

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Ms. April Luria is a partner at Roeca Luria Shin LLP and has been with the firm since 1994. Roeca Luria Shin LLP is a Honolulu-based firm centered around civil litigation defense including insurance litigation, medical malpractice, and professional liability.

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spotlight interview

by mayra artiles

JUAN DAVID ALZATE PEÑA
PINILLA, GONZÁLEZ & PRIETO (BOGOTÁ, COLOMBIA)

1. What led you to become an attorney?

I have been a very active political person since high school. I took part of different committees, seminars and led social projects. Politics and law are not the same, but have a very deep bond. Thus, I decided to study law to get a better understanding of how our country works. During law school, I also had the opportunity to work as an assistant at the Colombian Congress´ House of Representatives. However, I ended up practicing transactional law.

2. What type of law do you practice?

I am part of the Corporate and M&A practice team at the firm. We basically help clients to manage their companies the best way possible, creating for them a tailor made corporate governance and adding value to their investments. We also help foreign clients doing business in Colombia, providing counsel to achieve their goals whether they want to acquire a company here or find a strategic partner. We also advise internal conflicts between majority and minority shareholders that are having a bad time with their partners.

3. What do you like most about your practice?

Colombia has a very dynamic market and a lot of growth potential. Our practice is a great tool to connect people and build bonds between them. This in turn helps the growth of our country, and job creation to overcome Colombia’s inequality. Being part of that process is priceless for me.

4. What is a normal business day like for you?

I cannot say I have such a thing as a normal day at the firm, but I think that is the key to never getting bored. Making your daily work extraordinary is the essential element to keep your motivation up; this brings happiness, and with it, comes dedication and success.

5. What do you do to market yourself and your practice?

We mainly gain exposure by publications, and try to attend the most important networking events, as the ones Primerus hosts. However, our main marketing is client referrals, as we focus on being pro-business but very committed to practicing our values (generosity, solidarity and trust) in our daily practice. When you enhance these ideals, you market yourself very easily because your clients recommend you and your peers endorse you, which is the best advertising strategy.

6. What do you do when you are not working?

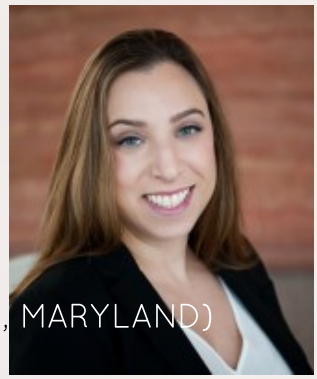
Well, during my free time, I try to grab a good book, watch an interesting movie or workout. I love going to the beach to dive so that is one of my favorite destinations every year. I also fly often to Medellin to visit my family; my niece and nephew are a perfect energy boost for bad days.

7. What do you like most about the Primerus network membership? What Primerus events have you attended, if any?

As a global network, Primerus is an excellent instrument to connect us more with peers and potential clients. Some of our current clients were referred by Primerus members. We love how Primerus is actively promoting webinars and interaction between all their members, no matter the rank of the lawyer involved. My firm actively participates in different events, including the yearly Global Conference. I personally attended the Young Lawyers Boot Camp 2015 that took place in San Diego, California, and it was a great experience. I took a halt due to my LLM studies at IU Maurer School of Law, but I look forward to attending more in the future.

spotlight interview

by mayra artiles



SIMA FRIED
THOMAS & LIBOWITZ, P.A. (BALTIMORE, MARYLAND)

1. What led you to become an attorney?

In my youth, there were a number of people in my life who inspired and encouraged me to attend law school. All of these people worked hard, but they seemed to genuinely enjoy their work and always had interesting stories. Even though at that time I likely did not understand what it means to "be an attorney," I wanted to follow in their footsteps. I have discovered that it is not an easy way to earn a living, but it can be very rewarding to help individuals and businesses solve and resolve their problems.

2. What type of law do you practice?

When I lived in New York, my legal practice was limited to securities and financial institutions litigation. Here at Thomas & Libowitz, my practice has expanded substantially. The focus of our litigation team is to find business solutions to business problems. Thus, in addition to the usual contract disputes and business torts that we handle every day, a substantial portion of my practice is concentrated on representing businesses in relation to their employees. That means I could be working in a more "transactional" nature, updating an employee handbook to comply with changes in the law, litigating a wage and hour dispute or charge of discrimination in court or at the agency level, or simply advising a client as to how to handle a problem with an employee. I previously worked in the internet and privacy law arena, and even taught media law to journalism students at one of Baltimore's local universities.

3. What do you like most about your practice?

What I enjoy the most about my practice is that I constantly am learning something new. Whether I am getting up to speed on changes in legislation or rules, learning the ins and outs of a client's business, or delving into a new practice area, I am constantly faced with different questions or issues that allow me to further expand my knowledge and abilities. This ensures that I am always developing and evolving as both an attorney and individual and my days are never dull.

4. What is a normal business day like for you?

There really is no such thing as a "normal business day" for me. The only guarantee for any particular day is that I will not accomplish everything I set out to do. That said, I start nearly every workday by setting a daily action plan so that, as the day progresses, I can ensure the most important tasks are being completed even if others are being pushed off to the next day. On any given day, my work encompasses various litigation practices, be it drafting motions, trying to resolve discovery issues, or strategizing with clients and/or colleagues. More rarely my work may include attending a settlement conference, or arguing at a motions hearing.

5. What do you do to market yourself and your practice?

Baltimore is a small city, so business relationships are often about who you know. My friends who attended college or law school locally have an advantage in that respect. I try to stay active in my area by going to different non-attorney networking events hosted by my various alma maters—and I always make sure to have a stack of business cards in hand. More importantly though, I try to capitalize on my friends' connections by tagging along to social events so I can meet more people.

6. What do you do when you are not working?

In order to keep my brain functioning at an optimal level, it is essential that I work out nearly every day. I am lucky that our firm culture encourages us to take time during the workday for physical activity. My time spent at the gym, pounding the pavement, or visiting my yoga mat helps keep my mind on track and enables me to perform my job better. When I'm not working or engaging in some sort of physical activity, I enjoy reading, watching movies, cooking and baking (my homemade apple pie once won an award), and just catching up with old friends over some food and a bottle of wine.

7. What do you like most about the Primerus network membership? What Primerus events have you attended?

Thomas & Libowitz is relatively new to Primerus. We've been members for a little over a year and so far I am enjoying how the network enables connections. I have enjoyed meeting other young attorneys in the network and being able to discuss our different practices and efforts to build business, as well as obtain advice from one another. I was lucky enough to attend the Young Lawyers Boot Camps in Orlando (2016) and again in Las Vegas (2017). It was great to reconnect in Vegas with people I had met the previous year and to build on those relationships. The Primerus network is allowing me to create contacts that help me grow as a professional.

quick tips: the proper way to ask a judge to reconsider

by nicole m. quintana

Nicole Quintana is a trial lawyer at Ogborn Mihm, LLP in Denver, CO. Nicole understands the impact that litigation can have on a client's life, and she balances the demands of all of her clients by being organized, analytical, and precise. Moreover, Nicole prepares a case from the start as though it will proceed to trial, always keeping in mind the ultimate goal of the client. Nicole represents clients in state and federal court in and outside of Colorado. She has tried cases to juries, to judges, and through arbitration, but also strives to reach early resolution where doing so serves the best interests of her clients.

You spent 50 hours writing that brief. The facts of your case combined perfectly with the law, and you nailed your oral argument to the court. But as the judge recites his decision on the record, the smile fades from your face and the heat of anger or dismay crawls up your neck. How could s/he have gotten this so wrong? How could that judge have ruled against you?

We have all been there at one time or another…believing that the judge came to the wrong conclusion for the wrong reasons. But then comes decision time: do you accept defeat or try to change the judge's mind and possibly insult the judge's intelligence or ego in the process? Motions to reconsider should not be a knee-jerk reaction to a disappointing ruling. Rather, they should be a purposeful approach to relief, whether verbal or written. The following are initial considerations a lawyer may want to make prior to "correcting" the court.

1. Judges are fallible, but they do try to get the answer right. Judges understand the time, effort and money that go into lawsuits and appeals, and on the whole, they prefer to come to the right conclusion in order to avoid increasing the costs and fees, as well as the emotional toll on parties. Try not to let anger be your first response, but consider the basis for the judge's decision. Seek reconsideration from a place of reasoned misgivings, instead of indignant opposition.

2. Determine whether the judge is wrong or you simply do not like the outcome. A majority of cases are affirmed on the appellate level, which means that a trial court's decision is typically based in, or at least justified in, fact or law. Prior to seeking reconsideration, talk to or provide the written briefs and order to a trusted colleague and ask for an objective viewpoint on the judge's position. Analyze whether the decision is supported by the law and facts, even if you had hoped for a different outcome.

3. Avoid using the phrase "with all due respect." To judges, this phrase is the semantic equivalent of "bless her heart." Also, avoid telling the judge that s/he is wrong or that you disagree. You invite the judge to take a defensive position in which his/her reflexive response is to advocate for the original rationale. As suggested by some judges, the better way to approach a request for reconsideration is to indicate your understanding of how the court reached its ruling, but state that you are making your record or indicate that, while such rationale makes sense under certain facts or law, there are other facts or law that were not considered or misapplied and alter the outcome.

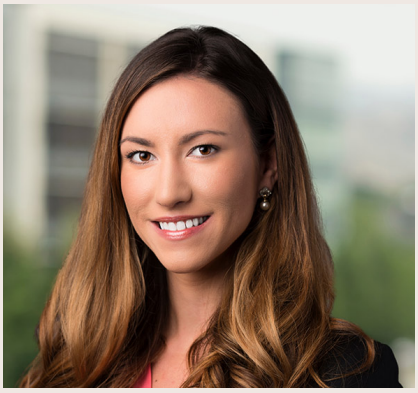
4. Do not reargue the same thing. A judge likely will not change a ruling when faced with the identical facts and law on which s/he previously based a decision. In fact, all a lawyer does then is allow the judge to firm up the basis for the original decision, making an appeal even more difficult. To merit reconsideration, lawyers need to point out manifest error, a misapplication of the law, or new or different law that became relevant as a result of the court's rationale and that substantiates reversal. Also, consider whether there are new or different facts that were not at issue based on the arguments, but became relevant based on the ruling. The purpose is not to reargue what you did not originally argue well enough; the purpose is to point out the oversights or misapplications that formed the basis of the opinion. Whether verbally seeking reconsideration or filing a motion, be concise, cogent and highlight the limited bases on which the court should reverse course.

5. Decide whether seeking reconsideration is the right move. If the ruling you seek to change was based on significant briefing from the parties and a voluminous, well-spelled out decision by the judge, perhaps a motion to reconsider is not the way to go. The court, in such instances, may be less inclined to perceive the error and overrule itself, having spent significant time and effort on rendering the decision. Thus, appealing may be the better option. Similarly, if it is an open court, evidentiary ruling, arguing with the judge in front of a jury as to why s/he should change his/her mind may have an adverse effect. The better move may be to make a record and move on with a potential basis for a later appeal.

In certain jurisdictions, a motion to reconsider is not a prerequisite to appealing and may, in fact, be disfavored under the rules of procedure. Lawyers should consider what course of action is in the best interests of their client and ensure that their approach to and basis for seeking reconsideration is respectful and sound.

preventing spoliation: the intersection between proportionality and preservation

by jaclyn gans



Ms. Gans rejoined Elam & Burke, P.A. in 2016 after serving a sixteen-month clerkship for the Honorable B. Lynn Winmill, Chief Judge of the United States District Court for the District of Idaho. Her practice focuses on employment and commercial litigation, but she advises clients in a variety of civil matters. Prior to joining the firm, Ms. Gans also clerked for the Honorable Jim Jones of the Idaho Supreme Court. While in law school at the University of Idaho, Ms. Gans was a member of the Idaho Law Review, where she received the Outstanding Associate Writer award in 2012.

In 2001, as the Enron scandal unfolded, SEC fraud investigators focused on Enron's auditors at Arthur Andersen. Immediately, Andersen assembled a team to shred key documents to cover-up their fraudulent audits. The team brought in a commercial grade shredder, operating it almost continuously for weeks, and shredded tons of crucial documents. This shredding would eventually result in criminal indictments and ultimately in the destruction of Arthur Andersen itself.

As attorneys, we all know generally what spoliation is—at the very least, we have some vague notion that we do not want to be associated with it. But with the explosion of electronically stored information (ESI), ever-evolving technology, and the challenges and costs that come along with both, a deeper understanding of spoliation is crucial. Attorneys need to have a firm grasp on when the duty to preserve evidence is triggered, who it applies to, how it should be implemented, and what documents or data should be preserved. With this knowledge, attorneys and their clients can better avoid potentially drastic spoliation-related sanctions.

This article first delves into the duty to preserve—when is it triggered, who does it apply to, how should it be implemented, and what should be preserved. Figuring out this latter point—the scope of preservation—can be difficult. On one hand, a party is entitled to relevant information reasonably calculated to lead to admissible evidence. On the other hand, the other party may incur enormous costs in preserving all information that falls within this broad ambit. The proportionality factors now found at Rule 26(b)(1) may not be determinative of the issue, but they certainly provide attorneys and courts with a valuable framework in deciding what should be preserved. Accordingly, the second part of this article discusses the intersection between proportionality and the scope of preservation. Spoliation-related sanctions—or, depending on your point of view, remedies—are also explored. Finally, practical suggestions to avoid preservation pitfalls are discussed.

The Duty to Preserve

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Of course, "a party can only be sanctioned for destroying evidence if it had a duty to preserve it." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

In determining whether such a duty exists, courts have identified four related inquiries: (1) when does the duty to preserve attach? (2) how must a party go about fulfilling its duty? (3) who is responsible for seeing that it is fulfilled? and (4) what evidence must be preserved? *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("Zubulake IV ")). Each inquiry is discussed in turn.

a. When

The general rule is that the duty "to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)) ("the duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."). As discussed below, the fact-intensive application that this general rule requires can be an onerous undertaking—not only for courts determining in hindsight when that duty was triggered, but also for practitioners looking to these rules for guidance going forward.

While it is difficult to draw across-the-board conclusions, there are at least a few seemingly universal truths regarding when the duty to preserve evidence arises. For example, it is well-established that—at the latest—the duty is triggered when the defendant is served with the complaint. *In Re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, 299 F.R.D. 502, 512 (S.D.W.Va. 2014). In certain instances though, the duty is triggered well before the filing of a complaint, while in the pre-litigation stage.

During the pre-litigation stage, "courts agree that the receipt of a demand letter, a request for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger the duty to preserve evidence." *Ethicon*, 299 at 512 (*citing Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013)) (indicating that a document preservation letter or letter threatening litigation triggers a duty to preserve evidence); *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 181 (D.Md. 2008) (stating defendant's duty to preserve arose when plaintiff's counsel made a written request to preserve evidence); *Silvestri*, 271 F.3d at 592 (holding duty arose when plaintiff retained experts to examine evidence for potential litigation).

In contrast, the duty to preserve is not triggered "from the mere existence of a potential claim or the distant possibility of litigation." *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). Similarly, "[m]erely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve." *Zubulake IV*, 220 F.R.D. at 217.

The bottom line is that in many cases, determining when the duty to preserve arose necessitates a fact-intensive, case-specific analysis. And in making this determination, courts will have "the benefit (and distortion) of hindsight." *In Re Ethicon*, 512.

b. How[1]

Once the duty to preserve evidence has been triggered, a litigant must engage in the following steps:

- Suspend its routine document retention/destruction policy;
- Identify all sources of potentially relevant information;
- Put in place a "litigation hold" to all sources of potentially relevant information; and
- Take affirmative steps to monitor compliance with the litigation hold.

Zubulake IV, 229 F.R.D. at 431.

Should a litigant downgrade data to a less accessible format, it does so at its own risk. "Permitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of the information more costly and burdensome—is a violation of the preservation obligation." *Scalera v. Electrograph Systems, Inc.*, 262 F.R.D. 162, 175 (E.D.N.Y. 2009). In that same scenario, a court may later refuse to shift discovery costs in favor of that litigant. *See Quinby v. WestLB AG*, No. 04 Civ. 7406, 2005 WL 3453908, at *8 n. 10 (S.D.N.Y. Dec. 15, 2005) ("if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.").

c. Who

This inquiry is two-fold: who has the obligation to ensure preservation and whose documents must be retained?

Regarding the first question, "[t]he preservation obligation runs first to counsel, who has a duty to advise his [or her] client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction." *Orbit One Communications*, 271 F.R.D. at 437 (internal quotations omitted). But clients are not off the hook. "[A]ttorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents." *Qualcomm Inc. v. Broadcom Corp.*, No. 05 Civ.1956–B, 2008 WL 66932, at *9 (S.D. Cal. Jan. 7, 2008), *vacated in part on other grounds*, 2008 WL 638108 (S.D. Cal. March 5, 2008). In the end, however, "[a]ttorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search." *Id.*

As for the second inquiry, when there is relevant information created by or for "key players," that information should be preserved. *Pippins v. KPMG LLP*, 279 F.R.D. 245 (S.D.N.Y. 2012). "Key players" are defined as individuals likely to have discoverable information. *Zubulake IV*, 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003). Key players can and often do include non-parties. In a potential Rule 23 class action brought under the Fair Labor Standards Act by New York-based Audit Associates against KPMG, the district court held that KPMG "undoubtedly does not have to preserve the hard drives of every employee who worked with an Audit Associate plaintiff under 'key player' reasoning, but it certainly has to preserve the hard drives of the Audit Associates themselves." *Pippins*, 279 F.R.D. at 256.

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[1] Yet another inquiry is "how long"—or, in other words, whether a litigation hold that is never expressly withdrawn requires the company to continue preserving evidence even after resolution of the legal action that triggered it. Case law on this precise topic seems sparse. But for a discussion of the same, see *In re Ethicon*, at 513.

d. What

The final and perhaps most difficult inquiry is determining what evidence falls within the scope of evidence that must be preserved. In an oft-cited district court opinion, Judge Scheindlin stated:

> Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.
>
> At the same time, anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.

Zubulake IV, 220 F.R.D. at 217. As further discussed below, the 2015 amendments to the Federal Rules of Civil Procedure add additional considerations for parties and courts alike when determining the scope of preservation.

Proportionality and the Scope of Preservation

The 2015 amendment to Rule 26(b)(1) made proportionality one of the factors, along with relevance, used in determining the scope of discovery. In other words, evidence is not discoverable unless it is both proportional and relevant. Thus, the pronouncement in *Zubulake* could arguably be amended to say that "anyone who anticipates being a party or is a party to a lawsuit must not destroy, unique, relevant, evidence that might be useful to an adversary" and is proportional to the case.

From a practical perspective though, a party would still be best served by preserving all relevant materials. If it were to destroy evidence after misapplying the proportionality factors, then that evidence could be permanently lost. At least one court agrees that "prudence [still] favors retaining all relevant materials." *Orbit One Commc'ns*, 271 F.R.D. at 436 (*citing Zubulake IV*, 220 F.R.D. at 218). While it is certainly not advisable for a party to apply the proportionality factors in its favor and then ask for forgiveness later, the parties should utilize these factors as a framework for discussing the scope of preservation early on in the case.

Rule 26(b)(1) now provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering":

- "the importance of the issues at stake in the action,"
- "the amount in controversy,"
- "the parties' relative access to relevant information,"
- "the parties' resources,"
- "the importance of the discovery in resolving the issues, and"
- "whether the burden or expense of the proposed discovery outweighs its likely benefit."

Fed. R. Civ. P. 26(b)(1). With this amendment, the parties and the courts have a collective responsibility to consider the proportionality factors in resolving all discovery disputes. *See* Fed. R. Civ. P. 26(b)(1) 2015 advisory committee notes.

Because of Rule 26(b)(1)'s inclusion of the proportionality factors, "proportionality is necessarily a factor in determining a party's preservation obligations." *Pippins v. KPMG LLP*, 279 F.R.D. 245, 255 (S.D.N.Y. 2012); *see also Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 n. 10. (S.D.N.Y. 2010) ("Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order. . . ."). Certainly, "[c]ourts conducting a post hoc analysis of a party's preservation

decisions should do so in light of the proportionality factors set forth in Rule 26, and the reasonableness of the preserving party's efforts." The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. __ (forthcoming 2017).[2]

But as alluded to above, courts have also cautioned parties against destroying evidence it deems disproportional without the protection of a court order. Because proportionality "is a 'highly elastic concept . . . [it] cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order.'" *Orbit One Commc'ns*, 271 F.R.D. at 436 n. 10; *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). This makes sense because at the preservation stage, the stakes are high: if the proportionality factors are misapplied, relevant information could be permanently destroyed.

In sum, as early as practicable, attorneys should discuss and apply the proportionality factors outlined in Rule 26(b)(1) when determining what information should and should not be preserved. The proportionality factors may not lend themselves to rigid application and bright line rules, but they nonetheless are useful guideposts for attorneys and courts alike.

Possible Sanctions/Available Remedies

In imposing spoliation-related sanctions, courts have two avenues: its "inherent power to control the judicial process and litigation" (*see Silvestri v. General Motors Corp.*, 271 F.3d 583, 589 (4th Cir. 2001)) and Rule 37(b). Where a party's spoliation violates a court order, Rule 37(b) permits the court to impose various sanctions, including dismissing the complaint or entering judgment by default, precluding the introduction of certain evidence, imposing an adverse inference, or assessing attorneys' fees and costs. Fed. R. Civ. P. 37(b). Under either approach, imposing a spoliation sanction is discretionary. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

In determining an appropriate sanction, courts generally consider the following factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the efficacy of lesser sanctions. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007); *Toppan Photomasks, Inc. v. Park*, 2014 WL 2567914 (N.D. Cal. May 29, 2014).

As alluded to above, spoliation-related sanctions are varied and potentially drastic. In *Zubulake IV*, three types of sanctions were requested by the moving party: (1) an adverse inference;[3] (2) a cost-shifting order; or

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[2] This commentary is available to download at:
https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality.

[3] A party seeking an adverse inference instruction or other spoliation-based sanctions typically must show the following three elements: (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Zubulake IV*, 220 F.R.D. at 220.

(3) awarding costs to re-depose witnesses to speak to destruction of evidence allegations. Monetary sanctions can also be imposed.[4] In circumstances of bad faith or other "like action," dismissal of the action may be warranted. *Cole v. Keller Indus., Inc*., 132 F.3d 1044, 1047 (4th Cir. 1998). "But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Silvestri*, 271 F.3d at 593 (affirming the district court's dismissal of the action when General Motors was "highly prejudiced" in a products liability action where the product (a motor vehicle) was not preserved.)

Avoiding Preservation Pitfalls

Given the potential devastating impact that failing to preserve relevant evidence may have, the importance of early and frequent communication cannot be overstated, nor can the significance of formulating a comprehensive discovery plan as it relates to ESI preservation.

To the first point, parties should communicate as early as possible about the type of information they expect the other to be preserving, identify what material is not being preserved, and document the expense in preserving ESI. If the parties cannot agree as to what evidence is proportional to the case, a party should preserve all relevant information and seek a protective order that asks the court to determine its preservation obligations. If a protective order is sought, the moving party must provide the court with enough information for it to balance the costs and benefits of preserving the evidence at issue.

To the second point, Rule 26(f) requires parties to confer "as soon as practicable" and "at least 21 days before a scheduling conference" in order to "discuss any issues about preserving discoverable information" and to "develop a proposed discovery plan." Fed. R. Civ. P. 26(f). The discovery plan should include the following: (1) the date range of ESI that will be preserved; (2) the scope of preservation, which would include the type of ESI preserved, the "key players" and custodians, and which databases, systems, or servers will be preserved; (3) which data sources may be preserved but not searched due to being inaccessible because of undue burden or cost; (4) the sources of ESI that will not be preserved; (5) modification of any ESI retention or destruction protocols; and (6) whether the parties will bear their own costs of preservation or whether the parties agree to share in that cost. In sum, if clients and attorneys are fully advised of their preservation obligations, ESI-related discussions are had at the outset of the case, and attorneys use the proportionality factors as valuable guideposts in determining what should be preserved, then any chance of spoliation-based sanctions will be greatly minimized.

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[4] *See Cache La Poudre Feeds LLC v. Land O'Lakes Inc.*, 224 F.R.D. 614, 637 (D. Colo. 2007) citing the following cases: *United States v. Philip Morris USA, Inc*., 327 F.Supp.2d at 26 (requiring defendant to pay a monetary fine of $2,750,000 for its non-compliance with company document retention policies and a court order addressing evidence preservation); *Bradley v. Sunbeam Corporation*, 2003 WL 21982038 (N.D.W.Va. 2003) (recommending that defendant be fined $200,000 for its abuse of the judicial process as a result of spoliation); *Danis v. USN Communications, Inc*., 2000 WL 1694325 (N.D. Ill. 2000) (imposing a monetary sanction of $10,000 for failing to take adequate steps to preserve documents and information that might be discoverable); *In re Prudential Insurance Company of America Sales Practices Litigation*, 169 F.R.D. 598, 616–17 (D.N.J. 1997) (after finding that defendant's document destruction hindered the administration of justice, required defendant to pay $1,000,000 to the Clerk of District Court); *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. at 558–59 (imposing a fine of $15,000 "for the unnecessary consumption of the court's time and resources" as a result of defendant's "reckless and irresponsible abrogation of its responsibility to assure full compliance with discovery requests").

res judicata: a more expansive reach

by liam duffy

Liam Duffy is an attorney with Rosen Hagood in Charleston, SC, where he represents both plaintiffs and defendants in complex civil litigation matters, with an emphasis on commercial and business cases, trust and estate litigation, and construction law. In addition to his litigation practice, Liam enjoys working as a strategic partner to startup and growth stage businesses, where he advises clients on a variety of general corporate matters such as formation, contract review, governance and employment issues.

Liam's practice is anchored by diligence, agility and a commitment to developing creative, practical strategies to help his clients navigate the most challenging legal scenarios.

Res judicata—also known as "claim preclusion"—is a legal creature seldom encountered outside the walls of first-year civil procedure classrooms. Yet, where applicable, res judicata can serve as a powerful legal weapon (both as a shield and a sword) that can be wholly dispositive of certain claims in litigation.

Not to be confused with collateral estoppel (i.e. "issue preclusion"), the rule of res judicata has historically been stated as prohibiting subsequent litigation where: (1) the parties in the new litigation are the same or in privity with the parties to the earlier dispute; (2) the claim or cause of action presented in the second or subsequent litigation is identical to the one adjudged in the prior proceeding; and (3) there was a valid final judgment on

the merits. The doctrine serves the public interests of finality and judicial economy by preventing repetitious litigation and giving conclusive effect to final judgments. In other words, res judicata prevents a second bite at the apple so that lawyers, litigants, and society generally can rely on the results achieved through our judicial system without fear of re-litigation or inconsistent judgments.

However, modern day application of res judicata as an offensive or defensive tool can be substantially broader than the traditional rule might indicate. Many jurisdictions now utilize a "transaction or occurrence" test, which holds that a valid, final judgment rendered on the merits bars all subsequent actions based on any claim which was brought, or could have been brought, arising out of the transaction or occurrence that was the subject matter of the previous action.

Some states have even codified this expanded formulation of res judicata. Take Rule 1:6 of the Supreme Court of Virginia, for example:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent action that arises from the same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

Res judicata's preclusive effects may be even more far-reaching in the numerous jurisdictions that have followed the federal judiciary's lead and abandoned the requirement of "complete mutuality" of parties. What this means, as articulated by the First Circuit Court of Appeals, is that "[c]laim preclusion does not merely bar a plaintiff from suing the same defendant for the same claims in a different action; under certain circumstances, a defendant not a party to an original action may also use claim preclusion to defeat the later suit."[1] The use of "non-mutual claim preclusion" is much more prevalent in defensive res judicata than offensive res judicata. While each jurisdiction is different, courts typically analyze whether the newly-added defendants in the subsequent lawsuit were known to the plaintiff at the time of the first action, and whether such defendants have a sufficiently close and significant relationship (e.g. alleged co-conspirators) to the original defendant to fairly justify application of res judicata.

The rules of civil procedure for most jurisdictions list res judicata as one of the many available affirmative defenses, and a lawyer seeking to invoke its protections must be careful not to waive that right. As for plaintiff's counsel, it is important to keep in mind the potentially wide-ranging preclusive effects of res judicata when considering who to name as a defendant or which claims to assert in litigation. Failure to do either could have serious implications for the few cases where res judicata emerges as a paramount issue.

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[1] *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 17 (1st Cir. 2010).

disqualifying a physician for independent medical examination

by bruce dickinson & jacquelyn franco

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Whenever any person puts his or her mental or physical condition at issue in a case in which compensation is sought, the insurance company or other responsible party defending the case has a right to have a physician of its own choice examine the claimant. Fed. R. Civ. P. 35(a). There are a few reasons behind this request. The defendant or insurance company may be concerned that the plaintiff's injuries are not as severe as claimed, or they may just want to know the exact scope of injuries. In either event, case law regarding physician selection for Rule 35 evaluations, commonly referred to as IMEs, has addressed in what circumstances a court may reject the defendant's selection of the examining physician. Although a court is not required to accept a defendant's proposed examining physician, only if the plaintiff raises valid objection will the court appoint a different examiner. *Ragge v. MCA/Universal*, 165 F.R.D. 605 (C.D. Cal. 1995).

If a physician engages in a pattern or practice of providing improper, inflammatory opinions, an order barring him or her from performing a Rule 35 examination is appropriate. *Pham v. Wal-Mart Stores, Inc.*, 2012 WL 1957987 (D. Nev. May 29, 2012). The court in *Pham* did not define the exact conduct that is deemed a pattern or practice, nor did it define the exact opinions that are improper or inflammatory. However, the allegations against the selected physician involved opinions attacking the credibility of the plaintiff. In denying the plaintiff's motion to prevent the evaluation, the court noted that it was proper for the examining physician to review information that is relevant to the injury that is alleged, which can include discovery responses, deposition testimony, other health care records, and surveillance video. Moreover, the court held that it is proper for an examining physician to evaluate and comment on the credibility of the examinee's subjective complaints or to recognize the possibility of ulterior motives for subjective complaints that, in the opinion of the physician, are not supported by the objective medical findings. Accordingly, if an expert can relate his or her opinions as to a plaintiff's credibility on objective medical findings, he or she is not engaging in a pattern or practice of providing improper, inflammatory opinions.

An example of an improper, inflammatory opinion can, however, be found in *Fontana v. City of Auburn*, No. C13-0245-JCC (W.E. Wash. Aug. 21, 2014). The court in *Fontana* held that an expert's statement claiming the plaintiff's case was "meritless" was an improper opinion and grounds for striking. The expert, though, was still permitted to testify absent the improper opinion.

Another reason to challenge an examining physician is bias, *i.e.* the physician only performs defense evaluations. Courts tend to reject this argument though, finding that this issue is relevant, instead, for cross examination purposes, not justification to strike the examining physician. *See Lunsford v. Union Pacific R.R. Co.*, 2011 WL 2559839, *2 (E.D. Ark. 2011) ("[C]ourts have rejected efforts by plaintiffs to disqualify a physician based on the fact that the physician generally is retained by the defense side of a lawsuit.").

A different form of bias can come from the amount of income the examining physician receives from performing medical-legal work. Several district courts have held that the mere fact that a physician receives compensation from an insurance company for performing medical reviews does not justify striking the expert. *See, e.g., Lavino v. Metro. Life Ins. Co.*, 779 F. Supp. 2d 1095, 1104 (C.D. Cal. 2011) (finding evidence that "MLS performed 77 examinations for MetLife between 2009 and September 2010, for which MetLife had paid $118,816.25" not probative of bias); *Nolan v. Heald College*, 745 F. Supp. 2d 916, 923 (N.D. Cal. 2010) (concluding that statistics showing that MetLife paid NMS $236,490 in 2002, $569,795 in 2003, $838,265 in 2004, and $1,671,605 in 2005 for independent medical opinions "are not probative of bias"; *Kludka v. Qwest Disability Plan*, No. CV-08-1806-PHX-DGC, 2010 U.S. Dist. LEXIS 34572, at *22 (D. Ariz. Apr. 7, 2010) ("The mere fact that 20 or 30% of [a physician's] income is derived from record reviews does not show that he is biased."), *rev'd on other grounds by* 454 Fed. Appx. 611 (9th Cir. 2011). Although courts have held that the perceived biases recognized above are insufficient to prevent an expert from performing a Rule 35 examination, the examining physician's credibility can still be attacked during deposition and/or on cross-examination at trial. While defendants do not have carte blanche authority in selecting the Rule 35 examining physician, plaintiff faces a high standard of proof in seeking to disqualify the proposed physician.

the alchemist's guide to post-judgment collections

by samuel d. fleder

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"Congratulations, we won! …now what?" -- Anonymous Litigator

In the hectic world of North Carolina civil litigation, the focused practitioner understandably may lose sight of the forest for the individual trees. Analyzing thousands of pages of poorly-copied document production for that smoking-gun email, determining just the right dollar amount for your client's twelfth counteroffer to keep the adverse party engaged in settlement efforts, and speed-reading opposing counsel's summary judgment brief that was hand-delivered to you 30 seconds before the hearing started; such tasks lend themselves to intense focus, not an appreciation for the "bigger picture." Yet when the fortunate litigator does succeed in obtaining a civil judgment, whether by settlement, motion, verdict, or sheer luck, she is quickly confronted with the inevitable question from the client: how do we magically turn this paper judgment into gold?

To assist those with less experience in the alchemy of post-judgment collections, we present the following general formula for catalyzing the conversion of your client's paper judgment into something of tangible value.

1. Preparing Your Laboratory: Debtor's Exemptions

In order to get to judgment execution, the initial ingredient in the post-judgment collections formula, the judgment creditor must first (1) wait for the time to file a notice of appeal has expired, which is thirty (30) days from entry of judgment (tip: be sure to serve all parties with copies of the entered judgment under NCRCP 58 to get this clock started!), and (2) deal with the issue of exemptions.

A corporate (non-human) judgment debtor has no exemptions. If your debtor is a corporate entity, proceed to Step 2.

An individual (human) judgment debtor who is a North Carolina resident is afforded certain exemptions of her property from collection in satisfaction of a judgment debt by N.C.G.S. Chapter 1C, Article 16, known as the

Exemptions Act. The statutory scheme of the Exemptions Act effectively replaced the individual exemptions provided under Article X of the North Carolina Constitution. The general idea is that the State seeks to provide its residents some minimum protections from collection – ensuring that even the most judgment-laden citizen cannot be forced to give up the proverbial "shirt off his back." The Exemptions Act sets out categories of property and provides specific dollar amounts of which the debtor's interest in such property is exempt from the enforcement of creditors' claims. Some of these exemptions include, as of the time of publication of this article:

- up to $35,000.00 in value of real property, or personal property (often a mobile home that has not had its title retired to the land on which it sits), that is the debtor's residence, except that a debtor who is 65 or older may exempt up to $60,000.00 if the property was previously owned as tenants by the entireties or joint tenants with right of survivorship by the debtor and a deceased spouse, N.C.G.S. § 1C-1601(a)(1), known as the "homestead exemption";
- up to $3,500.00 in value of one motor vehicle, *Id.* § 1C-1601(a)(3);
- up to $5,000.00 in value, plus an additional $1,000.00 for each dependent of the debtor, in household furnishings, household goods, clothes, books, animals, crops and the like which are "held primarily for the personal, family, or household use of the debtor" or the debtors' dependents, *Id*. § 1C-1601(a)(4);
- up to $2,000.00 in value of professional books, implements, or tools of the trade, *Id*. § 1C-1601(a)(5);
- up to $25,000.00 in funds in a 529 college savings plan, *Id*. § 1C-1601(a)(10);
- the debtor's entire interest in:
    - life insurance, *Id*. § 1C-1601(a)(6);
    - professionally-prescribed health aids for the debtor or a dependent, N.C.G.S. § 1C-1601(a)(7);
    - personal injury or disability awards and compensation, *Id*. § 1C-1601(a)(8);
    - certain retirement funds, *Id*. § 1C-1601(a)(9) and (11); alimony and child support funds, *Id*. § 1C-1601(a)(12); and
- a "wild-card" exemption of up to $5,000.00 in value in any property, to the extent the debtor has not used her entire homestead exemption, *Id*. § 1C-1601(a)(2). (Note that the "wild-card" exemption does not apply to property purchased within 90 days of the initiation of post-judgment collection proceedings or the filing of bankruptcy).

Before the Clerk will issue a Writ of Execution (described below) on a judgment against a human debtor, you must first complete and send to the Clerk for issuance both a Notice of Right to Have Exemptions Designated (Form AOC-CV-406) and a Motion to Claim Exempt Property (Form AOC-CV-415). These forms explain the available statutory exemptions to the debtor, and provide instructions for the debtor to claim her exemptions by completing and filing the Motion to Claim Exempt Property and/or requesting a hearing. Upon receipt back from the Clerk, you must serve the debtor with the issued Notice and Motion. Service must first be attempted by personal service pursuant to NCRCP 4(j)(1), and an affidavit of proof of service should be filed with the Clerk. If service is unsuccessful, however, N.C.G.S. § 1C-1603(a)(4) allows the creditor next to serve the Notice and Motion to the debtor's last known address by regular mail and to file with the Clerk a certificate of mailing indicating that personal service was attempted unsuccessfully.

The judgment debtor has twenty (20) days from the date of service within which to file the Motion designating her exempt property and/or to request a hearing before the Clerk. N.C.G.S. § 1C-1603(e)(2). If the debtor fails to so act, her statutory exemptions are waived, and the judgment creditor may proceed with obtaining a Writ of Execution that will not be subject to any property exemptions. *Id.*; *but see Household Fin. Corp. v. Ellis*, 107 N.C. App. 262, 419 S.E.2d 592 (1992) (holding that even where judgment debtor waived his statutory exemptions by failing to file a Motion to Claim Exempt Property, constitutional exemptions could nonetheless

be asserted thereafter and up to the time of an execution sale, when substantial time had passed from time of waiver to time the exemptions were later asserted).

If the debtor timely files her Motion to Claim Exempt Property, the judgment creditor is afforded 10 days after service of the debtor's motion to object to the claimed exemptions. N.C.G.S. § 1C-1603(e)(5). Where the creditor objects to the claimed exemptions, the Clerk must set the objections on for hearing before a district court judge at the next civil session. *Id.* § 1C-1603(e)(7). If the creditor fails to object timely to the debtor's claimed exemptions, the Clerk will enter an Order Designating Property (Form AOC-CV-409), which will preclude any efforts by the Sheriff to levy on the exempted property. Accordingly, to the extent the debtor's claimed exemptions provide any grounds for dispute, it is often worth the time and effort for the judgment creditor to object and schedule a hearing. The prudent post-judgment alchemist should look out for attempts to exempt multiple motor vehicles, understated property values, or attempts to use the "wild-card" exemption while also claiming the entire homestead exemption. If the creditor fails to object, it has no assurance of how the Clerk will transcribe the debtor's exemptions into the Order Designating Property – creating the possibility that further hearings may be required to clarify or amend the Clerk's Order to correct an overly-broad or inaccurate description of the property subject to exemption. Generally speaking, if the creditor does not file an objection, the debtor's exemptions will be incorporated into the Order Designating Property exactly as the debtor filed them. Additionally, each instance where the debtor is required to appear in court affords the creditor another opportunity to learn more about the debtor's assets and situation, and more importantly, to engage in post-judgment settlement efforts and start receiving cash payments on your paper judgment.

2. Initial Ingredients: Execution

Once the time for filing a notice of appeal has expired and you have addressed the exemptions issue, the post-judgment alchemist can finally take her first step toward the magical conversion of paper judgment to legal tender: obtaining a Writ of Execution. The Writ of Execution (Form AOC-CV-400) is an order from the Clerk of Court (only clerks – not judges – may issue these) determining the dollar amount owing on your judgment and commanding the county Sheriff to satisfy that judgment by seizing and selling the debtor's property, subject to any claimed exemptions. *Id.* § 1-305. Fill out and send the Writ to the Clerk with a cover letter and $25.00 fee to have the Writ entered. You can ask the Clerk to send the issued Writ back to you for your subsequent delivery to the Sheriff, or ask the Clerk to forward the Writ directly to the Sheriff for service on the debtor. In either case, ensure the Sheriff receives the Writ along with your $15.00 fee per defendant for service.

The Sheriff has 90 days to act on a Writ of Execution. The Sheriff's efforts to locate property subject to execution vary from county to county, but will generally involve a written letter to the debtor demanding payment, a search of the county's Register of Deeds for any real property not encumbered by a lien or deed of trust, a search of NCDMV records for any vehicles not encumbered by a lien, and one or more in-person visits to the debtor. If you have information as to the whereabouts of specific, non-exempt assets of the debtor, share this information with the Sheriff to save time and assist the Sheriff's efforts. The power of the Sheriff to levy on property is statutorily limited: only property owned by the debtor (not the interests of another joint owner or property owned as tenants by the entireties) is subject to execution, and the Sheriff cannot resolve ownership or valuation disputes, which must instead be adjudicated by the Court. *See* N.C.G.S. §§ 1-302 *et seq.* After the Writ is sent to the Sheriff, you may call the Sheriff's office to inquire about the status of execution efforts. Do not annoy the Sheriff with overly-frequent calls! The Sheriff is your sole avenue to converting your paper judgment into cash at this stage, so be sure to allow at least four weeks to pass before making an initial inquiry.

In the event the Sheriff locates property on which to levy, he will contact you to request an advancement of fees.

The property may then be seized and sold at a Sheriff's public sale. For sales of personal property, notice of the sale is posted at the courthouse for 10 days prior to the sale date, the property is sold to the highest bidder, and the Sheriff submits a report of sale within 5 days. N.C.G.S. §§ 1-339.41 -.71. For real property sales, notice of sale is posted for 20 days prior to the sale date and published in a newspaper qualified for legal advertising in the county once a week for 2 successive weeks. The notice of sale must also be served on the debtor. The property is sold to the highest bidder, and the Sheriff submits a report of sale within 5 days. *Id.* Note that real property execution sales are subject to an upset bid process, where the high bid can be upset with a new bid of the greater of 5% of the prior bid or $750.00, delivered to the clerk within 10 days of the sale date. *Id.* § 1-339.64. The net proceeds of a Sheriff's sale, after deducting the Sheriff's commission and expenses of sale, are delivered by the Sheriff to the Clerk. If the payment received is less than full payment of the judgment amount, the Clerk credits the judgment with the proceeds received and then sends payment to the judgment creditor's attorney of record. If the proceeds will fully pay the judgment amount, the Clerk sends a Notice of Payment of Judgment (Form AOC-CV-410) to the creditor's attorney, which allows 10 days for any objection before the Clerk cancels the judgment and sends payment to the creditor's attorney.

The Sheriff is empowered to obtain additional information from corporate judgment debtors in searching for property on which to levy. Any person having charge or control of the corporate debtor's property must provide the Sheriff with the names of the corporate directors and officers and a schedule of all of the corporation's property. *Id.* § 1-324.2. The Sheriff may also levy upon receivables and debts due to the corporate debtor, and can require the debtor's agent or employee to assign such debts to him for collection. *Id.* § 1-324.4. Providing the Sheriff with contact information for an officer or director of your corporate debtor can result in a bevy of useful information about existing assets.

If the Sheriff finds no property on which to levy, the Writ of Execution is returned unsatisfied to the Clerk. It is critically important to note that each of the below-discussed supplemental post-judgment proceedings becomes available only after a Writ of Execution has been issued (and in some cases, only after the Writ is returned unsatisfied). Accordingly, the judgment creditor should always have a Writ of Execution issued before moving on to subsequent post-judgment steps – even if the creditor is confident at the outset that the Sheriff will not locate property subject to levy. If you suspect that your debtor has assets located in a different county, transcribe your judgment accordingly and repeat the execution process.

3. Applying the Centrifuge: Supplemental Proceedings

Once the Writ of Execution is returned unsatisfied, the post-judgment alchemist's toolbox expands significantly in terms of available next steps.

The judgment creditor may issue written interrogatories to the debtor to inquire about existing assets, even before the Writ is returned. N.C.G.S. § 1-352.1. Note that unlike NCRCP 33 interrogatories, post-judgment interrogatories are not limited in number (except as justice requires to protect the debtor from annoyance, embarrassment, or undue expense). Post-judgment interrogatories may be served at any time within 3 years of the issuance of execution, as long as the judgment remains unsatisfied. The debtor must respond under oath and within 30 days of service. If the debtor fails to fully respond, the creditor can move to compel the debtor to respond. Where the debtor violates an order compelling her response to interrogatories, the creditor can file a motion for order to show cause, requiring the debtor to appear in court and explain to the judge why she should not be held in contempt (and subject to civil fines and/or a "pick-up warrant" for her arrest to be brought before the court). N.C.G.S. § 1-368. A show-cause motion must include a sworn affidavit confirming the basis for a contempt finding and must be served on the adverse party at least 5 days prior to the hearing. *Id.* § 5A-23.

Where the Execution is returned unsatisfied, the creditor may file a motion for examination of the debtor. *Id*. § 1-352. Upon granting the motion, the Court will order the debtor to appear in Court and answer under oath the judgment creditor's verbal questions regarding the debtor's assets. The creditor may also examine third-party witnesses in this manner with respect to the debtor's assets. *Id.* § 1-356.

Where the judgment remains unsatisfied and within 3 years from the issuance of a Writ of Execution, the judgment creditor may move the court to order the debtor, her agent, or anyone having possession or control of her property to produce and permit the inspection and copying of documents and records that are the debtor's property or provide evidence of the debtor's property, or to permit the creditor's entry upon private lands for the purpose of inspecting the debtor's property. *Id*. § 1-352.2.

Where the judgment creditor learns that property of the debtor may be subject to immediate transfer or disposition by the debtor or a third party in possession or control, the creditor may move the Court for an order restricting the debtor's or third party's ability to transfer, assign, or otherwise dispose of that property. *Id.* § 1-358.

The above-described supplemental proceedings should all be filed in the county where the judgment was entered. Note, however, that any orders directing the debtor to appear in person must designate an appearance location in the county of the debtor's residence. *Id*. § 1-361.

The creditor may also move the Court to appoint a receiver, frequently a local attorney (not your spouse or your law partner!), to take control and dispose of the debtor's property in satisfaction of your judgment. *Id*. §§ 1-363 and 1-502. Receivers can be appointed pre- or post-judgment. The receiver must post a bond prior to undertaking his appointment.

Each of these options should be viewed by the post-judgment alchemist as having dual purposes: the discovery of information about the debtor's assets that may be subject to sale by the Court in satisfaction of the judgment debt, and the opportunity to pursue continued settlement negotiations with the judgment debtor. With careful planning of your post-judgment strategy, often involving the simultaneous deployment of multiple motions along with written interrogatories, the post-judgment alchemist may successfully transform her paper judgment into settlement payments.

4. **Turning Up the Heat: Post-Judgment Levy on Funds**

One frequently-successful option for catalyzing your client's judgment into currency is a post-judgment levy on funds in the debtor's bank account. North Carolina is one of only four states that does not provide for statutory wage garnishment in the judgment-execution context, and a levy on funds is frequently the closest available option. N.C.G.S. § 1-360 provides that "debtors of the judgment debtor may be summoned," and in the banking context, every deposit of funds by a debtor into her bank account constitutes a credit to the debtor and renders the bank a "debtor of the debtor."

Where the creditor has information that the debtor may have a deposit account with a bank with an office in a county within the Clerk's jurisdiction, the industrious post-judgment alchemist may file with the Clerk an *ex parte* motion pursuant to N.C.G.S. §§ 1-358, 1-360, and 1-362 seeking an order compelling the depository bank to appear via affidavit and provide the Clerk with an accounting of the funds it owes to the debtor and enjoining the bank from disbursing or encumbering those funds until further order of the Clerk. Once the "freeze" order is entered, the creditor sends the order to the bank (some banks will accept these by fax, others require the original by mail) along with a form affidavit, with which the bank states what, if any, funds exist and have been frozen. Upon receipt of an affidavit showing the existence of funds, the creditor then schedules a hearing before the Clerk, provides written notice of the hearing to the debtor, and then attends a hearing to obtain a subsequent

order directing the bank to release the frozen funds to the creditor. Note that exempt funds are not subject to levy – including child support payments, social security payments, and the debtor's earnings for personal services received up to 60 days prior to the order (but which the debtor must prove by affidavit or otherwise). N.C.G.S. § 1-362. The release order is sent to the bank, which then sends its check for funds in reply. Often, a settlement can be reached in advance of the hearing date, once the debtor realizes she can no longer access the funds in her bank account.

Note that the practice and procedure of bank account levies vary widely from county to county, so be sure to inquire with your local Clerk's office to determine what is expected in your jurisdiction.

5. Proving the Hypothesis: Final Thoughts

With intentional planning and a grasp of the numerous statutory tools available, the scrupulous litigator may from time to time successfully achieve the alchemy of converting paper judgment to tradeable currency. So go forth, ye post-judgment alchemists, and transform!

governmental investigatory report findings and conclusions: what is admissible?

by m. matt jett

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Introduction

Admissibility of governmental investigatory reports, particularly findings and conclusions relating to fault, can have massive ramifications. Accordingly, it is important to recognize admissibility issues relating to governmental investigatory reports and how to properly argue for or against admission of same into evidence. The purpose of this article is to establish not only the basic premise for admissibility of governmental investigatory reports, but to also provide case law and arguments for admiralty litigators to utilize when arguing for or against admissibility of the findings and conclusions contained in governmental investigatory reports.

Admissibility of Governmental Investigatory Reports

Governmental investigatory reports are presumed admissible under Federal Rule of Evidence 803(8). In this regard, Federal Rule of Evidence 803(8) defines the "public records and reports" which are not excludable by the hearsay rule as follows:

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

Based on the presumption governmental investigatory reports are admissible under 803(8), the party challenging the report being admitted into evidence bears the burden of establishing the report is not trustworthy

based on: (1) the timeliness of the report; (2) the investigator's skill or expertise; (3) whether a hearing was held; and (4) the investigator's possible bias. *Id*. at 167 n.11. A court's decision regarding admissibility is reviewed under an abuse of discretion standard. *See Eason v. Fleming Companies, Inc*., 4 F.3d 989 (5th Cir. 1993) (per curiam). Accordingly, most governmental investigatory reports, and included findings and conclusions, are admitted into evidence based on the presumption of admissibility established in *Beech*. *See Beech*, 488 U.S. 153.

Admissibility of Governmental Investigatory Report Findings and Conclusions

However, contrary to *Beech*, in *Thibodeaux v. Wellmate*, the United States District Court for the Eastern District of Louisiana found that although governmental investigatory reports are presumed admissible, "legal conclusions" contained within the reports are inadmissible regardless of whether the report is trustworthy. *See Thibodeaux v. Wellmate*, 2014 WL 1329802 (E.D. La. Mar. 31, 2014) (not reported). Additionally, three circuit courts, the Fourth, Ninth and Eleventh found "legal conclusions" are not admissible under 803(8). *See Zeus Enters., Inc. v. Alphin Aircraft, Inc*., 190 F.3d 238 (4th Cir. 1999); *see also Sullivan v. Dollar Tree Stores, Inc*., 623 F.3d 770 (9th Cir. 2010); *Hines v. Brandon Steel Decks, Inc*., 886 F.2d 299 (11th Cir. 1989). Based on the aforementioned deviations from *Beech*, an evaluation regarding case law for and against admission of governmental investigatory report findings and conclusions is warranted.

Cases Supporting Admitting Governmental Investigatory Report Findings and Conclusions Into Evidence

There are several cases an admiralty litigator can rely on to argue governmental investigatory report findings and conclusions are admissible. The cases begin with the 1988 U.S. Supreme Court decision in *Beech Aircraft Co. v. Rainey*, 488 U.S. 153 (1988). In *Beech*, the Judge Advocate General ("JAG") conducted an investigation and issued an investigative report and findings relating to a Navy flight training crash. *Id*. at 156. The United States Supreme Court addressed "the longstanding conflict among the Federal Courts of Appeals over whether Federal Rule of Evidence 803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing 'factual findings,' extends to conclusions and opinions in such reports." *Id*. After comparing the interpretations of various Courts of Appeal and conducting its analysis, the United States Supreme Court held 803(8) should be broadly interpreted and found "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C)." *Id*. at 161-70. In particular, the United States Supreme Court opined:

> [w]e hold, therefore, that portions of investigatory reports otherwise admissible under 803(8)(C) are not inadmissible merely because they state a conclusion or an opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. *Id.* at 170.

Accordingly, the *Beech* court held the JAG investigatory report conclusions and opinions regarding the accident being caused by pilot error were admissible because they were derived from a factual investigation, were trustworthy and did not violate Federal Rules of Evidence 401 & 403. *See Id*.

Walker v. Braus next addressed this issue. *See* 1991 WL 55877 (E.D. La. April 8, 1991) (not reported). In *Walker*, a collision between two vessels, the Trahan and the Braus, occurred and Mr. Walker was killed. *Id.* at *1. The United States Coast Guard investigated the accident and issued an investigative report which found the proximate cause of the collision was Trahan's speed on an unsafe course and careless navigation. *Id.* at *4. At trial, Plaintiff objected to admitting the report into evidence and claimed it was hearsay, untrustworthy and

contained legal conclusions. *Id.* In determining whether the Coast Guard report was admissible, the *Walker* court found the Coast Guard had vast experience in investigating maritime accidents, was an impartial investigator, the report was timely in spite of being issued eight weeks after the incident, a formal hearing was not required, the Coast Guard report stated factual, not legal conclusions, and there was nothing to suggest the report was untrustworthy. *Id.* As such, the court admitted the Coast Guard report, including the findings indicating Trahan was the proximate cause of the collision, into evidence. *Id.* at *8.

In *Moss v. Ole South Real Estate*, the Fifth Circuit evaluated whether findings in a Housing and Urban Development ("HUD") and an Air Force investigatory report were admissible. *See Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1303 (5th Cir. 1991). At trial, the Magistrate excluded both investigatory reports and claimed the reports were untrustworthy because they were: (1) untimely; (2) the circumstances prompting the investigation were "somewhat irregular"; (3) the investigation was inadequate because the investigator relied on prior interviews and there was not a formal hearing; and (4) the Magistrate's review of the reports and file led him to believe the findings were incomplete and misleading and witnesses were biased. *Id*. at 1306.

On appeal, the Fifth Circuit evaluated whether the Magistrate erred by not allowing the Air Force and HUD reports into evidence. *Id.* at 1305. The court found in light of the presumption of admissibility, the party opposing admission of the report bore the burden of proving the report was untrustworthy. *Id.* The court then held the Magistrate abused his discretion by excluding the reports and opined:

> the Magistrate did not limit himself to determining whether the reports were untrustworthy. Instead, he made several determinations that witnesses in the reports were not credible, and as a result the reports were not credible and therefore were untrustworthy. Credibility is not the focus of the trustworthiness inquiry. The magistrate looked broadly at credibility in ruling on both reports. . . In making determinations of credibility, the magistrate overstepped his role. The court must allow the jury to make credibility decisions and to decide what weight to afford a report's findings. . . It follows that in determining trustworthiness under Rule 803(8)(C), credibility of the report itself or the testimony in the report are not the focus. Instead, the focus is on the report's *reliability*. *Id*. at 1306-07 (emphasis in the original).

Smith v. Waterman concerned the admissibility of a Coast Guard investigation regarding whether Waterman wrongfully discharged Smith for improperly performing his duties while undocking a vessel. *See Smith v. Waterman Steamship Corp.*, 36 F.3d 90 *1 (5th Cir. 1994) (not reported). Smith argued the Coast Guard report was untrustworthy and, thus, inadmissible. *Id*. In evaluating whether the report was untrustworthy, the court pointed out Smith did not produce any evidence indicating the report was untrustworthy. *Id*. Rather, the record indicated: (1) the report was timely; (2) a formal hearing to determine fault was not warranted because it was not a major maritime accident; (3) Smith was given input into the investigation; (4) the investigation kept the case open at Smith's request; and (5) it was only when no additional information could be provided to support Smith's position that the case was closed. *Id*. Based on the foregoing, the Court rejected Smith's argument and found the report (and the finding Smith improperly performed his duties) was properly admitted.

In 1996, the United States District Court for the Eastern District of Louisiana decided *Avondale Indus., Inc. v. Bd. of Comm. of Port of New Orleans*, 1996 WL 280787 (E.D. La. May 24, 1996) (not published). Avondale filed suit against the Board of Commissioners for the Port of New Orleans for damage caused to its vessel as it attempted to clear the span of the raised St. Claude Avenue Bridge. *Id.* at *1. At trial, defendants filed a Motion in Limine to exclude or prevent introduction of the Coast Guard Marine Safety Information System Report. *Id*. The court rejected the defendants' arguments and opined the "admissibility of a report under Rule 803(8)(C) depends, not upon an arbitrary distinction between "fact" and "opinion", but whether the report is

trustworthy." *Id*. (citing *Beech*, 488 U.S. at 167; *Moss*, 933 F.2d at 1305) (emphasis added). The court then listed the trustworthiness factors established in *Beech* and *Moss* and again mentioned the burden of proving untrustworthiness is on the moving party. *Id*. The court found the report was trustworthy, and thus, its findings and conclusions were admissible. *Id*.

Cases Favoring Excluding Governmental Investigatory Report Findings and Conclusions

In *Thibodeaux*, the plaintiff was injured on an offshore platform when a potable water tank bladder burst. *Id*. at *1. After the accident, the Bureau of Safety and Environmental Enforcement ("BSEE"), which was then known as the Bureau of Ocean Management, Regulation and Enforcement ("BOERME") conducted an investigation and prepared a report regarding the accident. *Id*. Part of the report contained BSEE's conclusions regarding the probable causes and contributing causes of the accident. *Id*. at *2.

Relying on *Zeus*, *Sullivan* and *Hines*, the *Thibodeaux* court held BSEE's conclusions were inadmissible because "the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements of the underlying legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires." *Id*. at *2. The oldest case relied upon by *Thibodeaux* was *Hines v. Brandon Steel Decks, Inc*. *See Hines*, 886 F.2d at 299. In *Hines*, the Eleventh Circuit addressed whether conclusions in an Occupational Safety and Health Administration ("OSHA") report were admissible. In this regard, the Eleventh Circuit stated, "Rule 803(8)(C) allows into evidence public reports that (1) set forth factual findings (2) made pursuant to authority granted by law (3) that the judge finds trustworthy." *Id*. The Court went on to explain, "while a legal conclusion encompasses 'the idea that the State will habitually sanction and enforce a legal relation of a specific content,' a factual conclusion is one of a number of 'contingencies on which the State predicates this relation.'" The court found reviewing courts should consider whether the report should be excluded because it is cumulative, irrelevant, more prejudicial than probative, fails to assist the jury or would confuse the jury. *Id*. at 304. As such, the court determined the trial court committed error by solely relying on *Beech* and *per se* admitting the OSHA report and its findings without evaluating whether they were trustworthy or violated Federal Rule of Evidence 403. *Id*. The court further noted public reports otherwise admissible under 803(8)(C) may nevertheless be excluded in whole or in part if the trial court finds they are either irrelevant or more prejudicial than probative. *Id*. In response, the court remanded the case for the trial court to evaluate whether the OSHA report and its findings were admissible. *Id*.

Thibodeaux then relied upon *Zeus*. *See Zeus v. Alphin*, 190 F.3d at 238. Zeus sued Alphin for breach of a contract requiring Alphin to restore Zeus' airplane to "an airworthy condition." *Id*. The issue on appeal concerned whether the district court properly admitted the decision and order dismissing Alphin's appeal under 803(8). *Id*. at 241. Alphin argued the administrative law judge's decision was not a "factual finding" because it was not the result of an investigation but rather was a result of an appellate quasi-judicial proceeding. *Id*. at 241-42. The court rejected Alphin's argument and reasoned the administrative law judge satisfied the "investigation" requirement of 803(8) because he engaged in a systematic and detailed inquiry into the airworthiness of Zeus' airplane. *Id*. at 242-43. Accordingly, the administrative law judge's factual findings were admissible under 803(8). *Id*. at 243. The court then evaluated whether the NTSB's order, which dismissed Alphin's appeal, was admissible under 803(8). *Id*. at 243. The court determined the order was inadmissible because the "NTSB order merely held that Alphin lacked standing to appeal the ALJ's decision. The NTSB order involved no factual determinations and was strictly a legal ruling." *Id*. (emphasis added). Said another way, the order was not admissible under 803(8) because it did not contain any factual findings to support any opinions or conclusions.

The most recent case *Thibodeaux* relied on was *Sullivan v. Dollar Tree*. *See Sullivan*, 623 F.3d at 770. *Sullivan* involved a lawsuit where Sullivan was seeking lost wages under the Family and Medical Leave Act ("FMLA"). *Id.* at 775. The Department of Labor ("DOL") concluded Dollar Tree's actions violated the FMLA and informed the parties of its decision. *Id*. at 775-76. At trial, Sullivan attempted to introduce the DOL report into evidence but the district court held it was inadmissible hearsay not exempted by 803(8). *Id*. at 776. On appeal, the *Sullivan* court addressed the issue of whether 803(8) covers investigative report legal conclusions as well as factual findings. *Id*. at 777. As part of its analysis, the *Sullivan* court discussed *Beech* and pointed out the *Beech* court "cabined" its decision in footnote 13 which stated, "[w]e thus express no opinion on whether legal conclusions contained in an official report are admissible as 'findings of fact' under Rule 803(8)(C)." *Id*. (citing *Beech*, 488 U.S. at 170 n. 13). Based on the foregoing, the Ninth Circuit found the DOL report's finding regarding Dollar Tree being Factory 2-U's "successor in interest" was inadmissible hearsay. *Id*.

Conclusion

Governmental investigatory report findings and conclusions are admissible in the Fifth Circuit so long as they are "trustworthy." However, as shown in *Thibodeaux*, *Hines*, *Zeus* and *Sullivan*, several arguments exist for the admiralty litigator seeking to exclude findings and conclusions which are unfavorable to the litigator's case in maritime, OCSLA and Louisiana cases.

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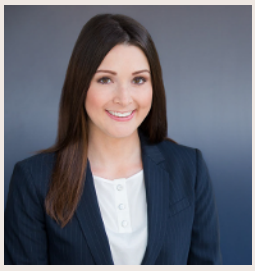

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Young Lawyer Section Updates

YLS Membership Call – The membership calls take place the second Tuesday of every other month. Here is the remaining call schedule for 2017:

- Tuesday, July 11th at 1:30 pm ET – Topic: Cyber Security
  - Guest Speaker: Khizar Sheikh - Mandelbaum Salsburg (Roseland, NJ)
- Tuesday, September 12th at 1:30 pm ET – Topic: Tips from the Bench
  - Guest Speaker: Honorable James Clayton Lewis, Circuit Court Judge for the 2nd Judicial Circuit in Virginia, and former Primerus Member Attorney
- Tuesday, November 14th at 1:30 pm ET – Topic: TBD

Primerus Events Calendar

- September 6-9 – Claims & Litigation Management Alliance Claims College (Baltimore, MD)
  - Primerus will be a sponsor
- September 11-13 – HAI client event (Chad Sluss attending – making a presentation about Primerus/PCRI) (Hartford, CT)
- October 4-7 – Primerus Global Conference (Vancouver, Canada)
- October 15 – 18 – ACC Annual Meeting (Washington, DC)
  - Primerus will be a corporate sponsor
- November 9 – 10 – Primerus Defense Institute Insurance Coverage & Bad Faith and Professional Liability Joint Seminar (New York, NY)
- November 16 - Primerus Europe, Middle East & Africa/Association of Corporate Counsel Legal Seminar (Brussels, Belgium)