Avoiding and Managing Commercial Disputes in the US: Overview

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A Practice Note examining ways corporate counsel can reduce or eliminate litigation risks when faced with exposure in the US. This Note also provides an overview of the key issues corporate counsel face when managing US-based commercial disputes, including settlement, insurance, discovery (including e-discovery), privilege, and fee arrangements with outside counsel.

Commercial disputes are a constant risk for corporate counsel and can cause company-wide damage in a short amount of time. Critically, a company's law department must continuously minimize the threat of litigation and, if litigation is unavoidable, manage disputes as effectively as possible. This Note explains how corporate counsel can reduce or eliminate litigation risk. It provides an overview of the preliminary issues that arise at the outset of a dispute, including settlement, insurance, privilege, electronic discovery, and disclosure rules, as well as tips for selecting the right outside counsel and deciding on the most suitable fee arrangement. This Note also looks at the:

- Importance of including dispute resolution forum and procedure clauses in all contracts.
- Advantages and disadvantages of arbitration over litigation.
- Preservation of company documents and guidelines for employees under a litigation hold.

For a detailed discussion of the basic components of the US litigation process, see Practice Note, Initial Stages of Federal Litigation: Overview (0-503-1906).

MINIMIZING THE RISK OF LITIGATION

Although major litigation is usually outsourced to law firms, in-house lawyers often play a key role in minimizing the risk of litigation by reacting to disputes when they first emerge and managing interactions with other parties.

The best way to manage litigation is to avoid it altogether. There are several ways of doing this and an in-house legal department should initiate or at least be involved in most of them. Ways to best avoid litigation can be identified by examining five common areas of commercial risk:

- Transaction risk.
- Counterparty risk.
- Country risk.
- Product risk.
- Process risk.

TRANSACTION RISK

Certain types of transactions are especially prone to litigation. For example, major acquisitions, complex financial deals, and construction projects have greater exposure to litigation than other types of transactions. Contractual protection and insurance can help avoid the litigation that arises from these transactions or limit a dispute's financial impact.

Ensuring that written contracts are used for key transactions and that potential risks are clearly defined and allocated can reduce exposure to litigation. For example, a proper supply contract can reduce the possibility of a dispute by addressing:

- Product specification.
- Delivery time.
- Payment terms.
- Remedies for defective or late goods (including any exclusion or limitation of liability).
- Governing law (see Choice-of-Law Clauses).
- Dispute forum (see Jurisdiction and Arbitration Clauses).
- Dispute resolution mechanisms (that is, using the court system versus arbitration) (see Dispute Resolution Clauses).

When contractual protection is insufficient, financial exposure may be transferred to insurers. In-house lawyers must work closely

with insurance managers to ensure that contracts and insurance arrangements complement each other and there are no gaps (or overlaps) in coverage (see Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (8-502-7415)). In addition, counsel must ensure that insurance coverage is not invalidated by the transaction's contract terms. For example, a party may not be covered by its insurance policy if it contractually accepts liability.

Even small transactions (such as consumer sales) may bear a significant litigation risk because of volume. Many small claims together can be just as damaging as one large one. It may be possible to reduce consumer inquiries and disputes by, for example, simplifying standard terms and conditions and properly addressing labeling issues.

Regular contract reviews can also reduce litigation risk. Each review should establish that:

- Important transactions are properly documented.
- Key contractual terms are incorporated.
- Residual risks are quantified and proper insurance coverage and other appropriate measures are taken.
- Contractual procedures are adequate (including legal department involvement).
- All relevant documents (including contracts and acceptance notes) and complaints are properly filed and retained.

The reviewing attorney should use checklists for each type of contract (see Checklist, Minimising the risk of litigation (6-101-2037)).

COUNTERPARTY RISK

If your company is conducting business for the first time with a new or little-known counterparty, counsel should check the party's credentials. Determine whether it:

- Is well established in your company's particular industry.
- Has a litigious reputation.
- Has sufficient financial resources to cover its contractual commitments.
- Has recoverable assets.

Counsel can obtain this information from several sources, such as:

- Industry and financial references.
- Credit searches.
- Company searches.
- Inspection of accounts.
- Internet searches.
- Judicial record searches.
- Property searches.

COUNTRY RISK

Litigation is increasingly international. Certain countries have seemingly biased or even corrupt judiciaries and consequently present difficulties in obtaining and enforcing awards.

The US is criticized as a forum for litigation because of unpredictable jury awards, a heavy discovery burden, and a contingency fee system that encourages litigation. The US legal system, however, has vast procedural safeguards and an impartial judicial system in addition to many measures to enforce an award or judgment.

Incorporating appropriate choice-of-law and jurisdiction clauses can reduce uncertainty. The courts of most countries respect these clauses. There remains, however, a significant area of potential exposure to non-contractual claims (for example, products liability and environmental claims).

Some risks may be reduced by conducting operations in the relevant countries through third parties, such as an agent or subsidiary company. Many foreign jurisdictions, however, attach liability to parent companies for the actions of their subsidiaries. To reduce the risk of parent liability, it is usually necessary for the subsidiary to be independent from the parent and have full operational autonomy. Counsel should obtain local legal advice on issues regarding inter-corporate liability and implement appropriate legal structures and procedures.

Counsel also must consider the differences among jurisdictions in limitation periods, as well as the types of loss that may be recovered and the treatment of exclusion and limitation clauses.

PRODUCT RISK

Corporate counsel can reduce exposure to product risk through:

- Quality management systems.
- Product recall and crisis management plans.
- Clear product instructions.
- Marketing communications involvement.
- Warnings displayed on products.
- Contractual terms.
- Insurance.

All of these measures should be considered together and regularly reviewed by a multi-disciplinary committee (including lawyers, product managers, designers, and insurance, regulatory, and marketing personnel).

PROCESS RISK

Litigation risks frequently emerge from day-to-day business activities, including:

- Environmental, health, and safety issues.
- Employer/employee disputes.
- Intellectual property disputes.
- Regulatory investigations.

To address these, appropriate multi-disciplinary teams should:

- Review business processes.
- Ascertain potential risk areas.
- Change procedures where necessary.
- Implement compliance programs consistent with current rules and regulations.

LAW AND JURISDICTION CLAUSES AND DISPUTE RESOLUTION METHODS

Failure to agree on a suitable dispute resolution forum governing law and procedure concerning an international contract can have significant disadvantages when a dispute arises. These disadvantages may include:

- Unfamiliar substantive law (even one influenced by a fundamentally different underlying social philosophy).
- Inconvenient location.
- Excessive delay.
- Foreign language.
- Restricted choice of representation.
- Unfamiliar procedure.
- Unduly restrictive or excessive awards of damages and costs.
- The possibility of a biased tribunal.
- Difficulties in enforcing an award.

This section discusses various ways that companies can minimize these risks.

DISPUTE RESOLUTION CLAUSES

A straight-forward mechanism for dispute resolution should be incorporated in most contracts, but this is often overlooked in practice. Options range from informal mechanisms, such as referral of the dispute to senior executives at the respective companies or some form of alternative dispute resolution (ADR), to more formal arbitration and choice of law and jurisdiction clauses.

Alternatively, it is possible to opt for a combination of these mechanisms by including a dispute escalation clause. This type of clause may, for example, require that the dispute first be referred to both parties' chief executives, followed by mediation, followed by arbitration or litigation if the dispute cannot be settled within a set period of time. Frequently, this type of clause encourages a negotiated settlement (see Practice Note, Hybrid, multi-tiered and carve-out dispute resolution clauses (9-384-8595)).

CHOICE-OF-LAW CLAUSES

At the outset of a transaction, counsel should consider the contract's governing law because the law chosen provides the context in which the contract is to be drafted. If the chosen law is not US law, a lawyer experienced with the relevant country's law should be closely involved in the drafting process. US law is usually specified as the law of a particular US state that either has a well-developed body of law in a particular area or is one where a party's lawyer is accustomed to practice.

Most developed legal systems respect an express choice of law in a commercial contract unless it is considered to have been chosen deliberately to avoid a mandatory provision of a national law or there are other public policy reasons for not doing so.

In the absence of an express choice of governing law, the court in the jurisdiction where the action was commenced must decide which law to apply to the contract according to that jurisdiction's principles.

Most courts look to the country (or other jurisdiction) that has the closest and most real connection with the dispute in determining which jurisdiction's courts should hear a particular lawsuit. This is commonly referred to in the US as the "significant relationship" rule (Restatement (Second), Conflict of Laws § 188(1)). The Restatement's significant relationship rule abandons the more traditional territorial or *lex loci* conflict-of-laws rules, which gave great weight to the place of contracting or performance in determining choice of law. Under the modern rule, the rights and obligations of the parties concerning a particular issue under a contract are determined by the local law of the jurisdiction that has the most significant relationship to the transaction and the parties. This concept essentially looks to the dispute's center of gravity.

In addition, courts sometimes apply the law of a jurisdiction that does not necessarily have the closest relationship to the dispute if the terms of the contract or surrounding circumstances support the inference that the parties intended for a particular jurisdiction's law to govern their dispute. This is the principle of protection of justified expectations (Restatement (Second), Conflict of Laws § 6(2)(d)).

For a sample choice-of-law clause, see Standard Clause, General Contract Clauses: Choice of Law (9-508-1609).

JURISDICTION AND ARBITRATION CLAUSES

Generally, a contract should state that any disputes arising from the agreement must be resolved either by arbitration or in the courts of a chosen jurisdiction. This is true even if the contract specifies a more informal procedure, such as mediation, as a precursor.

A convenient jurisdiction may be a factor in deciding not to choose arbitration. For example, resolving a dispute before US courts, which have extensive experience in determining commercial disputes, may be an attractive alternative to arbitration. The contrary is likely to be the case, however, if the only alternative to arbitration is the jurisdiction of a country known for delays, incompetence, or court bias.

Where one of the parties is domiciled or transacts business only in jurisdiction(s) other than that specified in the contract, it can save time and expense when later commencing proceedings if there is a clause in the contract providing for valid service of process to be effected by delivery to an appointed agent within the agreed jurisdiction. In the US, if the defendant is not domiciled or does not transact business in the agreed forum, generally service must be made on the defendant party in its jurisdiction according to the procedural law of that jurisdiction. Counsel should consider including an automatic substitute for service in case the process server cannot make personal service on the defendant.

Without an effective jurisdiction or arbitration clause, the parties must rely on the rules of private international law to determine the correct forum for their dispute. In the US, the appropriate forum determination is based (at least in part) on a constitutional due process inquiry into whether the defendant possesses sufficient minimum contacts with the forum state so that the maintenance of a lawsuit does not offend traditional notions of fair play and substantial justice (see *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Under the 14th Amendment of the US Constitution (Due Process clause), no binding judgment may be rendered against a person unless the person has contacts, ties, or relations with the forum jurisdiction. Most states have long-arm statutes that apply jurisdiction coextensively with the Due Process clause. A few states,

however, including Illinois and Mississippi, require the defendants to have greater in-state contacts within the state forum than those required by the US Constitution.

A corporation is subject to the personal jurisdiction of the courts in the state where it was incorporated as well as the states where it has offices and conducts continuous and systematic business activities. Companies are also typically subject to personal jurisdiction in the states where the conduct (or injury) that gave rise to the lawsuit occurred. Even a single contact can trigger a state's jurisdiction over a corporation, such as when that contact gave rise to the lawsuit (see *Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958)). The question of whether placing a product into the stream of commerce with knowledge that it might end up in a US state forum, alone, would be enough to confer jurisdiction is still unsettled under US law despite a 2011 US Supreme Court opinion where a majority of Justices appeared to hold that merely placing a product into the stream of commerce, without more, is not enough to confer jurisdiction in the state where the product eventually ends up (see *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) ("As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State' . . . and the so-called 'stream-of-commerce' doctrine cannot displace it.")).

For sample jurisdiction and arbitration clauses, see Standard Clause, General Contract Clauses: Choice of Forum (1-508-2288) and Practice Note, Standard recommended arbitration clauses (1-381-8470).

Arbitration Versus Litigation

The principal factors that counsel should bear in mind when deciding between arbitration or litigation are:

- **Neutral forum.** Arbitration can provide neutrality where parties come from different countries, particularly countries with different legal cultures.
- **Expert "judge."** A judge is primarily an expert in the national laws and procedures of his country, although there are special courts that resolve disputes involving international trade and customs issues (for example, the US Court of International Trade) and settle claims for monetary damages made against the US government (for example, the US Court of Federal Claims). Arbitration gives the parties the ability to appoint an arbitrator with particular expertise in the subject matter of the dispute (see Practice Note, Selection of party-nominated arbitrators (3-203-6680)).
- **Flexible procedure.** The arbitration laws of most countries allow for greater procedural flexibility in arbitrations than is available in the courts. The parties usually have considerable freedom to agree to, and the arbitrator considerable freedom to order, a procedure tailor-made for the dispute and the parties in question. Judges, however, are constrained by the procedural rules of the legal system in which they operate. The flexibility of arbitration can be particularly invaluable when parties have very different backgrounds and must make compromises that are fair to both parties concerning, for example, disclosure, examination under oath, rules of evidence, or the form of any pleadings. With arbitration, there is also more geographical freedom and greater freedom of representation. There is usually no requirement for the parties to be represented at the hearing by a locally qualified lawyer and the absence of a formal national procedure eliminates the need for local procedural expertise.
- **Confidentiality and privacy.** Most countries' court procedures require that a trial be accessible to the public. In contrast, it is generally accepted that all arbitration hearings are held in private. The fact that arbitration proceedings are confidential is often considered one of the primary advantages of arbitration.
- **Finality.** In many jurisdictions an international arbitration award is not subject to an appeal on the merits, and a party may apply to have it set aside only for a limited number of reasons (see Federal Arbitration Act (FAA), 9 U.S.C. §§ 10-11, § 201, §§ 207-08, § 304, § 307). This is an advantage because it prevents or minimizes the possibility that a losing party will delay enforcement of the award by pursuing unmeritorious appeals through the courts. There is a risk, however, of unfairness if a party is unable to challenge an award that is plainly wrong.
- **Enforceability.** If enforcement is likely to be required in a country other than the one in which the litigation or arbitration occurs, it is easier if there is a treaty between the two countries for the mutual recognition and enforcement of judgments or awards. The primary worldwide mutual enforcement treaty for arbitral awards is the New York Convention. There is no parallel mechanism for court judgments, but there are numerous regional and bilateral treaties. Several US states have enacted the Uniform Foreign Money-Judgments Recognition Act, which provides for the full recognition and enforcement of money judgments of the courts of other nations in the same way they would recognize the judgment of a US court. Courts may also rely on the doctrine of international comity when enforcing a foreign judgment.
- **Speed.** The time and cost of proceedings, whether in litigation or arbitration, ultimately depend on the attitude of the parties. If all parties want the dispute to be heard quickly and efficiently, both arbitration and litigation can meet this requirement, depending on the court and country where the proceedings are held. In an international commercial context, however, arbitration has the benefit of being final in most cases, ruling out appeals on the merits. In addition, any arbitration award is more easily enforceable abroad under the New York Convention. Further, counsel may choose an arbitrator who has time to quickly determine the dispute. If the parties to arbitration opt for a panel of three popular arbitrators with busy schedules, however, finding a hearing date convenient for the arbitrators and all parties may result in as much delay as waiting for a trial.
- **Cost.** Choosing arbitration often reduces costs if the arbitration is conducted quickly. This is particularly true in comparison to US litigation, because arbitrators typically do not allow overly extensive discovery. The nature and extent of any permissible discovery should therefore be considered and defined in the arbitration clause. If not, an arbitral tribunal may allow too much or too little discovery given the nature of the issues. Counsel should consider the additional costs that arbitrations entail, including the arbitrator fees and the administrative expenses of the arbitration (for example, the costs of the arbitral institution employed and of renting a hearing room), which have to be borne by the parties equally (at least initially). In addition, recovery of costs in arbitrations is less predictable because the norm is for the

arbitrators to have complete discretion over the apportionment of costs between the parties.

- **Coercion.** A national court is usually in a stronger position to prevent obstructive tactics from an especially difficult opponent than is an arbitrator. Unlike judges, arbitrators lack authority to impose penal sanctions on a party and must be careful to appear to be acting fairly to prevent challenges to their awards.
- **Multi-party.** National courts have the power to join third parties to litigation proceedings. Arbitrators rarely have this power in arbitration proceedings unless they have the consent of the parties and the affected third parties.
- **Certainty.** Arbitration awards have no precedential value. A written court judgment on a standard supply contract, therefore, may be more useful in the long term than an endless series of arbitrations against many trading partners. The lack of a precedent system also makes it more difficult to predict the result of an arbitration.

Alternative Dispute Resolution

The term ADR describes a variety of methods of resolving disputes. It spans the area between the adjudicatory dispute resolution systems (including litigation, arbitration, adjudication, and expert determination) and simple negotiation.

A common form of ADR is mediation, a voluntary dispute resolution process in which a neutral person (the mediator) tries to help the parties reach a negotiated settlement. Mediation usually takes the form of an open session attended by all of the parties, their representatives, and the mediator. Each of the parties briefly outlines its case, followed by a series of caucus meetings between the mediator and each of the parties. The style of the mediator may be, for example, facilitative, evaluative, or conciliatory, depending on the wishes of the parties.

The advantage of a mediation clause is that it triggers a process that, unlike negotiation, would not necessarily occur at the early stage of a dispute, when tensions are high and not all facts are known. Often parties deem themselves to have satisfied a negotiation clause through the exchange of two emails. But a well-drafted mediation clause also provides a specific process that gives the parties a framework for negotiations and involves a neutral third party to initiate those negotiations.

US LITIGATION: FEDERAL AND STATE DICHOTOMY

When litigation is or may be brought in the US, the initial determination should be whether the case was or should be brought in federal or state court. Each court system in the US is governed by separate rules of procedure and evidence that cover every aspect of litigation, ranging from initiating proceedings to obtaining relief from a judgment. The parties litigating in these courts must comply with the applicable rules and should consult them at every stage of the litigation. Parties are not always at liberty to opt for one court system over the other. For example, access to US federal courts to bring a lawsuit is generally limited to cases concerning violations of federal law (federal question jurisdiction) and cases where the parties are from different jurisdictions (diversity jurisdiction).

In general, federal question jurisdiction applies in cases that involve:

- The US government.
- The US Constitution.
- Federal laws and treaties.
- Controversies between states or between the US and foreign governments.

If a case does not involve a federal question, but is based on state law, the only way that it may be brought in federal court is if:

- There is complete diversity of citizenship between the parties according to the Judiciary Act and Article III, Section 2 of the US Constitution (such as between citizens of different states or between US citizens and those of another country).
- The matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

The requirement of complete diversity means that if one plaintiff is a citizen of the same state as any defendant, no matter how many other parties may be located in other states, there is not complete diversity and the case usually has to be heard in state court.

In 2005, however, the US Congress amended the diversity statute through the Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. §§ 1332(d), 1453, and 1711-1715) to curb abuses of the class action device. To prevent these abuses, Congress made it easier for defendants in a state court class action to remove the case to federal court, mostly by permitting federal courts to have original jurisdiction over class actions in which the aggregate amount in controversy exceeds $5 million and there is only minimal diversity, meaning that at least one plaintiff and one defendant must be from different states (see generally *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1122 (11th Cir. 2010) (reversing its previous opinion and finding "no requirement in a class action brought originally or on removal under CAFA that any individual plaintiff's claim must exceed $75,000")).

Generally state courts have the authority to hear any case, except for certain federal question cases where federal courts have exclusive jurisdiction, such as in matters involving:

- Admiralty.
- Bankruptcy.
- Patent infringement.
- Federal tax claims.
- Copyright violations.

WHEN LITIGATION ARISES: PRELIMINARY ISSUES

Managers must inform the legal department as soon as litigation becomes reasonably foreseeable so that the legal department may prepare the company's defenses and evaluate any settlement possibilities before formal proceedings are commenced. Once litigation becomes reasonably foreseeable, the legal department usually must issue and circulate a written litigation hold (also known as a document preservation notice, legal hold, or hold order) instructing company personnel to preserve documents. Failure to institute a proper litigation hold may result in sanctions and unfavorable presumptions against a company in relation to any missing documents (see Practice Note, Implementing a Litigation Hold (8-502-9481) and Standard Document, Litigation Hold Notice (0-501-1545)). Note, however, that litigation holds outside the US may create issues concerning local privacy laws and therefore, should be handled with care.

THE POSSIBILITY OF NEGOTIATION

The vast majority of disputes are settled during the litigation process. Counsel should therefore always consider whether it is possible to negotiate a settlement instead of incurring the expense of commencing or defending a lawsuit (see Practice Note, Settlement Tactics in US Litigation (4-502-7417)). Counsel should consider what the business objective is, how to achieve it, and what happens if the objective is not achieved. The most natural times to settle a case are at the beginning of the action, during dispositive motion practice, after fact or expert discovery, and before gearing up for trial.

Consider who should handle any negotiations. Often only one person takes on this responsibility. Whether this should be a lawyer or a business manager depends on the dispute's particular circumstances. The ability to keep the litigators focused on winning the case while someone else handles settlement discussions can be a useful tactic.

If lawyers do not participate in the settlement talks, it is obviously necessary for the negotiator to be fully briefed on the legal position and the dangers of making admissions (even if unenforceable in court due to a "settlement privilege") or of disclosing too much information. In addition, the lawyers should be frequently updated on all settlement discussions.

TIME LIMITS AND INSURANCE

One of the first things to do when litigation becomes foreseeable is to check the relevant statutes of limitation as well as any time limits that may have been included in the contract to determine whether the claims are timely. If any part of the claim may be covered by insurance, check the policy and claims procedure. Failure to make the claim within an insured period and to strictly follow the claims procedure may lead to the carrier denying the claim (see Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (8-502-7415)).

LITIGATION STRATEGY

Formulate a litigation strategy before entering into negotiations with the other side. Consult all areas of the business the dispute may impact. Consider the following questions:

- Is there a continuing business relationship despite this dispute?
- Are there likely to be adverse public relations consequences regarding customers, suppliers, or competitors if the dispute escalates?
- Does the mere existence of the dispute present problems in bidding for new business or obtaining financing, or otherwise adversely affect the company's corporate status (for example, a drop in share price, disclosure in accounts, or as part of any due diligence exercise)?
- Conversely, could there be a commercial advantage in publicly demonstrating the rigorous pursuit and enforcement of claims (for example, regarding intellectual property)?
- What is the value of the claim and can the other side afford to pay any damages award and costs if you win or successfully defend the claim?
- Where are the opposing party's assets for enforcement purposes?

For additional information, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations (3-504-0061).

WRITTEN LITIGATION HOLDS AND E-DISCOVERY

Discovery is one of the cornerstones of US litigation and requires each party to provide the other party with non-privileged documents that are relevant to any party's claim or defense and proportional to the needs of the case (Federal Rule of Civil Procedure (FRCP) 26(b)(1)). The parties' obligations are extensive and failure to adhere to the discovery rules may result in severe sanctions. There are two main features to the discovery process:

- Preserving potentially relevant documents.
- Searching for and disclosing relevant documents.

As mentioned above, once litigation is reasonably foreseeable, the legal department should generally issue a written litigation hold notice to company personnel, including an instruction to preserve and not destroy any information that may be relevant to the dispute. The company should also set up a way to collect the preserved records so that the documents can be searched by someone other than the employee preserving them (see Practice Note, Implementing a Litigation Hold (8-502-9481)).

Failure to issue a timely written litigation hold as soon as the duty to preserve arises may expose the company to severe sanctions (see *Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012)). Sanctions for this type of failure include dismissal, monetary penalties, and adverse inference instructions.

PRESERVATION OF DOCUMENTS

The obligation to preserve relevant documents is usually imposed when litigation becomes reasonably foreseeable and generally continues until the final resolution of the litigation. A company may be obligated to preserve this information even after the lawsuit ends, however, if it reasonably anticipates future litigation on the same issue. Product manufacturers, for example, often face successive lawsuits by different plaintiffs claiming they were injured by one of the manufacturer's products. The company must not destroy any documents that may have to be disclosed in the litigation, including copies of paper documents and electronic documents such as emails. If a company has a document retention policy, it may have to suspend it immediately.

DISCLOSURE

In litigation brought in US federal courts, FRCP 26 generally requires parties at the outset of the lawsuit to disclose to the other side a wide class of documents and information (that are or have been in their possession, custody, or control) as their "initial disclosures" to the opposing side, without the opposing side serving a discovery request. Specifically, parties must disclose:

- The name and, if known, address and telephone number of each individual likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.
- A copy (or a description by category and location) of all documents, electronically stored information (ESI), and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

- A computation of each category of damages claimed by the disclosing party, who must make the documents or other evidentiary material on which the computation is based available for inspection and copying unless they are privileged or protected from disclosure (FRCP 34).
- For inspection and copying as required by Rule 34, any insurance agreement under which an insurer may be liable to:
  - satisfy all or part of a possible judgment in the action; or
  - indemnify or reimburse for payments made to satisfy the judgment.

  (FRCP 26(a).)

DISCOVERY OF ESI

FRCP 26(f)

A party may request (and is entitled to receive) relevant and non-privileged paper documents and ESI. The FRCP requires the parties to deal with issues concerning the preservation and production of ESI at the outset of the discovery process. For example, as part of the FRCP 26(f) meet and confer conference that usually takes place within the first 100 days of a litigation, the parties must develop a proposed discovery plan that addresses issues in the preservation and disclosure of ESI, including the format of production.

The Rule 26(f) conference usually provides the well-prepared lawyer with a good opportunity to negotiate the minimum possible preservation and production obligation. This makes it important for corporate litigants to educate counsel on issues related to relevant witnesses and their ESI, including where the ESI may reside, early on in the litigation.

For more information, see Rule 26(f) Conference Checklist (7-554-1645).

FRCP 34

FRCP 34 allows the requesting party to specify the format of production. The responding party must inform the requesting party of the format in which the responding party intends to produce the ESI if the:

- Responding party objects to a requested form.
- Requesting party did not specify a form of production.

The responding party does not need to produce the ESI in more than one format (FRCP 34(b)(2)(E)(iii). Also, generally, a responding party does not need to produce ESI from sources not reasonably accessible because of undue burden or cost (FRCP 26(b)(2)(B)).

If the request does not specify a format of production, the responding party must produce the ESI in a format that is either:

- The same in which the ESI is ordinarily maintained.
- Reasonably usable.

For more information on ESI, see E-Discovery Toolkit (1-503-3009).

GUIDELINES FOR EMPLOYEES

When facing litigation, counsel should discuss these key points with employees:

- No documents relating to the dispute should be destroyed while they are pending review by the legal team.
- Before creating new documents relating to the dispute, consult the legal department. Business managers are often understandably eager to identify (and correct) mistakes that may have been made in the lead-up to a dispute and ensure they are not repeated. Documents created as part of this process, however, are potentially discoverable and can have extremely damaging effects on the litigation.
- Notes should not be made on any relevant documents after the event that triggered the dispute.
- The disclosure obligation applies to confidential communications and board minutes (business managers often overlook this obligation).
- Email messages and any attachments are discoverable. Personnel should preserve all emails and documents held on their personal computers as well as on the main computer database (see Practice Note, Implementing a Litigation Hold: Monitor and Enforce Compliance (8-502-9481)). Emails relating to the dispute after it has arisen should be discouraged because these are also potentially discoverable and people are often careless in the way they phrase emails, which can hurt the company.
- Privilege does not necessarily attach to a document merely by copying it to a member of the in-house legal team or other lawyer (see Practice Note, Attorney-Client Privilege: Scope of Protection: Routing Non-Privileged Communications Through Counsel (7-502-9405)).
- The disclosure obligation may extend to relevant documents held by agents and other third parties, including consultants and accountants.
- "Documents" are defined widely to include:
  - ESI;
  - emails;
  - text messages, tweets and instant messages;
  - voicemails;
  - photographs;
  - audio and video recordings;
  - computer records;
  - films;
  - plans and drawings; and
  - digital copy machine records.

The obligation to disclose relevant documents and ESI continues throughout the litigation. Counsel should therefore set up procedures to ensure that the company also discloses additional documents that are discovered or created after the company has produced its documents to the other side. However, the company may enter into a stipulation with its adversary providing that no documents post-dating the filing of the complaint will be produced.

PRIVILEGE

The main exception to the right of discovery concerns documents that are privileged. A party must generally disclose the existence of privileged documents, but may object to their inspection or production to the other side. A document is not privileged just because an attorney is copied.

In the US, there are two main privileges:

- Attorney-client privilege.
- Work product doctrine.

Some jurisdictions recognize other privileges as well, including:

- Accountant-client privilege.
- Privilege concerning trade secrets.
- Psychotherapist-patient privilege.
- Marital communications privilege.

If applicable, these other privileges may operate as an absolute privilege to prevent disclosure or as a partial privilege that justifies redaction or entry of confidentiality orders. Counsel must research the laws of the jurisdiction in which a case is brought to determine what privileges are available.

For more on the law of privilege, see The Attorney-Client Privilege and Work Product Doctrine Toolkit (0-501-1475).

ATTORNEY-CLIENT PRIVILEGE

Confidential communications between a lawyer and his client made to obtain or provide legal advice may be protected by the attorney-client privilege. Privileged documents, therefore, do not have to be disclosed to the other side in discovery (although the party claiming the privilege must produce a privilege log to the other side generally describing the documents that are being withheld on privilege grounds). Privileged communications may lose their protection, however, if they are disclosed to third parties who are outside the intimate attorney-client relationship.

Who is the Corporate "Client?"

In the corporate context, one of the most important areas of privilege law concerns the identity of the client to whom legal advice is communicated. The US Supreme Court's decision in *Upjohn v. United States* held that confidential communications between a company lawyer and a company employee may be privileged if both the:

- Employee (regardless of his position in the corporate hierarchy) communicated with the lawyer to secure legal advice for the corporation.
- Subject matter of the communication was within the scope of the employee's corporate duties.

(449 U.S. 383, 394-95 (1981).)

In these situations, the employee is deemed to embody the corporate "client" for privilege purposes, although the corporation is usually given the sole right to assert or waive the privilege, regardless of the employee's wishes.

The Supreme Court rejected in *Upjohn* the old "control group" test as the governing test in federal courts (at least in cases primarily based on alleged violations of federal law). The control group test limited the scope of the corporation's privilege to communications between the corporation's lawyers and the corporation's top management (and other employees fitting a certain limited description). Most states, including California, Florida, New York, and Texas, have since rejected the control group test. Many of the states that rejected the control group test have adopted some version of the *Upjohn* test.

However, some states, including Alaska and Illinois, continue to apply the control group test.

The control group and *Upjohn* tests are not the only tests used by courts to determine whether the privilege attaches to communications between corporate counsel and company employees. Some states, including Arizona, have rejected both the control group and *Upjohn* tests in favor of a functional approach protecting communications with an employee whose conduct may give rise to liability. Several other jurisdictions, including Delaware and the District of Columbia, have yet to articulate a particular test for determining when communications between company employees and corporate counsel are privileged.

Discussions by management (and other current employees who are within the privileged relationship) among themselves regarding legal advice given to them by the company's lawyers generally are also privileged if they had an expectation of confidentiality over the communications. By contrast, communications with former employees may or may not be privileged, depending on the circumstances (see Practice Note, Attorney-Client Privilege: Identifying the Attorney and the Client: Communications with Former Corporate Employees (9-502-8339)).

Applicability of the Privilege to Communications with In-House Counsel

Although the attorney-client privilege certainly can apply to communications with a company's in-house lawyers, the privilege does not automatically attach to all documents that are sent by or to an in-house attorney (or any other lawyer, for that matter). For example, the attorney-client privilege does not apply to communications made by an in-house lawyer acting in a non-legal capacity (such as a director of the company). Wherever possible, therefore, in-house counsel should create separate documents to reflect the different functions they are performing.

Common Interest Privilege

Advice to co-parties or the various participants of a joint venture is often covered by the common interest doctrine (also known as the joint defense doctrine), which applies where advice is given to parties sharing a common interest in litigation. For a detailed discussion of the common interest doctrine, see Practice Note, Attorney-Client Privilege: Ensuring Confidentiality: The Common Interest Doctrine (5-502-9406).

Confidentiality and Waiver

The attorney-client privilege may sometimes be waived where the client or attorney discloses otherwise privileged communications to third parties, or where they use the fact of a privileged communication to gain an advantage in litigation (for example, by asserting an advice of counsel defense). Consequently, the more widely available or distributed a document becomes, the more difficult it is to maintain confidentiality and therefore privilege. Employees should be particularly careful with email and attachments because they can reach a wide audience very quickly.

Once it has been ascertained that a document (or part of it) is privileged, counsel must ensure that the privilege is not lost or waived unless there is a strategic reason for waiving the privilege. In that case, counsel must be aware that waiving the privilege for

one communication may trigger a subject matter waiver for all other undisclosed communications regarding the same subject matter.

UPJOHN INSTRUCTIONS OR WARNINGS

As noted above, the attorney-client privilege that protects communications between corporate counsel and the company's employees typically belongs to the company and not the individual employee. In a few instances, however, the company and an individual employee may jointly control the privilege, such as where either:

- The company's lawyer jointly represents the employee and the company.
- The company and the employee have entered into a joint defense agreement (see Practice Note, Criminal and Civil Liability for Corporations, Officers, and Directors: Corporate Joint Defense Agreements with Employees (6-501-9459)).
- The employee's communication relates to legal advice concerning the employee unrelated to the company's business.

Consequently, the company generally may waive the privilege without the consent of the employee and disclose any information that the employee shared with corporate counsel. To avoid any confusion regarding who controls the privilege, the company's lawyer should provide an Upjohn warning to a company employee at the outset of any interview advising that:

- The attorney represents the company, not the employee.
- Any discussions between the employee and the attorney are protected by the attorney-client privilege.
- The privilege is controlled solely by the company.
- The company may, at its discretion, unilaterally waive the privilege for any reason and share the contents of the interview with anyone.

However, when counsel provide *Upjohn* warnings, they run the risk of employees not disclosing potentially incriminating information given the employees' inability to control the disclosure of any statement made to corporate counsel. Nevertheless, employees generally have a duty to cooperate with investigations or run the risk of termination (see, for example, *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69 (2d Cir. 2016) (holding that the company's interview demands were reasonable and it had cause to fire the two employees for refusing to comply).

Not providing an adequate *Upjohn* warning may have ethical implications for the company's lawyer. For example, the ABA's Model Rules of Professional Conduct state that the "lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to" the organization's directors, officers, or employees (among others) (American Bar Association Model Rules of Professional Conduct, Rule 1.13(f)). A lawyer must also make reasonable efforts to correct any misunderstanding where an unrepresented person misunderstands that lawyer's role (American Bar Association Model Rules of Professional Conduct, Rule 4.3).

WORK PRODUCT DOCTRINE

The work product doctrine protects, from disclosure to third parties, documents and tangible things that are prepared in anticipation of litigation by or for a party or its representative. The work product protection may be overcome in certain instances where the party seeking discovery shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. However, even if the work product protection is overcome, courts must still protect from disclosure the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation (commonly referred to as opinion work product). Like the attorney-client privilege, the work product doctrine's protections may also sometimes be waived. The work product doctrine's protections are codified in FRCP 26(b). The Supreme Court first recognized the work product doctrine in *Hickman v. Taylor*, 329 U.S. 495 (1947).

In some ways, the work product doctrine is broader than the attorney-client privilege because its protections are not limited solely to communications or confidential matters. However, the work product doctrine is also narrower than the attorney-client privilege because its protections extend only to documents and other tangible things that are prepared in anticipation of litigation.

Anticipation of Litigation Requirement

The proceedings for which documents are prepared need to be adversarial in nature but do not need to relate to a formal court proceeding. The temporal requirement of anticipation requires that the work product be prepared before or during litigation. The threat or prospect of litigation must also be the motivation for the preparation of the work product.

Not all material created by attorneys necessarily deserves work product protection. Courts look to the primary motivation for creating a document, such as whether the document was prepared in the ordinary course of business or for other non-litigation purposes. Examples of materials that would not be work product-protected include SEC filings or other state or federal regulatory filings where there is no adversarial component.

Overcoming the Work Product Protection

Fact work product, that is, any work product that does not otherwise qualify as opinion work product, can be discoverable when the requesting party demonstrates a substantial need for the material and an undue hardship in obtaining the information by other means. By contrast, opinion work product is generally not discoverable.

Waiver

As with the attorney-client privilege, a party may waive the work product protection by disclosing otherwise protected documents to third parties or by using work product to gain an advantage in litigation. However, in contrast to the attorney-client privilege, the work product protection generally survives disclosure to friendly third parties. In other words, disclosure to third parties waives the work product protection only if the disclosure substantially increases the chances that the work product will fall into the adversary's hands.

Work Product Protection Extended to Testifying Experts

Historically, communications with a client's testifying expert were not shielded from disclosure in federal litigation. In 2010, however, the FRCP was amended to extend work product protection to an expert's draft reports and to certain types of communications between a client's lawyer and an expert witness retained to testify for the client at trial (FRCP 26(b)(4)(B), (C)).

GUIDELINES TO PROTECT THE COMPANY

Employees should observe the following guidelines to avoid prejudicing the company's position:

- Do not destroy any documents relating to the dispute.
- Search for and collect any documents (including any electronic and paper copies) relating to the dispute as soon as possible, including:
  - correspondence (such as emails, voicemails, text messages, memoranda, drafts, and manuscripts);
  - notes of meetings;
  - diaries;
  - tape recordings;
  - transcripts;
  - photographs;
  - drawings;
  - films;
  - videos; and
  - discs.
- If any documents are in storage, retrieve them.
- Do not approach third parties for documents or copies relating to the dispute unless this has been cleared by the company's outside counsel or its legal department.
- Do not rearrange or edit relevant files.
- Do not make notes on or alter any relevant documents. The mere act of opening certain electronic files may alter those files (for example, the date an electronic document was last accessed may change).
- Do not create any new documents relating to or concerning the litigation, including internal memoranda, unless you are requested to do so by the company's attorneys or its legal department.
- If the company is approached by third parties (for example, the police, insurers, regulators, auditors, accountants, or the press), refer the matter to the company's attorneys or its legal department and seek advice from them before responding.

HIRING OUTSIDE COUNSEL

The main advantage of hiring outside counsel is their specialized expertise and resources. Their involvement may also add credibility to your case. If there is no prospect of negotiating an early settlement of the dispute and the company decides to hire outside counsel, important issues to address include expertise, litigation budget, fee arrangements, beauty contests (see Beauty Contests), team selection, and potential selection of e-discovery or other litigation support service providers.

EXPERTISE

Most in-house counsel consider expertise as the most important factor in selecting a law firm. The key question to ask of firms is whether they have expertise in:

- The area of law raised by the dispute, such as:
  - contracts;
  - securities; or
  - products liability.
- The forum of the dispute.
- Litigation or arbitration, depending on how the dispute is to be resolved.
- The subject matter of the dispute and the relevant business sector, such as:
  - banking;
  - media;
  - energy;
  - insurance; or
  - construction.
- Cases of a similar size and complexity. There is a difference between conducting litigation involving large-scale and technical matters and cases involving a discrete point of law.
- Advocacy, where appropriate. Does the firm have the capability to draft pleadings and conduct advocacy in court?
- E-discovery. Does the firm have experience managing e-discovery companies to handle large document productions involving the retrieval, processing, and review of millions of pages of ESI?
- Conducting cases with a foreign element, if necessary. For example, does the firm have offices or legal contacts, or both, abroad?

LITIGATION BUDGET

Counsel should ask law firms to prepare a detailed litigation budget estimate at the outset. The progress of a case is always unpredictable, but experienced lawyers should be able to estimate what a particular case will cost to resolve once they have the opportunity to assess:

- The nature of the dispute.
- The complexity of the dispute from a legal and technical standpoint.
- The amount of documents involved, both paper and electronic, including their type, location, and accessibility.
- The likely number of factual witnesses and their accessibility.
- The need to retain:
  - expert witnesses; and
  - local/national counsel.
- The availability of litigation technologists and litigation support resources.
- The likely timetable of the dispute given the particular court involved.
- The approach that the other side is likely to take. For example, are they likely to throw resources at the case and launch many interlocutory applications?

Having set up a detailed budget, controlling costs on an ongoing basis is easier. A detailed estimate encourages more disciplined case management. Outside counsel should be required to justify cost overruns and tactical changes that result in increased costs.

For a sample litigation budget, see Standard Document, Litigation Budget Template (7-525-8883).

FEE AGREEMENTS

Fee quotes are about risk. An hourly rate means the overall bill is open-ended and all of the risk is on the client. By contrast, a fixed fee places risk on the firm by specifying at the outset the fee it can charge.

Firms should at a minimum quote hourly rates (according to seniority) for the lawyers who will be working on the case. Because the associate attorneys typically undertake the bulk of the work, the hourly rate for all of the lawyers should be considered, not only the partner leading the team. Inquire about the rates for other members of the legal team, including paralegals, contract attorneys, litigation technical support personnel, court reporters, and couriers.

Hourly rates provide an immediate point of comparison among firms but should not be treated as the decisive factor because they do not tell you how quickly the work will be done. A more experienced lawyer who charges a higher hourly rate can actually be cheaper than a less experienced lawyer who charges a lower hourly rate, if the more experienced lawyer takes substantially less time to do the same amount of work. Currently a large percentage of the expense of many disputes is due to the costs of retrieving, processing, reviewing, and producing ESI. Counsel must be careful in estimating those costs and determining who will do that work. Increasingly, for example, document review is initially handled by contract (or temporary) lawyers at a fraction of the rate of law firm associates.

Where the work can be defined, counsel should ask the firms to provide cost and time estimates. The firms the company should consider must have expertise in the work counsel wants them to do and should therefore have some idea of the cost parameters. An estimate does not bind the firm but it provides counsel with a point of reference that may be used to monitor performance and control costs.

Hourly rates can be negotiable and hybrid fee arrangements are growing in popularity. For example, a firm may agree to charge on the basis of a conditional fee arrangement under which reduced hourly rates are charged during the conduct of the case. However, these rates are generally subject to a higher success fee being charged if a good result is achieved (good can be more difficult to define if you are defending proceedings).

Firms may also offer so-called blended rates, quoting one hourly rate for all lawyers regardless of seniority. This can make a firm look cheaper than others that are quoting differentiated hourly rates, but may not make the outcome cheaper (for example, if the more junior lawyers are doing the bulk of the work). Blended rates can be useful for open-ended litigation where accurate estimates are more difficult. Other firms may quote daily rates that reward the client for using them for whole days instead of for small fractions of each day.

For more information on various types of fee arrangements, see Article, Alternative Fee Arrangements (0-502-5910). For examples of retainer agreements, see Standard Documents, Engagement (Retainer) Letter: Hourly Fee Arrangement (6-521-3395), Engagement (Retainer) Letter: Alternative Fee Arrangement (4-523-3525) and Engagement (Retainer) Letter: Contingency Fee Arrangement (0-521-9300).

BEAUTY CONTESTS

The in-house lawyer who is inexperienced with litigation or who wishes to change the company's current lawyers may want to invite several firms with relevant expertise and good credentials to participate in a bidding process. This is also known as a beauty contest. In the US, this is generally done after consulting colleagues, contacts in the legal world, other third-party advisers (for example, auditors or bankers), and well-known legal directories for possible contestants. Frequently, firms will attend these beauty contests with the lawyers who would work on the case and explain why they should be selected. Price can be used as a primary consideration in determining the beauty contest winner but often is not.

TEAM SELECTION

Because a dispute may last for a long time, counsel must set up a good external and internal team from the outset.

External Team

If you regularly use a firm with a litigation capability and are happy with its performance to date, your task is easy. Nevertheless, ensure that the firm has the right expertise to suit the particular dispute and that you agree to the fees.

Whether you intend to retain your existing lawyers or new lawyers, it is wise to meet the whole team, including associates and paralegals, and not only the lead partner. The same applies when you have to engage more than one law firm, such as when you need local counsel. You may have to work with these people for a long time and you should form a good relationship. If you are unhappy with any particular individual, express your dissatisfaction early on and request a change of personnel if necessary.

The chosen law firm should tell you who:

- Is responsible for the case's day-to-day conduct.
- Is supervising the team.
- To approach with any type of problem (for example, the head of the litigation department).

Counsel should request a team roster with details on everyone who will be working on the matter, their direct phone numbers, mobile numbers, email addresses, and home contact details. Ensure that outside counsel knows that you want to be informed in advance if there are to be any personnel changes.

Counsel should also consider practical issues, including:

- Are you to be the main or sole point of contact for instructions?
- How much correspondence do you want to see? For example, do you want to be copied on all inter-counsel emails?
- Would you like weekly or monthly reports or executive summaries?

Ideally, the in-house lawyer should be an active member of the team. The dispute places the business's money, and possibly reputation, at stake. Outside counsel can offer advice, but the ultimate decisions are the client's.

If you do not want to be intimately involved in the day-to-day conduct of the case (for example, in a highly technical case best coordinated by a non-legal colleague with relevant expertise), you

should at least set up a single line of communication between the company and outside counsel. Otherwise, you may find that outside counsel is receiving conflicting instructions from your company, possibly from two individuals with different agendas. One individual should be responsible for providing the company's instructions and, ideally, this should be made clear in an engagement letter.

Internal Team

In-house counsel must set up an adequate in-house support team. Do not underestimate the level of input required from the company, particularly in relation to large-scale litigation. Identify at the outset the relevant individuals within a business who can deal with the following issues throughout the course of the case:

- Technical queries.
- Commercial considerations.
- Collection of relevant documents. Consider employing a paralegal to oversee this if there is a large amount of documents in several locations.
- Management reporting.
- Insurers (where applicable).
- Public relations.
- Financial concerns and accounting requirements.
- Escalation.

This not only eases the burden for inside counsel, but also sets up an effective structure for conducting the litigation from an in-house perspective. In-house counsel must keep management informed of progress and manage their expectations so that they can make well-informed decisions on important issues, particularly settlement offers.

HIRING OVERSEAS LAWYERS

When selecting counsel in an unfamiliar country, discuss with the prospective lawyers the background of the legal system in which they operate. This is important because there are considerable differences in the legal traditions and systems of individual countries and in the training, types of work, and organization of lawyers. For example, in some EU member states (including France) in-house lawyers are not given the same status as outside lawyers, meaning, among other things, that the attorney-client privilege does not protect communications between in-house lawyers and company employees.

Most international firms work on an hourly rate, but not always. This rate can be affected by fee regulations. In some countries fees are partially based on the value of the matter (tariff-based fees).

Language is one of the most important criteria, but do not base the selection on who has the best command of the language of the country where the company is located. The company needs a good lawyer, not a linguist. Find a lawyer who can translate concepts, not just one who speaks the company's language flawlessly. Secretaries and support staff should also speak a language understood by the company's lawyers and executives, if possible.

CONFLICTS

In-house counsel should ask the law firm about potential conflicts and not expect the firm to disclose them on their own. Some of the potential danger areas are:

- **Commercial conflicts.** Ensure you and your lawyer understand what you mean by a conflict.
- **Small markets.** In small countries, only a few leading attorneys are in high demand and conflicts are more likely to occur.
- **Mergers.** Newly merged firms may not have the infrastructure in place to detect conflicts across the board, particularly if their computer systems are incompatible. Find out how long it will take before they become aware of any conflict.
- **Alliances.** Not all firms recognize the need to check conflicts throughout any alliance they may have with other firms in the same or different jurisdictions.
- **Expense-sharing arrangements.** Lawyers in expense-sharing practices do not always feel obliged to observe conflict-checking procedures with the rest of their firm.
- **Conflicts as a weapon.** In some legal markets, you may find that you cannot buy good advice because the top law firms may have conflicts. Counsel may benefit more from building a relationship with one good lawyer than from shopping around.
- **Non-lawyers.** Tax advisers or notaries may not be subject to conflict rules.

LITIGATION SUPPORT

Litigation support technology is becoming increasingly sophisticated. Counsel, with the help of in-house litigation technologists or e-discovery vendors, often leverage several technologies when managing documents in litigation:

- **Data filtering.** Software is readily available to extract and index relevant metadata in a document review platform, so that counsel can search within certain metadata fields (for example, date, author, recipient, or file type) (see Practice Note, E-Discovery: Processing Electronically Stored Information: Filtering (w-002-5325)).
- **Text retrieval or generation.** Technologies exist to extract text from file types that contain text content (such as word processing documents, spreadsheets, e-mails, and readable (or searchable) PDFs). For file types without extractable text, optical character recognition (OCR) technology is available to essentially read the face of the document, identify the text content (numbers, letters, and punctuation), and index that content. Both extracted text and OCR-generated test enables users to search the full text of documents for key words or phrases.
- **Technology-assisted review (TAR).** A TAR tool like predictive coding or continuous active learning (CAL) is a partially automated way to code documents for relevance or responsiveness to particular discovery requests and is an alternative to having counsel review each document for relevance. TAR employs a computer algorithm to:
  - analyze the features of a small set of attorney-coded documents; and

- use the information gained through that analysis to rank or classify a larger universe of documents.

(See Practice Note, Continuous Active Learning for TAR (w-001-8253) and Article, Predictive Coding: A Primer (1-523-0104).)

For more information on ESI, see E-Discovery Toolkit (1-503-3009).

CASE STRATEGY AND COST-BENEFIT ANALYSIS

Having selected the legal team, the next steps should be to conduct a cost-benefit analysis and formulate a case strategy.

The cost-benefit analysis should factor in the fees of the outside counsel and experts (if needed). It should also account for indirect costs, such as management time. Depending on the particular jurisdiction, a significant amount may not be recoverable even if the case goes to trial and you win. In the US, legal fees are generally not recoverable, unless a contractual agreement or applicable statute provides for the recovery of attorneys' fees.

When conducting the cost-benefit analysis, include a realistic assessment of the strength of the case and the potential amount of damages likely to be recovered or paid out. Test the weaknesses of the case and the implications of losing. Many cases are settled after proceedings commence but before trial. Both parties can save significant costs if settlement is reached before proceedings commence.

Having determined costs and damages, do a present value estimate of the case's worth. For example, if unrecoverable costs are estimated to be $50,000 and a projected recovery of $150,000 is expected in two years, applying a 10% discount rate per year for early receipt of monies, the present value of the case is about $80,000. Therefore, if the other side offers $80,000 to settle, they are in reality offering 100% of the claim's estimated present value. Valuing a case may also involve making percentage estimates of various recoveries. For example, if a case has a 50% chance of a $150,000 recovery and a 50% chance of a recovery of zero, under a portfolio valuation model the case can be valued at $75,000. Counsel should also consider contractual provisions regarding fee shifting and pre-judgment interest.

A strategy should be based on three basic questions:

- What is the objective?
- How can it be achieved?
- What are the consequences if it is not achieved?

Answering these questions helps build counsel's strategy on how to proceed with the litigation.

ALIGN OUTSIDE COUNSEL'S GOALS WITH THE COMPANY'S GOALS

In-house and outside counsel alike should always prioritize resolving the dispute with minimum impact on commercial operations. Egos, anger, or over-enthusiasm should not serve as a distraction to that objective. A case can easily develop a life of its own, resulting in costs escalating disproportionately while important commercial considerations are ignored. To avoid this, factor regular strategy meetings into the case timetable and invite the key members of the legal team and the relevant corporate business managers to review progress towards achieving the company's goal, whether it is to achieve early settlement or to take the case to trial as cost effectively as possible.