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# Medical Experts

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## **I. Introduction**

Medical experts may be used in a variety of cases both in consulting and testifying roles. Working with medical experts can be intimidating because the attorney will never know as much as the expert about the particular issue or issues for which the expert has been retained. However, through medical journals, treatises, nurse consultants, treating physicians, and the retained experts, an attorney may become extremely knowledgeable in a very narrowly-defined area of medicine, if the attorney prepares the case in a timely manner with organization and planning. By the time a party is required to disclose its experts' reports, the attorney should have a fairly high comfort level in working with the experts and the medical issues involved in the litigation.

The purpose of this article is to provide a roadmap to follow when retaining, preparing, deposing, and questioning medical experts at trial. This is a how-to article that will demonstrate, step-by-step, how to find, retain, and prepare the expert for testifying. You will also learn how to assist the expert in preparing his report under Fed. R. Civ. P. 26 and to determine which types of experts to hire and when to hire them.

## **II. Determining whether to retain an expert**

The decision to retain an expert witness should be made as early as possible in the litigation. Experts are very busy professionals and need a great deal of lead time to prepare opinions and to testify. Therefore, it is incumbent upon the attorney to begin thinking about whether expert testimony will be necessary to either defend or prosecute the case at its earliest stages. In fact, in criminal and affirmative civil enforcement actions, before an attorney files the indictment or complaint, an expert witness already may have become involved in the case to establish one or more elements of the crime or causes of action.

Similarly, in defensive monetary cases such as medical malpractice, nonmedical malpractice tort, and employment actions, the need for expert testimony is apparent as soon as the complaint is served. Keep in mind that the plaintiff's counsel has had up to two or more years to work with the plaintiff's experts depending on the administrative processing of the client's Federal Tort or Equal Employment Opportunity claim. Thus, defense attorneys must immediately begin to retain expert witnesses as soon as they are aware of the need for expert testimony.

Experts on standard of care, causation, and damages are almost always necessary in medical malpractice cases. Similarly, in nonmedical malpractice tort cases, an expert is often necessary to perform an independent medical examination and to determine causation and damages. Finally, in employment cases in which the plaintiff has alleged psychological harm from the alleged discrimination, a psychiatrist or psychologist must be retained to evaluate the causal connection between the purported discrimination and plaintiff's mental harm. Thus, when defending the United States, the attorney must carefully review the opposing parties' claims to determine whether expert testimony is necessary and the types of experts to retain.

## **III. Determining what types of experts to retain**

### **A. Medical malpractice**

In virtually every medical malpractice case, each side will retain an expert on standard of care — what a reasonable health care provider would do under the same or similar circumstances, causation — whether the alleged deviation from the standard of care caused the plaintiff's damages, and damages — economic, noneconomic, need for future care and treatment, all reduced to present value, and past economic loss, including the reasonableness of the prior care and treatment, and failure to mitigate damages. If any one of these elements is missing from the plaintiff's prima facie case, then the defendant is entitled to summary judgment as a matter of law. If a party intends to offer expert testimony in a

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particular area, opposing counsel must determine whether the testimony is relevant to the case and would assist the trier of fact in making a determination. In other words, simply because the other side has listed an expert in a particular area does not mean that you should also list an expert in that area. Under these circumstances, counsel might consider a motion in limine to preclude irrelevant testimony or testimony that does not assist the trier of fact in making a determination, i.e., a *Daubert* motion.

Additionally, at times the other side's expert testimony may not be in dispute, and the defense will not need to hire an expert on a particular issue or element of the prima facie case. For example, the parties may agree that the health care provider violated the standard of care, but may disagree whether this deviation actually caused damage to the plaintiff. The health care provider may have missed a malignant growth, but due to the type and advanced stage of the cancer when it should have been diagnosed, the misdiagnosis would have not made a difference in the outcome because the patient would have died even in the event of a timely diagnosis. More often the parties dispute whether the health care provider violated the standard of care, but agree that the provider's actions did cause damage to the plaintiff. An example of this situation is when a surgeon performs surgery in compliance with the standard of care, but the patient dies during surgery. In the absence of surgery, the patient would not have died. As such, the plaintiff has suffered damage which would not have occurred if the surgery had not been performed. Finally, in some cases no dispute as to standard of care and causation may exist, but the extent of the plaintiff's damages is an issue because of purported overtreatment, malingering, and lack of agreement on necessary future medical care or loss of earning capacity.

Never rely solely on the agency's review of the treating health care provider's care to determine whether the case is defensible. More often than not, the agency does not have all of the information which you may later obtain in discovery and in working with different experts. I once had a case in which agency peer review found that the government's gastroenterologist caused lack of oxygen during a procedure to

remove a piece of meat from a patient's esophagus. The patient did not "wake up" after the procedure and subsequently died. At the urging of the health care facility's general pathologist, I hired a neuropathologist to review the decedent's brain tissue. His examination revealed that a specific type of brain cell which is extremely sensitive to oxygen deprivation was still intact, effectively refuting the plaintiff's theory that the gastroenterologist failed to protect the patient's airway.

### **B. Nonmedical malpractice tort**

Nonmedical malpractice tort cases such as slip and falls, traffic accidents, and other misadventures, also may require expert testimony. Frequently, these cases require an independent medical expert to assess the extent of plaintiff's injury, whether the accident caused the physical problems the plaintiff claims, and whether future medical care will be necessary.

### **C. Employment**

The most frequently used medical expert in employment cases is the psychiatrist or psychologist, or both. Often the defense will want an independent psychiatrist or psychologist to perform an evaluation of the plaintiff to determine whether the plaintiff has suffered any psychological harm from the employer's alleged adverse employment action. An employee's alleged mental harm must be evaluated to determine whether issues unrelated to work, rather than the purportedly discriminatory conduct, are the true cause of the employee's mental distress. Many employees and their lawyers fail to make, or choose to ignore, the connection between the trials and tribulations of an employee's private life and the depression or other mental issues from which the employee suffers. To adequately assess these issues, the psychiatrist or psychologist must be provided with as much background information as possible about the plaintiff, including, but not limited to, medical and mental health records, arrest records, financial records, deposition testimony, marital counseling records, bankruptcy and domestic relations court files, school records, recent deaths of family members and friends, any prior history of mental or physical abuse, and the depositions of family members, friends and other

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employees. Often the employee may truly suffer from depression. Frequently, however this depression is the result of events external to the work environment such as family problems. Also, a physiological component to the employment plaintiff's psychological problems may require medical expert testimony, in addition to the psychiatrist or psychologist already retained. For example, an underactive thyroid can be the cause of depression.

#### **D. Other cases**

Other areas of civil litigation such as health care fraud and toxic tort litigation may require medical expert testimony. A physician may be necessary to determine whether the Medicare billing was appropriate based on what the health care provider stated in the patient's medical records. In defending toxic tort litigation, a panoply of experts may be necessary, ranging from the medical to the statistical arena.

#### **IV. Consulting only versus testifying expert**

Theoretically, all experts are consulting experts until the parties disclose their experts. The existence of consulting experts and their opinions does not need to be disclosed, except under very unusual circumstances. For example, a party may have retained the only expert in the United States on a particular issue. In that case, the court may order the consulting expert to be disclosed.

More typically, consulting experts are retained to assist the attorney in understanding the issues, marshaling the facts, assisting in strategy, and preparing questions to ask of the other party's experts. Consulting experts often are not disclosed because their opinions are detrimental to the party's case. For example, your expert may have told you that the treating physician fell below the standard of care. Obviously, this expert is not one you would want to disclose. However, the case may be defensible on either causation or damages grounds. You may want to retain this expert in a consulting role to educate you about the medical issues and to address new medical issues as they arise during discovery and even trial.

#### **V. Retaining experts**

##### **A. Finding an expert**

Next to understanding the medical issues involved in your case and your expert's opinions, finding an appropriate expert may be the attorney's most challenging task. You may have found yourself and your office using the same experts over and over again. Or, the case may have very unique issues requiring medical specialists who are rare, such as placental pathologists and neuroanesthetists. However, good experts can be found through many sources.

The first source is your colleagues, either in your office or throughout the Department of Justice. Your systems manager can send an E-mail to every U.S. Attorney's Office and the Department of Justice Torts Branch soliciting suggestions for experts. Additionally, if you have friends in private practice, you may seek referrals from them. Also, do not forget about treating physicians or other parties' experts you may have deposed or seen at trial in the past. Finally, the health care provider whose care is at issue may be able to suggest an expert to you. Be careful they have not suggested a best friend to testify on their behalf.

If referrals and past experience are not helpful in finding an expert, retaining a nurse consultant to find and suggest experts is another avenue. The nurse consultant under contract for the District of Arizona does not work exclusively for our office. She also provides her services to private law firms, and, as a result, has access to a large base of experts through work outside of the office. However, if the nurse consultant fails to find an expert for you, try asking the consultant to search the medical literature for articles discussing the issue or issues in your case. Often the authors of those articles make excellent experts and usually come from academic backgrounds that can be especially persuasive in addressing unusual medical issues.

##### **B. Local or out-of-state experts**

Whether to retain a local or an out-of-state expert largely depends on the size of the city in which your office is located and the medical resources available. If at all possible, try to retain

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local experts. This will allow you a greater opportunity to meet with your expert face-to-face rather than telephonically. Nothing can replace the effectiveness of a face-to-face meeting with your expert. Additionally, you will be able to justify meeting with your expert more frequently when the trip involves a short drive rather than a flight to another city.

The second best approach to communicating with your expert in person is video conferencing. Your office can arrange video conferencing for you with another U.S. Attorney's Office in the city where your expert is located. If documents should become an issue, they can be faxed back and forth or viewed together by use of an ELMO, "document camera."

Additionally, in the case of independent medical or psychiatric evaluations, having your plaintiff examined by a local expert is easier than having them examined by one located in another city or out of state. However, the need to use an out-of-state expert cannot always be avoided, and, as with any facet of expert witness use, a great deal of preplanning, organization and coordination will be necessary to arrange for an expert to examine a plaintiff who lives out of state. Additionally, to facilitate the government's payment of the plaintiff's travel, the best course is to ask the court to order such payment by stipulation of the parties or by separate motion.

### **C. Academic or in the trenches**

Whether to hire an expert who is an academician with a fifty page curriculum vitae, or a practicing physician who performs little or no teaching or research, is a disputed issue. The dispute stems from two valid schools of thought.

With respect to the academician who publishes, teaches, and performs a little medicine on the side, the attorney who retains this expert hopes that the court will be impressed with the expert's monstrous curriculum vitae. However, this type of expert may not be a wise choice for several reasons. The typical academician has practiced the medical procedure at issue infrequently at best, and often looks over the shoulder of the resident who is the one actually treating the patient. This subjects the academician to impeachment on questions such as "how many

times have you performed cholecystectomies by yourself without the presence of a resident;" and "If I were to subpoena records from the teaching hospital where you are on staff, how many times would those records place you as the primary surgeon performing cholecystectomies?" The obvious implication is that Dr. Academician, while knowledgeable about what residents are taught, is woefully unaware of the standard of care in the community for those doctors out in the trenches performing cholecystectomies day in and day out. If you ask these types of questions of the opposing party's experts, verify their answers by subpoenaing hospital records regarding surgeries Dr. Academician performed or depose the head of his department at the teaching hospital where he works. When in doubt, seek a FED. R. CIV. P. 30(6)(b) Deposition, which asks the teaching hospital to produce the person with the most knowledge regarding the number and types of surgeries Dr. Academician performs versus other surgeons.

The advantage of choosing a practicing medical expert over an academician is that this type of expert is most likely similar to the treating physician whose care is at issue. The doctor practicing "in the trenches" will have a more realistic and fair view of the standard of care, under which your treating physician should be judged to determine whether the standard was met.

This concept also extends to the level of expertise of the expert you hire. For example, in a case involving emergency room care, an emergency care physician should be retained, not an expert who specializes in the particular strange and unusual medical condition affecting the patient presented. In an obstetrical case in which a family practice doctor delivered the baby, another family practice doctor should be retained to state the standard of care for family practice doctors who deliver babies, unless the family practice doctor should have referred the patient to an obstetrician or perinatologist. If the care of a nurse is at issue, another nurse, and not a physician, should be hired to review the case. It is not fair to the health care provider, nor would such practice comply with the legal standard, to have an expert apply a standard of care which is different from or

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higher than the specialty in which your treating physician practices, or to hire an expert from a completely different field of health care.

#### **D. Paperwork**

To retain an expert, fill out a Form OBD-47 before the expert performs any work. If this process is reversed, your Administrative Officer will have to seek a ratification of the expert's work, a process which will cause unnecessary annoyance and wasted time for your administration.

Additionally, be careful what you state on Form OBD-47 because such forms could be discoverable. Describe the work in general terms so your work product is protected. Also, do not forget to send the potential expert a copy of the complaint so that he may perform a conflicts check before being retained.

### **VI. Preparing the expert's report under Fed. R. Civ. P. 26**

#### **A. Materials provided to expert**

At a minimum, experts should receive a copy of the complaint, a complete organized and tabbed set of the medical and psychological records, accident reports, eye witness accounts, and all discovery related to the issues you expect the experts to address. When in doubt, err on the side of providing the experts with the materials and send a letter itemizing the materials sent. Losing track of the information provided to experts is easy. When it is time to draft the experts' reports, the task will be simplified if you have saved all of your cover letters to the experts, listing the documents sent to them, behind a tab with the experts' names in your trial notebook. Be sure to supplement the experts' materials as discovery proceeds.

Where an independent medical, psychological, or psychiatric evaluation is required, it is extremely important to provide the expert with all of the medical records, the accident report, and the depositions of treating physicians and witnesses to the accident so that the independent examiner can make a fully-informed decision. Failing to provide your experts with the complete story will only subject them to later impeachment. Additionally, the plaintiff may

feign both physical and psychological injuries during the independent examination which the expert may fail to detect because of insufficient background information.

Finally, limit statements to your experts in your retention letter or cover letters transmitting materials. A smart opposing counsel will seek correspondence to and from your experts in discovery, and you will most likely lose on any work-product privilege objection. Do not allow opposing counsel to obtain your view of the case based on what you said to the experts in a letter.

#### **B. Timing of disclosures**

If you are defending at the Fed. R. Civ. P. 16 Conference, urge the court to require the plaintiff to disclose his or her experts' opinions first. There are many reasons not to agree to a simultaneous disclosure of expert witnesses. If the other side disputes the propriety of a staggered disclosure with the plaintiff disclosing his experts first, the following argument may be made: since the plaintiff has the burden of proof, the plaintiff should disclose first. In the event that the plaintiff cannot establish a prima facie case, government resources should not be wasted unnecessarily. Under a staggered disclosure of expert witnesses, if the plaintiff is unable to find experts to establish a prima facie case, then the defense is entitled to judgment as a matter of law.

Immediately after receiving the plaintiff's experts' reports, send them to your experts so that they have an opportunity to rebut the allegations. You will want your experts to address the opposing experts' opinions and bases for those opinions in a methodical, line-by-line manner in the report.

#### **C. First review with expert**

After you have provided your experts with sufficient information to allow them to formulate preliminary opinions, ask the experts to call you with those opinions by a specific date. If your experts cannot help defend the case, then it is better to know at the earliest stages possible that a case is indefensible. Whether or not your experts can help defend the case, take copious notes during your conversation. Make a determination whether the experts can help you defend the case

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or should be retained in a consulting role. Type your notes in a legible format after the interview. This will save time in the long run when you are assisting the experts in drafting the Fed. R. Civ. P. 26 Expert Report and at trial. You will also need documentation to support settlement of the case. Furthermore, neatly typewritten notes can form the outline for the opinions or direct testimony at trial. Place memoranda of every conversation with your experts behind the appropriate tab in your trial notebook for ready access.

#### **D. In-person meeting**

After the initial telephonic review, you should meet with your experts in person. Many attorneys skip these meetings, thinking them unnecessary. Nothing could be further from the truth. Your experts may need to draw diagrams or pull out textbooks to illustrate opinions and to help you understand them. Obviously, this is difficult to do over the phone. Additionally, you need to see your experts to evaluate what kind of appearance they will make at trial. Finally, an in-person meeting lays the groundwork for good rapport with your experts. You want your experts to become committed to your case and to feel good about being an advocate for the United States. You can establish that rapport only by personal contact—"bonding"—with your experts.

The next step is helping the experts draft their report. The 1993 Comments to Fed. R. Civ. P. 26(a)(2)(b) point out that this rule does not preclude counsel from providing assistance to experts in preparing their reports. Thus, when you are ready to help your experts draft their Fed. R. Civ. P. 26 Report, bring a laptop computer with you so that you and the experts can work on the report together. Prior to the meetings, refer to Fed. R. Civ. P. 26 for the headings to your experts' report, and have those headings already listed so that your experts may fill in the blanks underneath the headings.

Fed. R. Civ. P. 26 states six specific items which must be in an experts' reports. List these items as your headings: (1) a complete statement of the opinions and basis and the reasons for the opinions; (2) the data or information considered by the witness in forming the opinions; (3) exhibits to be used as a summary of or support for

the opinions; (4) the qualifications of the witness, including publications over the last ten years; (5) compensation for case review and testimony; and (6) list of other cases in which the witness has testified as an expert at trial or deposition for the preceding four years.

While working together with your experts is perfectly permissible in drafting the report, make sure your experts review the drafts of opinions thoroughly and confirm that what is stated is in their own words, not yours. You do not want your experts to be subjected to later impeachment regarding who wrote the report. Furthermore, you cannot possibly state the medical or other technical terminology as accurately as your experts. However, you can be of assistance in filling in the data or information considered by your experts by cutting and pasting from the cover letters you previously sent them itemizing the documents provided. Additionally, you may incorporate by reference the experts' curriculum vitae, and you certainly know the experts' compensation for case review and testimony from the OBD-47 form. However, all other portions of the report should be in your experts' own words with a little editing help from you. Physicians are not generally trained to be good writers. Consequently, you may need to clean up grammar, spelling, and syntax.

Once the report is in final form, ask them to print it out on their letter head. If the experts are unable to do this, take some of their letterhead back to your office and ask your legal assistant to do this for them. Send the hard copy to your experts for one last review and, if they are satisfied with it, ask the experts to sign and send it back to you for disclosure.

As the case develops, your experts may need to supplement the report. Perhaps they have reviewed additional materials which also support their opinions, or they may have additional opinions based on subsequent discovery you have forwarded to them. Make sure any supplementation is done in compliance with the deadlines set forth either by the court or by Fed. R. Civ. P. 26.

Additionally, do not allow the other side to surprise you at trial with new opinions. When the

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deadline to supplement discovery approaches, send a letter requesting that the opposing party supplement all discovery, including expert witness reports. This is especially true for the United States and any party representing the defendant in civil litigation. The government appears to be held to a higher standard in disclosing information. Additionally, courts seem to err on the side of allowing the plaintiff leave to make untimely disclosures, especially if precluding the testimony might result in judgment in the defendant's favor as a matter of law.

## **VII. Expert depositions**

### **A. Your expert's deposition**

To adequately defend your expert's deposition, it is essential to review the information on which the experts based opinions within a few days of their depositions. Try to avoid preparing the experts for their depositions on the day of the depositions. Also, the fact that the experts have testified in the past is no substitute for thorough, personal preparation of your experts.

Make sure your experts are fully familiar with the subject matter of the testimony and the facts of the case. If your experts cannot remember specific details during the depositions, they must know how to find the information in the materials you have provided. The experts should make sure their testimonies regarding the facts are correct and not merely guess at them. Inaccuracies in a recitation of the facts only provide fodder for impeachment at trial. Ask your experts to bring their files to the deposition so that they may have records available for quick referral, and encourage them to check the materials unless they are absolutely certain of the facts.

In preparing your experts for depositions, act in the role of opposing counsel and ask them the questions you expect will be posed by the other party's counsel. Ask them the tough questions so they have had a chance to think about their answers and are not surprised during the depositions. If you have had prior experience in deposition with the opposing counsel, tell the experts what to expect from that attorney as far as demeanor, competency, and aggressiveness. Advise your experts never to let their guard down no matter how nice opposing counsel seems.

However, your experts should be instructed to be truthful and cooperative during the deposition process.

### **B. Deposing the other side's experts**

To effectively depose the other side's experts, you must thoroughly prepare for the depositions. Effective preparation includes meeting with your own experts to understand the medicine and the opposing experts' opinions; asking your nurse consultant to draft an outline of areas of inquiry; being extremely familiar with the facts of the case; reviewing other witnesses' testimony; and drafting an outline of areas of inquiry.

Once in the depositions, aside from being organized and prepared, the most important task is to listen to the experts' answers to your questions and to let them talk. Make sure you do not miss some "gems" such as concessions or inaccurate assumptions because you are too wedded to your outline or are not a good listener. Let the experts talk so that there are no surprises at trial. Make sure you have given the experts every opportunity to explain the basis for their opinions and any assumptions they made in arriving at those opinions. The depositions of experts are not typically an appropriate time to aggressively cross-examine experts. If you do, you may give away your strategy at trial or tip off the experts to weaknesses in the other side's case. Obtain concessions where you can, but understand that your questioning is not going to change the experts' opinions, no matter how intellectually dishonest the opposing party's experts appear.

## **VIII. Expert trial testimony**

The key to effective expert trial testimony is the same as for depositions: thorough preparation. For your own experts' testimonies, make sure they know what they said in their depositions and in their reports and be able to explain any inconsistencies. Prepare the experts for direct examinations by going into role and asking them your anticipated trial questions. Help them feel familiar with exhibits and computer technology by using them during your preparation sessions. Physically take your experts to the courthouses and show them the courtrooms where they will testify. Nothing is worse than experts who are late for trial because they did not know where to go.

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Experts who have not previously testified at trial may need more than one trial preparation session to feel entirely comfortable. Because you will want to have created a trusting bond with your experts, have someone else perform a mock cross-examination of your experts to fully prepare them. Advise your experts that if they are asked about a statement in their deposition or report, they should ask the questioner to provide them with a copy of the transcript or report so that they may review it prior to answering the question. Also, since Federal Tort Claims Act cases are tried to the court, inform your experts that the judge may ask them questions, and that they should pay careful attention to what he is asking. Also, warn the experts that, although judges are very intelligent people, they are not trained in medicine. Therefore, the experts must strike an appropriate balance between making sure the judge understands the opinions and not insulting the judge's intelligence.

Be sure your experts know to dress professionally. This means a suit and tie for men and a suit or nice dress for women. Do not take for granted that your experts know how to dress for trial.

If your experts are testifying before a jury, as opposed to a judge in an employment case, be sure to prepare them for the increased sensitivity they must have to the jury's lesser sophistication level. However, they must not appear condescending to the jury. Make sure your experts assume the role of the teacher and do not use vocabulary that is unintelligible to the jury. If they should slip up at trial and use a difficult word or phrase, have them explain what they meant. Additionally, prepare your experts for questions from the judge, even in a jury trial. Ask your experts to direct their answers to the court in the case of a bench trial, or to the jury in the case of a jury trial, and not to you or opposing counsel.

## IX. Conclusion

An expert witness can make or break your case. Therefore, thorough preparation, forethought, and a little bonding with your expert can take your case from barely defensible to a winner at trial. Hopefully, this article has given you a roadmap to follow which will help you achieve excellent expert retention, preparation, and testimony. ❖

## ABOUT THE AUTHOR

❑ **Ann E. Harwood** joined the United States Attorney's Office, Phoenix, Arizona in 1995. As an Assistant United States Attorney in the Civil Section, she defended the United States, its agencies, heads of agencies and federal employees in tort, employment, immigration, and civil rights litigation. Former United States Attorney José de Jesus Rivera promoted Ms. Harwood to Deputy Civil Chief in 1998. Since December 2, 2001, she has been the First Assistant United States Attorney to United States Attorney Paul K. Charlton.✉

*The views stated in this article are solely the views of the author and do not reflect the views of the Department of Justice.*

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# The Use of Experts in a *Bivens* Case

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## I. Introduction

Any Department of Justice attorney who has defended an individual capacity constitutional tort action brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), knows firsthand the unique challenges these cases present. In a *Bivens* action, a federal employee defendant may be held personally liable for money damages for actions taken in the scope of his or her federal employment. From a practical standpoint for an Assistant United States Attorney defending the case, this means that a fellow federal employee is your personal client, the opposing counsel may appear to be on a mission to vindicate the plaintiff's rights, and the conventional wisdom is that a dismissal of the case should be possible by filing a comprehensive immunity motion. As in all federal civil litigation, however, that result may not be so simple.

The course of *Bivens* litigation is typically shaped by the assertion of the defense of immunity -- whether absolute, qualified or statutory. Federal officials sued in their individual capacity are shielded "from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether the defendant is entitled to immunity should generally be decided early in the proceedings to avoid the burdens of litigation and the costs and expenses of trial. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 200 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (deciding the immunity issue early in the litigation spares "a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon defending a long drawn-out lawsuit"). Even so, the district court may permit discovery that is tailored to the immunity issue. *See, e.g., Crawford-El v. Britton*,

523 U.S. 574, 598-600 (1998); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). Whether discovery involving experts is permitted in a *Bivens* case may depend upon the facts of the case and the disposition of the judge assigned to the case. Disputed material facts simply may preclude an early resolution of the immunity issue. In cases with difficult facts -- where the federal employee's actions resulted in the serious injury or death of another -- the district court may be more willing to permit discovery. Thus, despite the best intentions for an early resolution of the case, in short order, a *Bivens* defendant may be in the middle of a drawn-out lawsuit.

This article addresses the role of expert testimony in the overall strategy of the defense of a *Bivens* action. Special concerns in *Bivens* cases include: whether expert opinion will assist the trier of fact at all; the work to be performed by the expert during the pretrial phase of the case; and preparing the expert for deposition and trial testimony. Finally, as part of the overall strategy in defending the *Bivens* case, defense counsel should consider challenging the admissibility of an opposing party's expert's opinion if it does not meet the requirements of Fed. R. Evid. 702, as amended (effective December 1, 2000), in light of the Supreme Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny.

## II. Assessing the purpose of expert testimony in a *Bivens* case: will an expert's opinion assist the trier of fact?

A qualified expert may testify as to "scientific, technical, or other specialized knowledge" if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Department of Justice attorneys routinely rely upon experts in defending all types of civil actions. When many factual witnesses and complex issues are involved, the highly qualified expert who presents a cogent opinion may well tip the balance in our favor in a close case. However, not every case requires several experts, so before expending the time and

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effort to retain multiple experts, consider why the expert's opinion is necessary at all. Careful planning from the outset to determine what exactly the expert will contribute to the defense of the case, and how the expert will assist the trier of fact, helps to focus the defendant's theory of the case.

As a general matter in civil cases, experts may be grouped into two categories: liability and damages. Plaintiffs typically retain both liability and damages experts in *Bivens* cases. Depending upon the complexity of the case and the sophistication of plaintiff's counsel, plaintiff's experts may have been retained well before the lawsuit is filed in district court. From the defendant's perspective early in an action, it may be too soon to determine precisely how proffered expert testimony may "assist the trier of fact." Fed. R. Evid. 702. We may not yet have a clear understanding of how the issues will develop or what theories the plaintiff will pursue. Even if an immunity motion is planned, consider retaining at least one expert to address liability issues and one damages expert at this early phase in the litigation. Having a consultant with special expertise in an area that may be unfamiliar to you (such as forensics, ballistics, toxicology, rehabilitation needs) should assist you as the *Bivens* case proceeds. If you have not yet handled many *Bivens* cases, these two initial experts may also help in identifying other necessary areas in which opinions from other experts will be needed.

#### **A. Liability experts**

The role of a liability expert in a *Bivens* case will vary widely according to the specific issues and facts presented. In a case involving federal law enforcement officers, potential types of liability experts may include ballistics experts, toxicologists, forensic pathologists, medical examiners, human factors or biomechanics experts, accident reconstruction experts, and law enforcement procedures experts. Medical experts may also provide opinions bearing on liability issues, such as in an Eighth Amendment case for deliberate indifference to the serious medical needs of a prisoner. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Special concerns exist regarding the use of expert liability testimony in a *Bivens* case brought pursuant to the Fourth Amendment for excessive force by a federal law enforcement officer. A plaintiff in an excessive force case will likely attempt to present expert testimony critical of the "reasonableness" of the use of force by federal agents. Depending upon the specific proffered opinion, however, the expert's testimony may improperly address a pure question of law. The Supreme Court has held that the "reasonableness" inquiry in an excessive force case is an objective one. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them). Experts should not be permitted to testify concerning pure legal issues. See, e.g., *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994) (expert barred from testifying that department policies indicated deliberate indifference); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993) (plaintiff's expert precluded from testifying concerning probable cause); *Specht v. Jensen*, 853 F.2d 805, 808-09 (10th Cir. 1988)(en banc) (expert not permitted to testify that illegal search had occurred). Moreover, the proffered expert's opinion should not be admitted if it addresses an issue that the trier of fact may readily grasp without the assistance of expert testimony. See *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir. 1999), cert. denied, 530 U.S. 1208 (2000)(district court refused to admit testimony of plaintiffs' expert criminologist because "the question whether the danger was sufficiently lethal and imminent to justify the use of deadly force was within lay competence").

The court may admit expert testimony in an excessive force case, however, if there is a disputed issue as to the amount of force used. See *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000)(medical expert testimony admissible concerning the degree of force required to cause plaintiff's injuries). An expert's opinion may also assist the trier of fact in understanding the use of particular devices or techniques used in law enforcement. See *Kopf v. Skyrm*, 993 F.2d 374, 378-79 (4th Cir. 1993)(expert testimony should have been admitted on use of police dog and slapjacks).

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In cases arising under 42 U.S.C. § 1983, many courts have addressed the plaintiff's use of expert testimony on the issue of excessive force. The mixed results, both at the summary judgment stage and at trial, emanate from the particular fact pattern presented in the case. *See, e.g., Boyd v. Baeppler*, 215 F.3d 594, 603-04 (6th Cir. 2000) (summary judgment granted despite expert opinion that the suspect's condition after being shot made it improbable that he was a threat to police); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), *overruled on other grounds by Acri v. Varian Assoc.*, 114 F.3d 999 (9th Cir. 1997) (summary judgment granted despite proffered expert testimony since "the fact an expert disagrees with an officer's action does not render the officer's actions unreasonable"); *Zuchel v. City & County of Denver*, 997 F.2d 730, 742-43 (10th Cir. 1993) (lay expert should have been excluded from testifying concerning lesser alternatives to the use of deadly force); *Hygh v. Jacobs*, 961 F.2d 359, 363-65 (2d Cir. 1992) (expert testimony on police officer's conduct should have been excluded).

In defending a *Bivens* excessive force case, we should be critical of plaintiff's efforts to introduce expert "liability" testimony that very generally addresses the "reasonableness" of the use of force by a federal agent. Plaintiff's expert should not be permitted either to opine on purely legal matters or to usurp the role of the jury. Nevertheless, if the district court admits plaintiff's law enforcement expert's testimony in an excessive force case, defendant's expert must be ready to respond and to identify the problems and weaknesses in the expert's opinion. Indeed, in some instances with particularly difficult facts, it may be advisable to present expert testimony on the reasonableness of the use of force, because a qualified, objective expert supporting the actions of the federal officer may bolster our case in the eyes of the jury.

### **B. Damages experts**

In most *Bivens* actions, damages experts may be retained by the parties to assess the nature and extent of the plaintiff's claimed injuries and to quantify the economic losses suffered as a result of the alleged constitutional violation. Damages experts tend to be medical doctors, psychiatrists or

clinical psychologists, rehabilitation specialists, and life care planners. Economists or accountants are also frequently retained to analyze plaintiff's past and future economic damages resulting from the claimed injury.

One of the most important functions of the damages expert is to perform a physical or psychiatric examination of plaintiff pursuant to Fed. R. Civ. P. 35(a). These examinations provide important information for the expert to use in forming opinions in the case. If the Rule 35 examination is timed appropriately in the overall discovery schedule, the expert will be able to obtain additional background information that could assist in preparing for the plaintiff's deposition. With the approval of the court, it may be worthwhile to obtain more than one examination of the plaintiff from experts in different specialties.

### **III. Pretrial expert issues: scope of work to be performed by defendant's experts**

Working with experts can be one of the interesting, but time consuming aspects of defending a civil case. Investing your time in locating the best qualified experts and then devoting additional time in the preparation of defendant's experts during the pretrial phase of the case nearly always pays off in the overall success in the case. In defending a *Bivens* case, the Assistant United States Attorney may be faced with all of the typical issues associated with pretrial discovery under the Federal Rules of Civil Procedure, combined with the unique concerns in preparing the case for a potential jury trial.

#### **A. Retaining the expert**

Significant effort may be required by the Assistant United States Attorney to retain the best expert for the liability or damages issues in the case. Many experts routinely testify for the United States, but it is also worthwhile to pursue experts that may have never previously testified in federal court. New experts may not have any of the "baggage" from prior cases, and therefore, their credibility as a witness may be enhanced. If possible, meet the prospective expert in person prior to retaining him formally. In *Bivens* cases, there is always the possibility of a jury trial, so it

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is important to assess whether the expert will have the ability to relate well to the jurors.

One important source of potential experts is the federal agency that employs the *Bivens* defendant. Other federal employees within the same agency may possess specialized knowledge, especially concerning law enforcement issues. These agency personnel may also serve as consultants in assisting you to find other qualified witnesses within the same field of expertise. The agency counsel on the case may be able to provide names of retired federal agents who may be willing to testify in the case. Although an agency employee may serve as an expert witness, consider whether at trial the expert may be perceived as having an institutional bias in favor of the *Bivens* defendant.

At the time the expert is retained, be very specific with the expert about what particular tasks he will be required to perform. The costs of using experts on a case can be substantial, so it is important that the expert knows that he should not perform any work on the case that you did not request. It is also important to explain to the expert the Department of Justice expert contract Form OBD-47 ("Request, Authorization and Contract for Services of Expert Witness, Litigative Consultant, or ADR Neutral"), and the process by which he will be paid.

Often times in *Bivens* cases, there may be multiple parties, such as local law enforcement officers, that are also named defendants. The parties may consider sharing experts if all of the interests are aligned, but our retained experts must understand that their role in the case is as an expert for the United States and the federal employee defendant. In the end, the expert is being paid by the United States, so the Assistant United States Attorney must maintain control over the expert's work and communications with others concerning the case. Remember that all information you share or discuss with the expert potentially may be discoverable by other parties.

#### **B. Work by the expert to prepare an opinion**

Defendant's experts must have adequate information provided to them in order to prepare their opinions and fulfill the written report

requirements of Fed. R. Civ. P. 26(a)(2). The expert's report must contain a complete statement of all opinions and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary; the qualifications of the witness, including a list of all publications authored within the preceding ten years; the compensation to be paid; and a list of all cases in which the expert testified at trial or by deposition within the preceding four years. Fed. R. Civ. P. 26(a)(2)(B). An expert report is required only by individuals retained to serve as experts in the case or "whose duties as an employee of a party regularly involve the giving of testimony." Advisory Committee Notes, Fed. R. Civ. P. 26(a)(2000).

The work to be performed by the expert and the materials that must be reviewed to form an opinion obviously will vary depending upon the type of expert and the facts of the case. It is usually important to have liability experts visit the location of the incident giving rise to the *Bivens* case. Consulting with the expert as you walk with him through the incident at the same location can be very helpful in bringing new perspectives to the defense of the case. The expert will also provide better deposition testimony if he or she has a clear mental image of the location where the incident occurred.

Discuss with the expert in advance the items that must be included in the written report required by Fed. R. Civ. P. 26(a)(2)(B). Because many liability experts in *Bivens* cases base their opinion in large part on prior work-related experience in the field, there may not be specific scientific studies or data to include in the written report. As a result, be sure that the expert includes all available information and bases that support the opinion to protect against a *Daubert* challenge as to the admissibility of his opinion. Prior to the completion of the final draft, review the expert's report for typographical errors and completeness.

After the expert provides an initial written report, additional reports may be required. All parties have a duty to supplement the mandatory disclosures required by Fed. R. Civ. P. 26(a)(1), and that duty extends to information contained in a party's expert's report and through a deposition.

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See Fed. R. Civ. P. 26(e)(1). Should the expert perform any additional work on the case, the expert should provide a supplemental report no later than the time the final pretrial disclosures are due. See Fed. R. Civ. P. 26(a)(3)(C).

### C. Deposition of the expert

The deposition of defendant's expert frequently is a key point during the discovery proceedings. Experts are usually deposed after the fact witnesses in the case. Because factual issues frequently determine the outcome of a *Bivens* case, it is essential that the defendant's expert have a command of all of the pertinent facts developed in the case. Prior to deposition, the expert should either have reviewed the prior deposition transcripts of the fact witnesses or, at a minimum, understand the substance of the fact testimony.

Even if the expert is familiar with the deposition process because he has testified in other cases, schedule extra time for final preparation. This should include a review of the expert's file, a detailed discussion of how the expert's testimony fits into the overall defense of the case, and practice concerning the types of questions expected. If time permits, it may also be helpful for the expert to visit the scene of the incident for any last observations and to refresh his memory prior to testifying.

### IV. Trial issues: challenging the admissibility of plaintiff's expert's opinions

A challenge to the admissibility of plaintiff's expert's opinions in a *Bivens* case may serve as a powerful litigation tool in the overall defense strategy. In the past ten years, the admissibility of expert testimony has been increasingly scrutinized by the courts. After the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999), and the resulting amendment to Fed. R. Evid. 702 (effective December 1, 2000) to reflect these developments in the law, whether an expert should be permitted to take the stand now may be subject to challenge at any time and in any type of case. The gatekeeping function of the district court "to ensure the reliability and relevancy of

expert testimony" applies to all types of proposed expert opinion -- not just scientific testimony. *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999).

### A. Standard for admissibility of expert opinions

An expert witness may testify to scientific, technical, or other specialized knowledge if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592. When a witness has sufficient expertise and bases his opinions on the state of the pertinent art or scientific knowledge, the expert's testimony may assist the trier of fact and shed light on an issue beyond the common knowledge of the average layperson. See *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001)(citing *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997)). However, expert opinions offered by a witness who lacks qualifications or whose principles and methods are not reliable should be excluded at trial. See *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 871 (7th Cir. 2001)(no abuse of discretion for district court to exclude expert testimony because of lack of testing for "common sense" opinion).

In determining whether the proposed expert's testimony is admissible at trial, the district court acts as "gatekeeper" to exclude testimony that "does not meet the standards of reliability required under Rule 702." *Domingo v. T.K., M.D.*, 276 F.3d 1083, 1088 (9th Cir. 2002). "The trial court accomplishes this goal through a preliminary determination that the proffered evidence is both relevant and reliable." *Id.* (citing *Daubert*, 509 U.S. at 589-95). The court possesses broad latitude in deciding how to determine reliability. *Kumho Tire*, 526 U.S. at 149 (1999). Indeed, the decision to exclude expert testimony will be reversed on appeal only if it is "manifestly erroneous" and is reviewed for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). A separate evidentiary hearing is not generally required to discharge *Daubert's* gatekeeping function. *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000)(affirming the exclusion of an expert's

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opinion after a motion in limine and without any evidentiary hearing).

The first step is to assess whether the expert is qualified to testify in the form of an opinion. As a preliminary matter, Federal Rule of Evidence 104(a) provides that the court shall determine questions concerning the qualification of a person to be a witness. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592; *Oddi v. Ford Motor Co.*, 234 F.3d 136, 144 (3d Cir. 2000) (the court must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact). The proponent of expert testimony bears the burden of demonstrating that the witness is qualified to render an expert opinion. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001). To qualify as an expert under Rule 702, a witness must demonstrate qualifications by "knowledge, skill, experience, training, or education." Although this requirement has been liberally interpreted, that "does not mean that a witness is an expert simply because he claims to be." *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000)(quoting *In re Paoli RR Yard PCB Litigation*, 916 F.2d 829, 855 (3d Cir. 1990)).

Next, the plaintiff must satisfy the reliability requirements of Fed. R. Evid. 702 for the expert's opinion to be admitted. Fed. R. Evid. 702 provides that a qualified expert may testify in the form of an opinion if: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The factors set forth by the Supreme Court in *Daubert* may assist the district court to assess the reliability of an expert's opinions. *See Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II)*, 43 F.3d 1311, 1316-17 (9th Cir. 1995)(factors are illustrative of types of inquiries to judge "reliability"); *Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999)(*Daubert* factors are the starting point for the reliability analysis). A reliable expert opinion is supported by scientific, technical, or other specialized knowledge and "inferences must be derived using scientific or other valid methods." *Cooper v. Smith & Nephew,*

*Inc.*, 259 F.3d 194, 200 (4th Cir. 2001)(quoting *Oglesby v. General Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)). An expert's theory is not reliable, however, if it is based upon "unsupported speculation and subjective beliefs." *Guidroz-Brault v. Missouri Pacific R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001)(citing Rule 702 and *Daubert*, 509 U.S. at 590).

For an expert's opinion to be admitted, "[t]he reasoning between steps in a theory must be based on objective, verifiable evidence and scientific methodology of the kind traditionally used by experts in the field." *Domingo*, 276 F.3d at 1090 (citing *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998)). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. at 146. When examining an expert's opinions and methodology, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146. When such a gap exists, the expert opinion should not be admitted. *See, e.g., Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-03 (9th Cir. 1994)(expert opinions excluded where the expert failed to consider other obvious causes for plaintiff's condition); *see also Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000)(unreliable expert testimony excluded as to the cause and origin of a fire that resulted in a man's death); *Clark v. Takata Corp.*, 192 F.3d 750, 759 (7th Cir. 1999)(expert testimony properly excluded when expert failed to consider certain facts and relied upon unsupported assumptions).

### **B. Plan for the *Daubert* challenge**

When planning an attack on the admissibility of the opposing expert's testimony in a *Bivens* case, the primary focus should be on the expert's qualifications and the reliability of the opinions. A survey performed by the Federal Judicial Center to assess the impact of *Daubert* and its progeny concluded that federal judges are now more likely to examine the basis of expert testimony before trial and then exclude at least some of the expert testimony. *See Expert Testimony in Federal Civil Trials: A Preliminary Analysis*. Federal Judicial Center (2000). Of the 303 judges who responded

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to the survey, the most common grounds for excluding expert testimony in all types of civil cases was that the testimony was not relevant, the witness was not qualified, or the proffered testimony would not assist the trier of fact. *Id.* at 4.

In practical terms, any successful challenge to the admissibility of an expert's opinion must be planned early in the case. When the opposing expert submits the Rule 26(a)(2)(B) written report, it should be apparent that the admissibility of the proffered opinion may be disputed. At that point, defense counsel should begin the process of carefully planning the deposition of the opposing expert to build the record for a *Daubert* motion. After the deposition, be aware that the opposing expert may attempt to provide supplemental support for his opinions if plaintiff's counsel recognizes the expert may be vulnerable. Finally, once you have an opportunity to review and analyze the expert's deposition testimony, consider whether to bring a motion in limine to exclude the expert's opinions. If it appears that the motion in limine may not be granted, for strategic reasons it may be more advantageous to reserve the attack on the opposing expert until cross-examination before the jury at trial. Many of the same arguments that would serve as the basis for the motion in limine will also expose the lack of reliability of the expert's opinion and the flaws in the expert's reasoning for the trier of fact.

Few *Bivens* or Section 1983 cases have addressed the admissibility of an expert's opinion under Fed. R. Evid. 702, as amended effective December 1, 2000. In *Nadell v. Las Vegas Metropolitan Police Department*, 268 F.3d 924 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1917 (2002), an action against police officers

under 42 U.S.C. § 1983 for excessive force and false arrest, the district court properly excluded expert testimony concerning the arrestee's Quantitative EEG ("QEEG"). Plaintiff attempted to use the test results to demonstrate a physical injury from the use of force during her arrest. The district court first conducted a two-day evidentiary hearing, then excluded the expert testimony because the QEEG test results were "error prone" and had not been subjected to peer review. Further, the proposed expert could not distinguish between plaintiff's childhood head injury and injury caused during the arrest. In affirming the exclusion of the expert's testimony under an abuse of discretion standard, the Ninth Circuit held that the district court possesses "broad latitude in deciding how to determine reliability." *Nadell*, 268 F.3d at 927 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). ♦

#### ABOUT THE AUTHOR

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# Health and Human Services Standards for Privacy of Individually Identifiable Health Information

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## I. Introduction

On April 14, 2003, the new privacy rule ("privacy rule") governing patient health information will go into effect. *See* 45 C.F.R. §§ 164.102–164.534. The privacy rule will govern when and how "covered entities," defined as health care providers, health care clearinghouses, and health plans, will be permitted to disclose protected health information. It will effect the Department of Justice in at least three ways. First, it will limit the disclosure of health information that can be made by our components that generate medical records, such as the Bureau of Prisons and the United States Marshal's Service. Second, it will limit the access of the Department to patient health information in certain of its law enforcement functions. Third, the privacy rule will govern the access of the Department when conducting health oversight functions, such as investigations of fraud against the Medicare program.

## II. Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), among other things, authorizes the Secretary of the Department of Health and Human Services (HHS) to develop and submit to Congress privacy standards for medical information, including the uses and disclosures of such information that should be authorized or required. *See* 42 U.S.C. 1320d-8; 42 U.S.C. 1320a-7c. On November 3, 1999, HHS published a notice of proposed privacy rulemaking dealing with medical privacy. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 221,

59917 (Nov. 3, 1999) (to be codified at 45 C.F.R. pt. 160, 164). After receiving over 60,000 comments, HHS published a final privacy rule. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). Proposed changes to the rule were published on March 27, 2002 in the Standards for Privacy of Individually Identifiable Health Information: Proposed Rule 67 Fed. Reg. 14776-14815 (to be codified at 45 C.F.R. pt. 160, 164), and final changes are expected by the summer of 2002.

Although this privacy rule lacks force and effect until April 14, 2003, healthcare providers and other covered entities are free to implement the privacy rule at any time until then. Fearing that unscrupulous providers may use early implementation of the rule as a pretext to forestall production of records in health oversight investigations, a technical correction to the privacy rule was published on December 29, 2000 that states that healthcare providers and others may not interpose the new privacy rule as a defense to the production of medical records in the interim. *See* Technical Corrections to the Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 251, 82944 (Dec. 29, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

## III. What information does the rule cover?

The privacy rule restricts disclosure of any information, in whatever form, that can identify the recipient of medical services. Protected patient information as defined by the rule extends far beyond the traditional notion of a patient's medical chart or subjective notations in a file. It includes recollections and memories of workforce members of healthcare providers, as well as information that merely provides a connection

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between an individual and the receipt of health care. *See* 45 C.F.R. § 164.501. For example, a patient's name contained in a directory at a hospital switchboard constitutes protected health information under the rule and may not be disclosed to a caller absent that patient's consent.

In understanding the privacy rule, it is important to grasp two fundamental points. First, the privacy rule provides only a limited number of circumstances under which protected health information may be disclosed by a health care provider or a government healthcare program without the patient's consent. These permissive disclosures are contained in 45 C.F.R. 164.512 and include disclosures for law enforcement and health oversight purposes.

The second fundamental point to remember in understanding the privacy rule is that it governs only covered entities and their business associates — typically *not* the Department of Justice (exceptions are those instances already indicated, in which components of the Department may generate medical records, such as the Bureau of Prisons and the Marshal's Service). The term "covered entities" is defined to include all entities from whom we typically obtain health care records: government healthcare programs, insurance plans, and healthcare providers and suppliers. *See* 45 C.F.R. § 160.103. The Centers for Medicare and Medicaid Services (CMS), state Medicaid agencies, the Federal Employees Health Benefits Program (FEHBP), and the TRICARE program all are covered entities.

"Business associates" of covered entities are defined as all persons or entities who "assist with the performance of, or perform on behalf of, a function or activity" for an agency, insurance plan or medical provider, including lawyers and consultants. 45 C.F.R. § 160.103. A Medicare fiscal intermediary or Part B carrier are examples of business associates under the privacy rule. Covered entities are required to enter into contracts with these business associates, subjecting them to the same rules of non-disclosure as covered entities. These business associates must assure that their own subcontractors and agents comply with the same requirements.

Note, however, that the Department of Justice is not performing a service for or on behalf of government health plans when it conducts its investigations. Rather, it is performing its mandated role of enforcing the laws of the United States. Hence, the Department is not required to enter into a business associate arrangement with CMS, private health plans, or other covered entities and their agents in order to obtain data or other patient health information. *See* Standards for Privacy of Individually Identifiable Health Information: Final Rule, 65 Fed. Reg. 250, 82476 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

Because the Department is neither a covered entity (except as previously noted) nor a business associate, the privacy rule does not govern our ability to redisclose health information we may obtain in the course of law enforcement or oversight activities. Certain privacy advocates viewed this as a serious flaw in the privacy rule. In response, an Executive Order was issued on December 28, 2000 which, among other things, requires that protected health information concerning an individual discovered during the course of our health oversight activities shall not be used against that individual in an unrelated civil, administrative, or criminal investigation of a nonhealth oversight matter unless the Deputy Attorney General has authorized such use. *See* Exec. Order No. 13181, 65 Fed. Reg. 248, 81321 (Dec. 20, 2000). If the protected health information involves members of the Armed Forces, the General Counsel of the Department of Defense must authorize the reuse. *See id.* Nothing in this Executive Order, however, places any additional limitations on the Department's derivative use of records obtained by an administrative subpoena pursuant to 18 U.S.C. § 3486.

While the privacy rule does not directly govern the Department's use of patient health information, it nevertheless governs our ability to obtain such information. Virtually every health care provider, government healthcare program, insurer, and their respective business associates, will take care to assure that they are not violating the privacy rule when providing protected health information to the Department.

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#### IV. Permitted disclosures

The privacy rule requires that the consent of the patient be obtained before a disclosure can be made, unless that disclosure is expressly permitted under the privacy rule. It provides only a limited number of circumstances under which disclosures of health information may be made absent a patient's consent. *See* 45 C.F.R. § 164.512. For example, if the disclosure is "required by law", the covered entity is permitted to make the disclosure regardless of a lack of patient's consent. Any "mandate contained in law that compels a covered entity to make a disclosure of protected health information and that is enforceable in a court of law" is considered a disclosure required by law, under the rule. 45 C.F.R. § 164.501.

Required by law includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits."

*Id.*

The only restriction placed on this required by law disclosure is that the disclosure "complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1). However, a caveat in § 164.512(a)(2) states "[a] covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law." Hence, even if a disclosure is otherwise required by law, it must nevertheless meet the conditions contained in § 164.512(c) (relating to adult abuse and neglect or domestic violence), § 164.512(e) (disclosures in judicial or administrative proceedings), or § 164.512(f) (disclosures for law enforcement).

Another disclosure permitted without patient consent is for "public health activities" as defined

in 45 C.F.R. § 164.512(b). This includes disclosures for purposes of disease prevention or control (§ 164.512(b)(1)(i)), for purposes of reporting child abuse or neglect (§ 164.512(b)(1)(ii)), for potential Food and Drug violations (§ 164.512(b)(1)(iii)), and for purposes of reporting that a person may have been exposed to a communicable disease, if such disclosure is permitted by law (§ 164.512(b)(1)(iv)).

The privacy rule permits disclosure of health information in instances relating to adult abuse and neglect and domestic violence, but only in specifically defined and limited circumstances. *See* 45 C.F.R. § 164.512(c)(1). Although your state may have reporting statutes in place for these types of crimes, the disclosure is not necessarily required by law because the privacy rule's definition expressly defers to the restrictions contained in § 164.512(c). 45 C.F.R. § 164.512(a)(2). Specifically, if the state *mandates* the reporting of such a crime, the covered entity is permitted under the privacy rule to make the disclosure. 45 C.F.R. § 164.512(c)(1)(i). However, if the state merely *authorizes* a disclosure, then the covered entity may make a disclosure only if it concludes, in the exercise of its best judgment, that the disclosure is necessary to prevent future harm to the individual or other victims *or*, if the victim is incapacitated and unable to provide consent, only when the authorized law enforcement officer represents that the protected health information will not be used against the victim, *and* that immediate enforcement activity will be harmed unless the information is obtained before the patient may regain capacity to consent. 45 C.F.R. § 164.512(c)(1)(iii)(A)-(B).

The next area of permissible disclosure is for "specialized government functions," including military personnel, national security and intelligence activities, protective services for the President or heads of state, medical suitability determinations made by the Department of State, and, in specified circumstances, to correctional institutions. *See* 45 C.F.R. § 164.512(k)(1)-(5).

Finally, the privacy rule provides two additional areas of permissible disclosures that affect the Department: disclosures are permitted in some circumstances to "health oversight" and

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“law enforcement” agencies. To understand these provisions of the privacy rule, however, one must first understand the distinction drawn in the privacy rule between these two functions.

#### **V. Health oversight vs. law enforcement**

It seems counterintuitive to assert that the Department is not acting in a law enforcement capacity when investigating health care fraud or other health care related offenses. Indeed, in a literal sense we are. However, the privacy rule grants greater right of access to oversight agencies performing health oversight functions than is provided to general law enforcement. Hence, Department personnel seeking patient health information must first divine the capacity in which they are making the request: health oversight or law enforcement.

##### **A. Health oversight**

Covered entities and their business associates, generally, are permitted to disclose health information to a health oversight agency, as defined in 45 C.F.R. § 164.501:

oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of: (i) The health care system; (ii) Government benefit programs for which health information is relevant to beneficiary eligibility; (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or (iv) Entities subject to civil rights laws for which health information is necessary for determining compliance. *See id.*

A health oversight agency is defined as an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted

authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.

45 C.F.R. § 164.501(6)(v).

The preamble of the privacy rule states that the Department of Justice qualifies as a health oversight agency when performing health oversight functions. *See* Standards for Privacy of Individually Identifiable Health Information: Final Rule, 65 Fed. Reg. 250, 82942 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). However, a health oversight function does *not* include instances where

the individual is the subject of the investigation ... and such investigation ... does not arise out of and is not directly related to: (i) The receipt of health care; (ii) A claim for public benefits related to health; or (iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

45 C.F.R. § 164.512(d)(2).

##### **B. Law enforcement**

If Department personnel are seeking protected health information for purposes other than health oversight, their request likely will be categorized as a law enforcement request. *See* 45 C.F.R. § 164.512(f). Law enforcement disclosures include those that are required by law (§ 164.512(f)(1)(i)), those required under a court order, court-ordered warrant, or subpoena or summons issued by a judicial officer (§ 164.512(f)(1)(ii)(A)), a grand jury subpoena (§ 164.512(f)(1)(ii)(B)), or an administrative subpoena or civil investigative demand (CID) *but only to the extent* that the information sought is (1) "relevant and material" to a "legitimate law enforcement inquiry," (2) the request is "specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought," *and* (3) "de-identified information could not reasonably be used." 45 C.F.R. § 164.512(f)(1)(ii)(C). The preamble

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clarifies this section to state that "where law enforcement officials choose to obtain protected health information through administrative process, they must meet the three pronged test required by this regulation." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82681 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

Remember that this provision of the rule dealing with law enforcement access to records is distinct from the authority the Department possesses when conducting health oversight investigations. An administrative subpoena arising from a health oversight investigation need not meet the three-pronged test imposed on law enforcement administrative subpoenas. Disclosure may be made to law enforcement when the patient consents, the disclosure is required by law, or legal process is issued that meets this three-pronged test. Absent those criteria, the privacy rule permits disclosure to law enforcement only in the following circumstances:

- For the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, only the following can be disclosed: Name, address, date and place of birth; social security number; ABO blood type and Rh factor; type of injury; date and time of treatment; date and time of death, if applicable; and a description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos. The covered entity may not disclose the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue identification or location information. 45 C.F.R. § 164.512(f)(2).
- Information about victims of crime, but only with the victim's consent or, if without consent, by reason of incapacity or emergency, and then only if "the law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim," and also represents "that immediate law

enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure," and "the disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment." 45 C.F.R. § 164.512(f)(3). Of course, to the extent this information is required by law to be reported, this privacy rule does not preclude the disclosure. Examples may include information concerning victims of child or elder abuse, or victims of gunshot wounds. In these cases, even in the absence of the victim's consent or the representations of law enforcement, the disclosure may be made.

- Information about people who have died, but *only* "if the covered entity has a suspicion that such death may have resulted from criminal conduct." 45 C.F.R. § 164.512(f)(4).
- Information about crimes on the premises of the health care provider, but only if "the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity." 45 C.F.R. § 164.512(f)(5). If the health care provider is rendering emergency care off its premises, it may disclose protected health information to a law enforcement official, but only to an extent necessary to alert law enforcement to the crime or the location of such crime or of the victim(s) of such crime, and the identity, description, and location of the perpetrator of such crime. 45 C.F.R. § 164.512(f)(6). This permitted disclosure does not extend to information about abuse, neglect, or domestic violence emergency cases. *Id.* In those cases, disclosure cannot be made without complying with 45 C.F.R. § 164.512(c)(1).
- Disclosures to a coroner or medical examiner for purposes of identifying a deceased person, determining a cause of death, or for other duties as authorized by law. 45 C.F.R. § 164.512(g).
- Disclosures "to avert a serious threat to health or safety," if the health care provider, "consistent with applicable law and standards

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of ethical conduct,” and in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. 45 C.F.R. § 164.512(j)(1)(i)(A). Such disclosure can be made, though, only to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. 45 C.F.R. § 164.512(j)(1)(i)(B). Such disclosures also are permitted if they are necessary for law enforcement authorities to identify or apprehend an individual because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim. 45 C.F.R. § 164.512(j)(1)(ii)(A); or

- Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody. 45 C.F.R. § 164.512(j)(1)(ii)(B).
- Where the health care provider intends to tell law enforcement about an individual admitting participation in a violent crime, the disclosure may contain only the statement itself and the identification and location information listed in § 164.512(f)(2)(i). On the other hand, even if a patient makes a "statement admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim," the disclosure may *not* be made if the information was "learned by the covered entity" in the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure, or counseling or therapy; or through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy. 45 C.F.R. § 164.512(j)(2)(i).

#### **VI. Confidentiality of investigations**

The privacy rule provides that patients should be told when a disclosure of their health information is made. 45 C.F.R. § 164.528(a). All covered entities are required to maintain an “accounting” or log of each disclosure of health information, in the affected patient’s file. 45 C.F.R. § 164.528(a)(i). The entity must then

disclose that log to the patient on request unless certain conditions exist. Among these conditions is a written request from law enforcement or health oversight indicating that a disclosure would impede the requesting agency's activities. 45 C.F.R. § 164.528(a)(2)(i). In urgent circumstances, this request from law enforcement may be made orally but will be effective for no longer than thirty days unless a written statement is received within that time. 45 C.F.R. § 164.528(a)(2)(ii)(C).

This provision in the privacy rule requires that law enforcement and health oversight agencies, whenever requesting protected health information, take affirmative steps to assure the confidentiality of the investigation.

#### **VII. Special privacy rules relating to psychotherapy notes**

Psychotherapy notes are

notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session . . . Psychotherapy notes *excludes* medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

45 C.F.R. § 164.501.

Notwithstanding any other provision of the privacy rule, and except as stated below, a covered entity must obtain an authorization from the patient for any use or disclosure of psychotherapy notes. 45 C.F.R. § 164.508(a)(2). This authorization is specific to the psychotherapy notes and is in addition to the consent the patient may have given for other purposes, such as treatment, payment and health care operations. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82652 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 165).

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A covered entity who created the psychotherapy notes need not obtain patient authorization to disclose the records when disclosure is required by law; when disclosure is needed for the oversight of the provider who created the psychotherapy notes; or when disclosure is needed to avert a serious and imminent threat to health or safety. 45 C.F.R. §164.508(a)(2)(ii).

### **VIII. Disclosures for administrative and judicial proceedings**

The drafters of the privacy rule concluded that the current system governing disclosures and uses of medical records in the course of litigation, as exemplified by the Federal Rules of Civil Procedure, “does not provide sufficient protection for protected health information.” Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82596 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). Accordingly, 45 C.F.R. § 164.512(e) was drafted to govern use and disclosure of protected health information in most litigation arenas.

Covered entities are permitted to disclose protected health information in an administrative or judicial proceeding pursuant to an order of a court or of an administrative tribunal. Unless an order is issued, covered entities may disclose protected health information in response to a subpoena, discovery request, or other lawful process only after one of the following two conditions have been met: (1) the covered entities receive “satisfactory assurance” from the party seeking the information that reasonable efforts have been made to give notice to the individual who is the subject of the protected health information, 45 C.F.R. § 164.512(e)(1)(ii)(A); *or* (2) the covered entities receive satisfactory assurance from the party seeking the information that the parties to the litigation have entered into a qualified protective order, or that the party seeking the information has requested a qualified protective order from the court, 45 C.F.R. § 164.512(e)(1)(vi).

This protective order must prohibit the parties from using the information for any purpose other than the litigation or proceeding for which the information was requested. 45 C.F.R.

§ 164.512(e)(1)(v)(A). The protective order also must require that all protected health information either be returned to the covered entity at the end of the litigation or proceeding or be destroyed. 45 C.F.R. § 164.512(e)(1)(v)(B).

Nothing in this section dealing with disclosures in administrative or judicial proceedings supercedes other provisions of the privacy rule permitting disclosures to health oversight or law enforcement agencies. *See* 45 C.F.R. § 164.512(e)(2). The preamble of the privacy rule makes clear that if a covered entity is otherwise permitted to make the disclosure, a request that arises in a litigation context does not convert the request to the stricter privacy rules governing administrative or judicial proceedings. This is particularly important in those instances in which Department attorneys may require additional protected health information from a government health program while engaged in health oversight litigation. Rather than seeking a protective order or patient consent, the disclosing party may rely on our status as a health oversight agency and disclose the records. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82530 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

### **IX. Whistle-blower protections**

The privacy rule provides that a covered entity is not in violation of the privacy rule when a member of its workforce, or a person associated with a business associate of the covered entity, discloses, in good faith, protected health information to a health oversight agency or public health agency authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity; a health care accreditation organization; or an attorney, for the purpose of developing a *qui tam* lawsuit. *See* 45 C.F.R. §164.502(j)(1).

The privacy rule does not regulate the activities of whistle blowers. Rather, it regulates the behavior of covered entities and holds them responsible for the whistle blowing activity of their workforce. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82636 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). 45 C.F.R.

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§ 164.530(g) prohibits covered entities from sanctioning members of its workforce who file a complaint with the Secretary of HHS alleging a violation of this privacy rule, testify, assist, or participate in an investigation, compliance review, proceeding, or hearing, and who reasonably disclose protected health information in good faith and in compliance with the privacy rule to oppose an act of the covered entity made unlawful by the privacy rule. The preamble to the privacy rule makes clear that it is not intended as a new barrier to whistle blowing, nor does it permit covered entities to employ the privacy rule as a mechanism for sanctioning workforce members or business associates for whistle-blowing activities. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82636 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

## **X. Interplay with other statutes**

### **A. State statutes**

As a general rule, state law provisions that are in conflict with the privacy rule are preempted by the federal requirements. The three exceptions to this are: (1) If the Secretary of HHS determines that the state law is necessary to prevent fraud and abuse, ensure appropriate regulation of state health and insurance plans, for state reporting on health delivery, and “other purposes;” (2) if the state law is more stringent in protecting protected health information; or (3) if the state law addresses controlled dangerous substances. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82480 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

The preamble to the privacy rule states that where *The Privacy Act of 1974* (5 U.S.C. § 552a) allows a federal agency the discretion to make a routine use disclosure, and the medical records privacy rule prohibits the disclosure, the agency will have to comply with the medical records privacy rule. This means not making the disclosure. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82462-01 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

### **B. The Freedom of Information Act**

The Freedom of Information Act (5 U.S.C. § 552) provides for public disclosure, upon request, of many types of information in the possession of the Federal Government, subject to nine exemptions and three exclusions. One exemption permits the Federal Government to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). When a FOIA request seeks information that includes protected health information, the preamble of the privacy rule states that this FOIA exemption should be used to deny the request. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82482 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). 65 Fed. Reg. 82482.

### **C. The Federal Substance Abuse Confidentiality Act**

The Federal Substance Abuse Confidentiality Act provides for the confidentiality of health records that are maintained in connection with the performance of any federally-assisted, specialized alcohol or drug abuse treatment program. *See* 42 U.S.C. § 290dd-2, 42 C.F.R. Part 2. In most instances in which law enforcement or oversight agencies are seeking these types of records, the privacy rule will contain the more lenient requirements. Nevertheless, because disclosure to law enforcement and oversight agencies under the privacy rule is permissive, covered entities will not be in violation of the privacy rule for failing to make disclosures where the substance abuse statute precludes it. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82482 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

## **XI. Minimum necessary**

The regulation places an affirmative burden on a covered entity to “make reasonable efforts to limit [the disclosure of] protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.” Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82715 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164). This

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"minimum necessary" principle applies to all government requests unless the government can demonstrate that the request is required by law. 45 C.F. R. Reg. § 164.502(b)(2)(iv). When a disclosure is required by law, the minimum necessary standard does not apply. *Id.* See also Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82715 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt 160, 164). As stated, *supra*, "required by law means a mandate contained in law that compels a covered entity to make a disclosure of protected health information and that is enforceable in a court of law." 45 C.F. R. §164.501. Providers may question whether the various statutes and regulations permitting the Secretary of HHS and others access to protected health information for purposes of ensuring program integrity constitutes a required exception. A complete discussion of the required by law standard is contained in the privacy rule's preamble at Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82666 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

The regulation allows the covered entity to rely on government representations that the information requested is the minimum necessary for the stated purpose. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82715 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82530 (Dec. 28, 2000) (to be codified at 45 C.F.R. pt. 160, 164).

## **XII. Department of Justice suggested practices**

On August 30, 2000, the Deputy Attorney General issued Suggested Practices for Maintaining Confidentiality of Medical Records. Department personnel are expected to take all practicable steps to protect the confidentiality of individually identifiable protected health information. Requests for such records should be narrowed to specific providers or patients. Care should be taken to assure that such records are handled and maintained in a manner that assures their confidentiality. Confidentiality Agreements should be employed when, in the course of litigation or investigation, such records are shared with government experts, defense counsel, and

other third parties outside the government. Protective orders should be obtained when such records are produced in discovery and, when such records are to be made public in the course of litigation, steps should be taken to obscure patient identification, if practicable. As the April 2003 effective date draws near, these guidelines will be modified to accommodate the new privacy rule.

## **XIII. Conclusion**

The privacy rule and its preamble consume 367 pages in the Federal Register. As with any overview, this article can provide only a general guide to the rule with a focus on how the rule will effect the functions of the Department of Justice. Department personnel confronting issues under this rule are welcome to contact the author or Ian DeWaal, Senior Counsel in the Criminal Division, for additional guidance. ❖

## **ABOUT THE AUTHOR**

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# Discovery Considerations in Affirmative Civil Litigation

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## I. Introduction

No matter how meticulously prepared, all civil actions go through metamorphoses as a result of the discovery process. Affirmative civil enforcement ("ACE") actions are no exception. Discovery has increasingly become modern-day "legal combat." It is a process of tactics and strategy; it requires circumspection and vigilance. At the same time, counsel must always maintain a duty of candor toward the tribunal. Rule 3.3., ABA Model Rules of Professional Conduct.

Used effectively, the discovery process is the means by which parties determine the facts of the case and positions of the parties. Used ineffectively or without sufficient vigor and vigilance, the discovery process can hand your opponent an undeserved favorable ruling and, ultimately, an undeserved victory.

## II. Before discovery - procedure and strategy

The plaintiff's attorney's role and the defendant's attorney's role in civil actions are decidedly different. The plaintiff's attorney must be especially aware of Fed. R. Civ. P. 8, 9, 11 and 12 when initiating an ACE action. Rule 8 sets forth the general rules for pleading a civil action, however, its provisions must be read in conjunction with Rule 9(b) in an action involving fraud or the False Claims Act, 31 U.S.C. § 3729-§ 3733. ("FCA"). In an action involving fraud or the False Claims Act, Rule 9(b) requires that "[A]ll averments of fraud . . . , [and] the circumstances constituting fraud . . . shall be stated with particularity." While an FCA action does not require the same level of proof as a common law fraud action, that is, clear and convincing evidence, *see, e.g., Henderson v. Henderson*, 495 S.E. 2d 496, 499 (1998), it does require proof by a preponderance of the evidence,

31 U.S.C. 3731(c). The federal courts have held that in an FCA action the allegations still must be pleaded with particularity. *See, e.g., United States ex rel. Wilkins v. North American Const. Corp.*, 101 F. Supp.2d 500 (S. D. Tex. 2000); *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F. Supp. 2d 141 (D. Mass. 2000); *Wisiz v. C/HCA Development, Inc.*, 181 F.R.D. 385 (N. D. Ill. 1998); *United States ex rel. Vallejo v. Investronica, Inc.*, 2 F. Supp.2d 330 (W.D.N.Y. 1998); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055 (S. D. Ga.1990).

Those who pursue ACE cases should enjoy an advantage in the preparation of the case. Long before the defendant has had the chance to read the pleadings of the complaint which initiates the action, as Fed. R. Civ. P. 3 provides, the plaintiff has investigated the action, explored the facts, and researched the applicable law of the action. *See* Fed. R. Civ. P. 11(b).

## III. The dynamics of the discovery process

After surviving the initial motions to dismiss an ACE action, the discovery phase begins. It is advisable to be flexible and continue to evaluate and reevaluate all the facts and assumptions as they appeared at the beginning of the case, and as they proceed through their modifications during discovery. Be prepared to be surprised occasionally in the discovery process but remain confident as a result of thorough evaluation and preparation of the case.

Most competent defense lawyers are expert at working to erode the confidence of plaintiff's counsel in the merits of the case. The goal is to undermine the foundation of the action, to shoot holes in the plaintiff's assumptions, to nullify the plaintiff's theories, to discover the weaknesses in the case and exploit them to make the plaintiff lose confidence in his or her facts, agents, and witnesses. Those are all part of the psychology of litigation. Defending counsel hopes that by

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seriously undermining plaintiff's counsel's faith in the action, he may force ACE counsel to abandon the action or provide a settlement favorable to his client.

The discovery process, itself, is involved in the psychology of litigation. Fed. R. Civ. P. 26(a)(5) provides:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination [Rule 30 Fed. R. Civ. P.] or written questions [Rule 31 Fed. R. Civ. P.]; written interrogatories [Rule 33 Fed. R. Civ. P.]; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examination [Rule 35 Fed. R. Civ. P.]; and requests for admission [Rule 36 Fed. R. Civ. P.].

As Rule 26(d) provides, unless the court specifically orders otherwise, "methods of discovery may be used in any sequence, . . ." however, the rules now provide that "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."

Since the plaintiff and the defendant are already going to exchange the required initial disclosures under Rule 26(a)(1) and (2), in most situations, you will not want to "waste" interrogatories (remember you have only twenty-five in most instances). *See* Rule 33(a) asking for the names and contact information of persons with discoverable information, as provided in Rule 26(a)(1)(A), requesting copies or descriptions and locations of documents, data compilations, and tangible items that the other party has and will use to support its claims or defenses, as provided in Rule 26(a)(1)(B), pursuing computation of damages and the nature and extent of injuries, as provided in Rule 26(a)(1)(C), or requesting any insurance agreement used to satisfy all or part of a judgment that may be entered in the action as provided in Rule 26(a)(1)(D). It is also usually a waste of an interrogatory to ask for the identification of experts to be used at trial under Fed. R. Evid. 702, 703 and 705 because that you will be provided "at the times and in the sequence directed by the court." Fed. R. Civ. P. 26(a)(2).

#### **IV. Interrogatories - quick, easy and inexpensive**

Interrogatories are useful in combination with other discovery tools and in planning for additional discovery. They provide a quick and easy way to attempt to learn relevant information. Interrogatories may be used to discover and verify information needed to establish venue, subject matter, document authentication, and other necessary items of proof. They can also be used under Rule 36 "Requests for Admission." Consequently, while some pattern interrogatories are useful as a starting point, others must be tailored specifically to the case you are litigating.

As designed, interrogatories require the responding party to make "reasonable" efforts to search and obtain the answers to the requested interrogatories. Rule 26(g)(1). Of course, interrogatories are less time consuming than depositions when considering the preparation and scheduling time involved in each.

Interrogatories, may also be used to establish background information, and to learn facts and details that may not be in dispute or those that a deponent may not be able to remember at a deposition. They may also be used to reveal the contentions of the opposing party and the bases upon which those contentions rest. Rule 33(c). Interrogatories place the other side in the position of having to prepare, investigate, and research their positions and may reveal the party's strategy.

Despite their usefulness, interrogatories have their limits. They may only be served upon a party. They provide a full thirty days for response, so you may not receive any quick answers. You may not be able to use them at all if the "discovery clock" runs out. Typically only short answers, if any, are provided, and you cannot follow-up on those answers. Generally, the answers received will have been written by opposing counsel so that what you ultimately receive is well-filtered and painstakingly written.

#### **V. Depositions are the most useful discovery tool in ACE cases.**

Generally, depositions upon oral examination pursuant to Rule 30 are the most useful discovery tool and yield the best information for use with

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dispositive motions and trial testimony. It is advisable to have received the documents provided through the initial disclosures of Rule 26(a)(1) and (2) before deposing anyone and to have the documents available as deposition exhibits.

#### **A. Managing documents**

To manage the voluminous materials received, use a simple but effective Bates stamp sequential numbering system to account for and organize the documents. Keep the sequential numbering system simple or it can become too long and take up precious deposition time just to identify the exhibit pages. If the case is, for example, Roger Power, Inc., you might use the prefix "RogPow00001" or even "RP00001" rather than "RogPowAudit0001" for the audit report and audit papers, and later "RogPowExpert0001" for the expert's working papers and report. Remember that Fed. R. Civ. P. 30(d)(2) limits depositions to one day of seven hours unless the court orders or the parties stipulate otherwise. A paralegal, should prepare a constantly-updated index of the Bates stamped documents. If you have no paralegal, keep this index yourself. That will put you days ahead when it comes to getting your pretrial exhibits list assembled for the pretrial conference.

#### **B. Preparing to depose**

In anticipation of every deposition, counsel should prepare the categories of information about which questions will be asked. Many attorneys write out entire questions in anticipation of the deposition rather than list the categories and areas of inquiry. That is a good method if it relieves stress in preparation for the deposition. Having ready-made questions at hand and reading them to the deponent does provide a level of comfort. In reality, however, such questions may be too confining and thus prevent counsel from fully exploring the witness' knowledge. Even worse, they may cause counsel to become so focused on the questions that he or she fails to listen to the answers of the witness. It is important always to listen to the deponent's answers and think about following up on the answer.

A full understanding of the basis of the ACE action, a complete grasp of the facts, and basic

curiosity are frequently the best preparation for a deposition. The questioning often simply flows as the deposition progresses if you can relax and get into the "curiosity mode." An effective follow-up based upon innate curiosity and reasoning in depositions will stand counsel in very good stead for discovering the facts. Deponents have generally been well-coached to answer only what is asked in as brief a manner as possible, and admonished not to volunteer information.

If counsel fails to ask a question in just the right way, they will be stuck with the witness's parsing of the wording of the question. The result is often dependent on the perceived (or contrived) definition of a word by the deponent. For example, the question "Were you aware that the regents had forbidden [this specific conduct]?" can result in a "no" answer when the witness considers what "aware" or "forbidden" means. Instead, counsel should inquire "What have you ever read about [such conduct]?", "What have you heard about [such conduct]?", "What have you been told/informed/ about [such conduct]?" Each question has to be asked and answered separately. Even if the objection "asked and answered" is raised, you are still entitled to receive an answer and the witness cannot be properly ordered by his counsel not to answer unless there is a privilege or other proper limitation asserted. *See* Rule 30(d)(1) ("A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4) [bad faith conduct].") Of course, counsel may not become abusive with the questioning or opposing counsel may be able to limit or end it with the aid of the court. Rule 30(d)(4).

If the goal is to "nail down" what is already known about the facts, and counsel wants the deponent to confirm certain details, the examination will be more a cross-examination than a direct examination. A hostile deponent is likely not to confirm anything of substance in a deposition.

One good technique to use with a hostile deponent is to ask questions with which the witness must agree. This forces the witness to confirm information and respond affirmatively to your questions which are really statements, such

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as: "You are the CEO of ABC company?", "You have been the CEO of ABC Company since December 2000?", "Every day as CEO you receive email communication from employees of the ABC Company?" After affirmative responses to the questions, you may present some "innocent emails" so the CEO can confirm the form and style of emails. Then "smoking gun" type emails may be presented which are in the same style and format as the innocent ones and which the witness may now assert that he or she does not recall. If the innocent emails are earlier in time than the smoking gun emails, you may ask the witness to read the date and time from the e-mails to show that his or her memory is selective rather than subject to the concepts of primacy and recency. It stands to reason that the CEO should remember emails received in the recent past, as opposed to those in the more distant past. Responses from a witness who asserts that he cannot recall events are always the most frustrating when they occur in a deposition, at trial, or before a grand jury. It is difficult to prove that the deponent cannot recall anything about the subject matter.

### C. Conduct at depositions

Frequently there are "back and forth" exchanges between counsel in depositions. Rules 30 and 32 provide often ignored or misunderstood guidance regarding the conduct of depositions that make much, if not all, of the acrimony unnecessary. For example, as for witnesses and certain testimony, Rule 32(d)(A) states

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Objections as to those matters are generally preserved for later when opposing a motion which cites that testimony or when the transcript is provided in the pretrial materials for use at trial. See Rule 32(b).

As for the reporter recording the deposition and giving the deponents the oath, a party's conduct at the deposition, or as to how the

deposition is taken, Rule 30(c) states, in relevant part,

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceeding shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.

Again, in most instances the examination goes on unless it becomes so abusive as a result of the "conduct of any party" that it has to be stopped pursuant to Rule 30(d)(4). (Note, the rule says *party*, not *party's counsel*.) Otherwise, the objections can be raised later when the testimony is to be used by your opponent.

On the other hand, Rule 32(d)(2) states: "Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as disqualification becomes known or could be discovered with reasonable diligence." I once had occasion to object to the qualifications of a court reporter who was not authorized to administer oaths in the jurisdiction where the deposition was taken. Had I not made the objection before the deposition began I would have had difficulty using the deposition at trial, or otherwise, because opposing counsel could have argued that the person was not really under oath.

As for the acrimonious exchanges, or "speaking objections" which are often made by defending counsel during depositions, Rule 30(d)(1), states: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner." The proper way to object to questions at a deposition is to state the objection as definitely and succinctly as possible to preserve the issue and then stop talking. On occasion, counsel in depositions have made offhand, disparaging remarks about the deponent and the merits of the case. Counsel has even given the deponent signals through physical and verbal means, such as kicking under the table and making statements

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beyond simply raising objections, such as prompting a witness to answer "only if you remember," while signaling the deponent not to remember. Of course, after such an "objection" the witness's answer usually is "I don't recall." Clearly, such conduct is improper. For a case in which depositions were subject to court-set rules, see *Hall v. Clifton Precision, A Division of Litton Systems, Inc.* 150 F.R.D. 525, 531-32 (E.D. Pa. 1993).

Rule 32(d)(3)(B) states

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

If you must object to, for example, the presence of a person at the deposition whom you do not want to be present for any reason, you have to do so before the deposition starts.

#### **D. Two categories of deposition objections**

This appears to leave us with two categories of deposition objections - those that you have to make at the time the problem or concern occurs or else you lose the chance to do so and forfeit some rights to make them later, and those that you can ignore at the time they occur and still assert later. Objections which need to be made at the time of the depositions are generally those based on the form of questions and are appropriate if the question:

- is ambiguous (that would confuse the witness and leave you with a corrupted answer);
- is leading (that does not get at the truth from the witness's mouth);
- contains two or more questions and is compound (the transcript that results from such a question leaves you with an answer but you cannot tell to which question);
- assumes facts not in evidence (that, again, leaves you with a response to a question based

upon that which has or had no existence in reality);

- is argumentative (you end up with more lawyer transcript than witness transcript);
- contains ambiguous references (which confuse the witness and corrupt the answer);
- calls for legal conclusions (and those are not for the witness to make);
- calls for speculation ( may work with an expert witness and a hypothetical);
- misstates prior testimony (could be viewed as a trick question) or
- calls for a narrative response (where there is no question asked).

Objections to the form of a question are most often founded upon one of the following ten grounds:

- the question is too broad or calls for an excessive, narrative answer;
- the question is compound;
- the question has been asked and responsively and completely answered;
- the question calls for conjecture, speculation, or judgment of veracity;
- the question is ambiguous, imprecise, unintelligible or calls for a vague answer;
- the question is argumentative, abusive, or contains improper characterization;
- the question assumes as true facts in dispute or not in evidence;
- the question misquotes a witness's earlier testimony;
- the question calls for an opinion from a witness not qualified to give one; or
- the question is leading under circumstances where leading questions would not be permitted by Fed.R.Evid. 611(c).

Michael H. Graham, *Handbook of Federal Evidence* H 611.15-611.22 (4th ed.1996) (1-8 above).

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All too often defending counsel's objections serve to subtly caution the witness to frame his answer in a way that is not the whole truth, to provide a brief interval for the deponent to think about his answer, or as a pre-arranged signal to answer an inquiry in a certain rehearsed way. Frequently, defending counsel will simply shout "Objection!" without stating the specific grounds for the objection, contrary to Rule 30(d)(4) which requires that objections be "stated concisely."

Of course, a deposition is a terrific chance to size up the witnesses as well as their counsel. Depositions are "up close and personal," and occasionally involve serious controversy and acrimonious exchanges between counsel. For examples, see, *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D. NY 1987). ("You are being an obnoxious little twit. Keep your mouth shut."; "You are a very rude and impertinent young man."; and "Upon being cautioned . . . that his conduct would result in a request to the Court for sanctions, [he] countered: 'If you want to go down to Judge Pollack and ask for sanctions because of that, go ahead. I would almost agree to make a contribution of cash to you if you would promise to use it to take a course in how to ask questions in a deposition.'" As a result, the court described the diatribe as "the pinnacle of unreasonableness." *Id.* The violator was ordered to pay transcript costs, a fine for "contentious, abusive, obstructive, scurrilous, and insulting conduct in a court ordered deposition" and the deposition was ordered to be done over in the presence of a magistrate judge.); see also, *Van Pilsum v. Iowa State University of Science and Technology*, 152 F.R.D. 179 (S.D. Ia. 1993).

Counsel for both parties engaged in extensive colloquy which interrupted the flow of the deposition, [defending counsel for plaintiff] repeatedly objected to the form of [examining counsel's] questions. [Defending counsel for plaintiff] also engaged in *ad hominem* attacks on [examining counsel's] ethics, litigation experience, and honesty. In the . . . 167 page deposition, there are only four segments where five or more pages occur without an interruption from [defending counsel for plaintiff]; the longest of these is nine pages. [O]f the 4025 lines of transcript, only seventy

percent contain questions by [examining counsel] and answers by [deponent]. The balance is discussion, argument, bickering, haranguing, and general interference by [defending counsel] (818 lines) and response by [examining counsel] (340 lines); there are numerous instances where the reporter is required to read back a question due to the length of time between the question and the witness' opportunity to answer.

Defending counsel was ordered to pay half of the cost of the deposition, the deposition was rescheduled to be completed in four hours, all further depositions were to take place in the presence of a discovery master, and all depositions were to take place in the federal courthouse. This action was called by the court "day care for counsel who, like small children, cannot get along and require adult supervision." *Id.* at 181; see also, *Hall v. Clifton Precision, A Division of Litton Systems, Inc.* 150 F.R.D. 525 (E.D. Pa. 1993). (There were interruptions by defending counsel to "confer with my client about the meaning of the word 'document'" and to "review [the document] with my client." *Id.* at 526. The court opined that defending counsel has no proper need to "act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." *Id.* at 528. "[Once] a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth." *Id.*) For an outstanding example of unprofessional conduct during a deposition, see *Paramount Communications, Inc. v. QVC Network, Inc.* 637 A. 2d 34, 53-54 (Del. 1994).

## **VI. Requests for production of documents and things**

With all the opportunities to obtain documents through Office of Inspector General (OIG) subpoenas, search warrants, and civil investigative demands, it may seem that serving requests for production of documents pursuant to Rule 34 will take little time during discovery. That may be true where a government contract is involved. In fact, in the majority of FCA cases, the problem was not too few documents but too many.

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All documents obtained pursuant to subpoena should be reviewed and inspected to determine whether they are responsive to the subpoena. Occasionally, in cases involving voluminous materials, you may discover that some boxes had not even been opened after they were received by investigators. When this occurs, the task falls to the ACE AUSA and his/her paralegals and secretaries to organize, categorize, and mark the documents for access during discovery and for trial. If internal memoranda, emails, and executives' day-timer calendar books have not been provided in response to the OIG subpoena, you will want to request them in discovery. They can be very revealing and helpful to an ACE case and often may not have been received during the investigation.

Many times a defendant will assert privileges to keep from producing material pursuant to a Request for Production. Corporations often use *Upjohn Company v. United States*, 449 U.S. 383 (1981) to prevent disclosure of documents under the attorney-client privilege. However, that ruling is relatively narrow and may not cover the defendant as broadly as claimed.

When responding to the assertion of privileges, remember that the one who claims the privilege has the burden of establishing it. *United States v. Tedder*, 801 F.2d 1437 (4th Cir. 1986). Even if the court agrees with the defendant on the privilege issue, there is always the possibility that documents can be redacted to exclude the privileged material. *See, Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984); *see also, Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

As for privileged communications to an attorney by a client, unless the communication meets the standard set out in *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982), in the Fourth Circuit, it is not privileged. The *Jones* case cites the "classic test" for attorney-client privilege as established in *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (Mass.1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person

to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In the Fourth Circuit, a communication by an attorney is not privileged unless it reveals, directly or indirectly, a client's privileged communication. *United States v. (Under Seal)*, 748 F.2d 871 (4th Cir. 1984); *Burroughs Wellcome Co. v. Barr Laboratories*, 143 F.R.D. 611, 619 (E.D.N.C. 1992).

## VII. Admissions - making and withdrawing

Rule 36 Requests for Admission can be served on the parties for use in the pending action only. They can pertain to statements, opinions of facts, the application of the law to facts, or to whether the documents involved are genuine. It may be advisable to send copies of the documents you need to have authenticated to the other party with the requests for admissions or you can have them inspect them in your office. Requests for admission cannot be served before the Rule 26(f) conference.

In the requests for admissions each request to admit must be set forth separately. If the party does not admit or deny, or otherwise respond to the requests, the admission is deemed to have been established in thirty days. Therefore, the party must either admit, deny, object, or explain why they cannot respond with any of those responses. A party's denials have to track the request and the party cannot give the lack of information or knowledge as an answer unless they have first made a reasonable inquiry and still cannot respond. You may move the court to determine whether the responses are sufficient.

If the matter is admitted, that issue has been decided. However, with court approval, the

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admission can be withdrawn. *See, e.g., Hadley v. United States*, 45 F. 3d 1345 (9th Cir. 1995). ("Two requirements, . . . , must be met before an admission may be withdrawn: (1) presentation of the merits of the action must be subserved, and (2) the party who obtained the admission must not be prejudiced by the withdrawal."); *see also American Automobile Association v. AAA Legal Clinic of Jefferson Crooke, P.C.* 930 F. 2d 1117, 1119 (5th Cir. 1991) (There is a "two-part test: 1) the presentation of the merits must be subserved by allowing withdrawal or amendment; and 2) the party that obtained the admissions must not be prejudiced in its presentation of the case by their withdrawal.")

### VIII. Enforcement of discovery

There will, no doubt, be many occasions when you will not get what you request in discovery, especially with Rule 33 Interrogatories and Rule 36 Requests for Admission. When that happens, it is necessary to move the court to compel disclosure and discovery, and perhaps also for sanctions under Rule 37. Remember that you must certify with the motion that you have conferred, or attempted to confer, with the person or party who failed to provide the discovery before you asked the court to help. Rule 37(a)(2)(A).

It is plain to anyone who has ever had to ask the court to intervene in discovery that judges do not like discovery disputes and the nasty exchanges that they frequently entail. Judges prefer that the lawyers act "like grownups" and work out their disputes together. If your opponent is particularly prickly, or cannot control his or her client, you can expect that discovery will quickly turn into weekly motions to compel and motions for sanctions.

On many occasions, magistrate judges (who rule on the vast majority of discovery motions) will instruct counsel involved in discovery disputes to "go outside [of the courtroom] and see if you can settle this. I will place your case at the end of the docket and, after you have tried to work this out, we will see you" or the court will advise counsel, "I can make a ruling that will satisfy neither one of you, so I will give you the chance to work this out." Frequently, magistrate judges will admonish counsel that they should try to be

more civil and "get along better" in discovery. One can readily gauge how nasty the discovery is becoming by reading the letters that counsel write to each other during discovery disputes, which, inevitably, they append to discovery motions to demonstrate to the court how "outrageously uncooperative" their opponent is being.

### IX. Discovery abuse and dismissal of action for such abuse

\_\_\_\_The provisions of Fed. R. Civ. P. 37(b) allow the court to fashion a number of remedies for abuse of discovery, including dismissing the action altogether or declaring a default judgment. Rule 37(b)(2)(A); *See, e.g., Degen v. United States*, 517 U.S. 820, 827 (1996); *Downs v. Westphal*, 78 F. 3d 1252, 1257 (7th Cir. 1996). Such orders are left to the discretion of the trial court. They may be appropriate, for example, if a party fails to report to a deposition without explanation, evades questions, refuses to answer questions which he claims are repetitive, refuses to identify persons whom he claims provided information upon which the suit is based, or claims vague and spurious privileges. Under these circumstances, the court may consider whether the party's adversary was prejudiced by the opponent's lack of cooperation in discovery, whether the party whose case was dismissed was warned that it would be dismissed, and whether less drastic sanctions were imposed or considered before dismissal was ordered. *See, Regional Refuse Systems, Inc. v. Inland Reclamation Company*, 842 F.2d 150 (6th Cir. 1988).

In the ACE context, one of the remedies for discovery abuse is that matters involving a violated discovery order or other facts be deemed to be established for the purposes of the action, Rule 37(b)(2)(A), *see, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). Another remedy may involve holding that certain previously unrevealed evidence not be admitted in the trial or used in motions, *see, e.g., Carroll v. Acme-Cleveland Corp.*, 955 F 2d 1107, 1115-16 (7th Cir. 1992); *Navarro de Cosme v. Hospital Pavia*, 922 F 2d 926, 932 (1st Cir. 1991).

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If your discovery has been successful, you will be able to file a summary judgment motion or at least a partial summary judgment motion for your party. In FCA actions, however, it often comes down to an interpretation of the *mens rea* or *scienter* of the defendant and that will take a fact-finder's determination.

## X. Conclusion

Discovery in ACE cases is challenging, laborious, and exciting. When done skillfully, vigorously, and tenaciously, it is very satisfying and rewarding. It can either embolden the defendant or pave the way to settlement, but it is rarely boring. ❖

## ABOUT THE AUTHOR

❑ **Richard Sponseller** has worked as a criminal prosecutor and civil attorney for more than nineteen years in state and federal courts. Since January 1995, he has worked as an Assistant United States Attorney, Senior Litigation Counsel, in the Civil Division of the United States Attorney's Office for the Eastern District of Virginia. He is responsible for investigating and litigating civil fraud cases for federal agencies and civil environmental enforcement cases for the Environmental Protection Agency. He is one of the AUSAs in the Eastern District of Virginia responsible for promoting the district's in-house continuing legal education ("CLE") program. ❖

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# Not Ready for Prime Time: Premature Complaints for Indemnity and Contribution

*Tom Reeve*  
*Assistant United States Attorney*  
*Southern District of California*

Receipt of a state court third party complaint against the United States for indemnity or contribution can suddenly immerse you into a state court personal injury action, where you have neither an agency investigation nor an administrative claim. When that happens, what should you do? Under certain circumstances (no final adjudication of underlying damages and the action against the federal defendant(s) is only for

contingent future indemnity or contribution), after removal you may be able to successfully bring a motion to dismiss, remand the remainder of the action to state court, and probably never see the case again.

A military family sued a private contractor in state court for asphyxiation injuries to the family from faulty heater ventilation repair in their military housing. The plaintiff family was supported by their military community, had all their medical needs either provided by, or paid for, by the United States, and never filed a claim

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or suit against the United States. The defendant contractor filed a state court cross-complaint against the United States for future indemnity and contribution. The entire matter was removed. The United States then filed a motion to dismiss the cross-complaint, arguing that the claims were not ripe and did not meet the case or controversy requirement of Article III, section 2, of the Constitution. The motion was granted. On the eve of remand, the defendant contractor's insurer settled with the family, and, although vigorously promised, there was never any further claim against the United States.

This article suggests a framework for analysis of indemnity and contribution cases and urges consideration of early challenges to premature claims. The article then suggests, in a briefing format, arguments you may use to challenge premature claims for indemnity and contribution. The use of Article III challenges may apply in many circumstances. However, this article focuses only on the Federal Tort Claims Act (FTCA) (28 U.S.C. §§ 1346(b), 2671-2680).

## **I. Background**

Although indemnity and contribution are usually spoken in one breath, they are separate jurisprudential doctrines with distinct origins and purposes.

### **A. Definitions**

For this article, the following definitions are offered.

*Contribution.* The fundamental concept of contribution is sharing the burden of a debt or loss. Contribution allows one defendant to force a concurrent or joint tort-feasor to bear a share of the common burden of liability by sharing damages. The single defendant with an adverse judgment may sue an alleged joint tort-feasor for contribution.

*Indemnity.* The fundamental concept of indemnity is to shift the entire burden of liability from one defendant to another party. Such a shift can occur if the third party is either contractually obligated to provide indemnity or, in some states, if the defendant was secondarily liable while the third party was primarily liable and equitable rules are applied. A typical contractual liability claim

arises either from a hold-harmless agreement or from an insurance contract.

The 1993 Torts Branch Monograph, *Indemnity and Contribution*, is an excellent source for a much more detailed discussion of these topics. The Monograph summarizes these concepts by stating, "[b]oth indemnity and contribution are efforts by a defendant to shift the financial burden of a settlement or of an actual or potential judgment on to a third person. . . . Indemnity seeks to shift the entire loss on to the third party, while contribution aims to share some percentage of loss with that person." *Id.* at 4.

### **B. Initial defense considerations**

Understanding the applicable substantive state law is essential. It is important to know whether such causes of action are recognized in your state. As set out in 28 U.S.C. § 1346(b), when there are claims against the United States for money damages, the United States is to be generally treated as a private person would be in accordance with the law of the place where the act or omission occurred. If such actions are recognized, what are the threshold requirements and have they been met?

You should also consider whether any exclusive-remedy doctrines are implicated. For example, Federal Employee's Compensation Act (FECA) payments to the injured party may bar the action. *See LaBarge v. County of Mariposa*, 798 F.2d 364, 366-67 (9th Cir. 1986) (Auto accident killed three secret service agents and their survivors sued the County. The County settled and sought contribution from the United States. The Court of Appeals held that a "private individual in like circumstances" would be immune to suit under the state's workers compensation law.); *Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888, 891-92 (3d Cir. 1988) (interpretation of federal and Pennsylvania law held to bar third party action). *See also* 135 A.L.R. Fed. 403, § 3a (1997) (federal compensation acts, in the nature of workers compensation acts, as affecting recovery against the United States under the Federal Torts Claim Act) (FTCA).

In an area with a large number of military personnel, consider the plaintiff's status, as the

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*Feres* doctrine can defeat the cross-claims. The case of *Feres v. United States*, 340 U.S. 135 (1950), held that military members injured incident to their service could not recover under the FTCA. The case of *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669-70 (1977), where an injured military pilot sued the ejection seat manufacturer and the manufacturer attempted to implead the United States for indemnity, addressed this issue. It held that the manufacturer's third party indemnity claim was barred by the rationale of *Feres* (the military pilot had been injured incident to service and could not sue the United States).

For a comprehensive listing and brief discussion of other potential federal defenses, FTCA jurisdictional exclusions, and federal exclusive-remedy statutes, please refer to the 2002, Torts Branch Monograph, *Compendium of FTCA Defenses*.

### **C. The FTCA waiver of sovereign immunity extends to these types of claims**

It is well settled that the FTCA waiver of sovereign immunity extends to include proper and ripe actions for contribution and indemnity. *United States v. Yellow Cab Co.*, 340 U.S. 543, 556 (1951) (Although the FTCA empowers a district court to hear a case for contribution against the United States, it does not *require* the district court to hear such cases.) As the Supreme Court stated: "If special circumstances had demonstrated the inadvisability, in the first instance, of impleading the United States as a third party defendant, the leave of court required by Rule 14 could have been denied." *Id.* at 556.

In the case of *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983) the Supreme Court confirmed that indemnity actions could be brought under the FTCA.

The Federal Tort Claims Act permits an indemnity action against the United States "in the same manner and to the same extent" that the action would lie against "a private individual under like circumstances." 28 U.S.C. § 2674; *see Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669-670 . . .

(1977) (*citing United States v. Yellow Cab Co.*, 340 U.S. 543 . . . (1951)).

### **D. Actions brought solely for contribution and indemnity (even if including A Prayer For Declaratory Relief), if standing alone and if made before judgment or settlement, can be dismissed**

Frequently, the United States is a proper defendant in a federal district court FTCA action when a codefendant brings a "protective" cross-complaint for indemnity and contribution (and may also pray for declaratory relief-apportionment of liability). Under these circumstances, as long as there remains an independent original jurisdictional basis which keeps the United States in the case, experience teaches that the interests of judicial economy and the possible existence of supplemental jurisdiction may cause the judge to allow premature cross-claims among codefendants. If the circumstances change or if you change the circumstances, then the premature actions for contribution and indemnity can be successfully attacked by a motion to dismiss.

If premature (before settlement or judgment) claims for indemnity and contribution are the *only* claims against the United States, then you should try to have the United States dismissed from the suit. Any of the following circumstances can produce the vulnerable "all alone" status for the premature third party claims for indemnity and contribution.

(1) The tort plaintiff has not sued the United States or one of its employees.

(2) The multi-party action that was removed has been severed, the underlying tort action (without a federal defendant) remanded, and the district court retained only the action based solely on the premature third party claims for indemnity and contribution against the United States.

(3) The plaintiff did sue the United States, but the United States settled with the plaintiff and the suit of plaintiff versus third party complainant remains unresolved (in these circumstances, there may also be an alternative defense to non-settling codefendants based on the "good faith" of the settlement).

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(4) The plaintiff did sue the United States, but that suit has been eliminated by motion, leaving only the third party action against the United States. Such circumstances can arise after removal of a state court suit against a federal defendant, where no pre-suit administrative claim was filed. 28 U.S.C. § 2679(d)(5).

If the case is within the ambit of supplemental jurisdiction (28 U.S.C. § 1367), that may make remand discretionary rather than mandatory, which may complicate creation of the circumstances to support a dismissal. Although a full discussion of Section 1367 is beyond the scope of this article, it is noted that the section is limited to just those "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

The tactical challenge is to manage a case so that the third party's premature claims become the only ones pending against the United States and to do so before the hypothetical loss is realized and the indemnity and contribution claims accrue. But, before the "How?" let us consider the "Why?" and the risks.

#### **E. Why a dismissal without prejudice should be sought and the risks**

Why go to the trouble of fighting through a motion to dismiss, if the result is just a dismissal without prejudice, and the claims may come back later? The short answer is, because the claims do not usually come back. This is often a quick, efficient, and complete end to the case against the United States.

A losing defendant is not eager to start another lawsuit, and a losing defense attorney will not be eager to leave the familiar surroundings of state court for the unknown formalities and strictures of federal court. Additionally, starting a second lawsuit after settling or losing the first usually makes no economic sense for the potential third party complainant. In the unusual event of a large loss by an institutional defendant (insurer or municipality, with salaried trial counsel), with a favorable expectation of liability apportionment, the claims for indemnity or contribution may return.

If a previously dismissed case is later filed when ripe, the United States is not at a significant disadvantage. The plaintiff has already received a binding adverse finding of negligence. That binding finding is a strong incentive for any later action to be focused on achieving a mitigating settlement and not on actually retrying a previously lost case. Additionally, the United States will be free to do discovery, the issues will be more developed, deposition or trial transcripts will be available for review, and the indemnity or contribution seeker will face collateral estoppel on many important issues, while the United States is generally free to present a full defense.

There are two primary areas of risk to evaluate. First, in some states, if a potential indemnitor has notice of a proceeding and an opportunity to defend, but declines to participate in the case, certain trial determinations cannot be contested, such as the reasonableness of the verdict and the liability of the party seeking indemnity. These issues usually arise in the context of a "bad faith" or assignment lawsuit against an insurance company (which has previously denied a defense and then denied indemnity). Additionally, some states permit claims for defense attorneys' fees and expenses as part of indemnity actions.

If the refiled case is essentially a contractual indemnity case, you may not have a proper FTCA action. Counsel should consider seeking dismissal of the case for lack of jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), or transferring the case to the Court of Federal Claims, pursuant to 28 U.S.C. § 1631. *Saunders v. South Carolina Public Service Authority*, 856 F. Supp. 1066, 1075 (D.S.C. 1994) (the court held that contractual indemnity claims against United States were within the exclusive jurisdiction of the Court of Federal Claims, since they exceeded \$10,000).

The second area of risk arises simply because the case will be older. Litigation of older cases has many familiar difficulties that arise due to the passage of time. As time passes, memories fade and witnesses may move or disappear. The benefits of early termination and improbable return generally and generously outweigh the

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slight disadvantages of the rare return of an older case.

If after weighing the unique circumstances of your case, you decide to seek dismissal of the claims for indemnity and contribution as premature, you may wish to supplement the following arguments with additional citations to local cases.

## **II. Sample arguments in the sequence they might be presented in a motion to dismiss**

### **A. Introduction**

This motion to dismiss is brought pursuant to Fed. R. Civ. P. 12(h)(3), which states, in part: "[w]henver it appears by suggestion of the parties . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

The Cross-complainant is attempting to bring a hypothetical and premature indemnification and contribution action against the Cross-defendant. The Cross-defendant respectfully suggests that pursuant to Article III, section 2, of the Constitution, this Court lacks jurisdiction over the subject matter of this premature indemnity and contribution action.

(Insert a factual summary that supports the motion to dismiss. This case was originally brought in state court by plaintiff Doe against defendant Roe. Defendant Roe then filed a third party complaint against the United States for indemnity and contribution. The United States removed the case to this Court. Plaintiff Doe has never sued the United States. The matter between Doe and Roe remains unresolved - neither settlement nor judgment has been achieved. The eventual existence or non-existence of Roe's indemnity and contribution claims is totally dependant upon the occurrence or non-occurrence of future contingencies - the loss of the lawsuit by Roe and the manner of the loss.)

These claims do not reach, let alone cross the case or controversy threshold, and must be dismissed because they are hypothetical and depend upon the happening of a future contingency to become ripe for adjudication. It is not that Cross-complainant can never bring these claims against the United States. Once there has been a settlement or a judgment, and after

compliance with the Federal Tort Claims Act (FTCA) (28 U.S.C. §§ 1346(b), 2671-2680) procedures, then Cross-complainant may well be able to sue. However, at this time the unripeness of Cross-complainant's claims prevents this Court from having subject matter jurisdiction. These claims and the United States must be dismissed from this lawsuit.

### **B. Cross-complainant has the burden to prove there is jurisdiction for its premature indemnity and contribution claims to be heard**

District courts are courts of limited jurisdiction. Although the Cross-defendant is the moving party, the Cross-complainant, as the party invoking federal jurisdiction, has the burden of showing that jurisdiction is proper. As stated by the unanimous Supreme Court in *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), it is to be presumed that a cause lies outside a federal court's limited jurisdiction, and the burden of establishing jurisdiction rests on the party asserting jurisdiction.

Because the premature indemnity and contribution claims do not satisfy the "case or controversy" requirements of Article III, section 2 of the Constitution, the Cross-complainant cannot meet the burden of proving there is subject matter jurisdiction for this Court to hear the claims.

### **C. Cross-complainant's indemnity and contribution causes of action have not accrued**

Until a cause of action has "accrued," there is generally no basis for subject matter jurisdiction in a district court. The determination of "accrual" of a cause of action under the FTCA is a matter of federal, rather than state law. *United States v. Kubrick*, 444 U.S. 111 (1979). Federal case law holds that claims for indemnity or contribution do not accrue until the date on which a judgment is entered or a settlement is reached. As stated in the case of *United Services Auto. Ass'n ("USAA") v. United States*, 105 F.3d 185, 188 (4th Cir. 1997), "indemnity means compensation for loss already sustained."

There has been no settlement, nor any judgment adverse to Cross-complaint for which it can be indemnified. An indemnity or contribution claim does not accrue until the party claiming

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contribution or indemnity has made a payment. *General Electric Co. v. United States*, 792 F.2d 107, 109-10 (8th Cir. 1986) (Tort-feasor that was found partially liable filed an FTCA administrative claim with the Government more than two years after the tort-feasor paid the judgment. Held: the contribution claim accrued on the date the judgment was paid.). See 3 James Wm. Moore, *Moore's, Federal Practice* §14.29, pp. 14-75 (3d ed. 1997) (as a general rule, the statute of limitations will not start to run on a claim for indemnification until judgment has been entered against the defendant, or until the defendant has paid the judgment and, thus, suffered the loss it seeks to shift to the third party). Cross-complainant's claims have not accrued.

**D. As a matter of law, there is no subject matter jurisdiction for this premature suit against the United States, as there is neither a current case nor a current controversy regarding indemnity or contribution**

The possible damages exposure of the United States in this case is unknown and presently unknowable. The Cross-complainant has no idea of the scope of its demands, if any. Indeed, if the United States offered to settle the case today, the Cross-complainant would not know what sum to demand. The United States does not know, nor can it learn the level of effort or resources appropriate to expend in the defense or settlement of this action. Is this a \$1.00 case, a \$1,000,000 case, or no case at all? At this point, it is all speculation and hypothetical guessing -- no one knows! The United States should not be forced to expend its limited resources on speculation about hypothetical questions that may never materialize.

There is not yet any Constitutionally sufficient, actual controversy in this case. The absence of such actual controversy, or "ripeness," prevents the existence of necessary subject matter jurisdiction. The Supreme Court has held that the Constitution limits federal courts to jurisdiction *only* over actual cases and controversies. For a case to present an actual immediate controversy, it must be "ripe." *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 580-81 (1985) (Manufacturer could bring an action challenging federal regulations, as the claims did not depend upon the outcome of "contingent

future events that may not occur as anticipated, or indeed may not occur at all.").

To distinguish an abstract question from an actual controversy, a court must decide "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality . . ." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272-73 (1941) (citing to Article III, section 2, of the Constitution, the court held that an action by an insurer to defeat a contractual indemnity obligation, was ripe, as there was substantial controversy with sufficient immediacy and reality. See also *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (founder of corporation sued corporation and, in part, Court ruled that one count was not ripe for consideration). In *Clinton*, the Court stated:

The "basic rationale" of Article III ripeness doctrine "is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 . . . (1967). . . . [A] federal court normally ought not resolve issues "involv[ing] 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 . . . (1985) (*quoting* 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532 (1984)). In the absence of an immediate and certain injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." See *Warth v. Seldin*, 422 U.S. 490, 499 n.10 . . . (1975).

The possible future existence of any basis for claims for indemnity or contribution in the instant case wholly depends on *a future contingency that may not occur*. Cross-complainant seeks relief from a potential judgment or settlement that may never happen. At this point, the potential dispute in the instant case "has not 'matured sufficiently to warrant judicial intervention.'"

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Under the standard of *Maryland Casualty*, 312 U.S. at 273, the instant case does not constitute an "actual controversy" because it lacks immediacy and reality. Until it is determined that Cross-complainant is liable and to what extent, any decision by this Court ordering indemnity by the United States would be inappropriately "highly speculative and theoretical." *Bellefonte Reinsurance Co. v. Aetna Cas. and Sur. Co.*, 590 F. Supp. 187, 190 (S.D.N.Y. 1984) (In a declaratory relief action by an insurer, the court stated that "[f]ederal courts are precluded by Article III from rendering advisory opinions. Rather, for adjudication of issues in federal court, 'concrete legal issues, presented in actual cases, not abstractions are requisite.'" *The Bellefonte* court, at 191, summarized the law and further stated: "In short, a controversy is justiciable under the [Declaratory Judgment] Act only if it presents the plaintiff with a present danger or dilemma, and not a danger or dilemma which is contingent upon the happening of certain future or hypothetical events."

The controversy in the instant case is not present, real, and definite because neither judgment nor settlement adverse to Cross-complainant has occurred, and such may never occur.

**E. Fed. R. Civ. P. 14 and 28 U.S.C. 2675(a) do not provide subject matter jurisdiction in this case**

Cross-complainant may assert that Fed. R. Civ. P. 14 combined with 28 U.S.C. § 2675(a) provides jurisdiction for the Court to hear the premature indemnity and contribution claims. Such an assertion would be mistaken. Rule 14 provides that after commencement of the suit, a defendant may sue a third-party who is, or may be, liable to the defendant for all or part of the plaintiff's claim against the defendant. Rule 14 sets out procedural guidance for potential third party claims. The Cross-defendant is not urging a lack of Federal Rules compliance. Rather, the Cross-defendant is urging a lack of jurisdiction. The Federal Rules do not create federal jurisdiction. Indeed, the noncreation of jurisdiction is specifically set forth at Fed. R. Civ. P. 82, which states, "[t]hese rules shall not be construed to

extend . . . the jurisdiction of the United States district courts." *See also* 28 U.S.C. § 2072(b).

Section 2675(a), under certain circumstances, waives the normal requirement of submission of an administrative claim, when it states that the "provisions of this subsection shall not apply to such claims as may be asserted under Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter-claim." However, this limited waiver of the otherwise mandatory administrative claim submission procedure was not a grant of general jurisdiction to the United States district courts. Although the administrative claim requirement is waived by Section 2675(a), the requirement for a case or controversy found in Article III, section 2, of the Constitution is still applicable. Section 2 states, in part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to controversies to which the United States shall be a party . . . ." As discussed above, the Constitutional requirement for a case or controversy has been recognized, refined, and sustained by federal case law. The limited jurisdiction of federal district courts requires that for any case to be heard that case must have a substantial controversy with immediacy and reality and the controversy must not be dependant upon a future contingency. *See Maryland Casualty*, 312 U.S. at 273; *Thomas*, 473 U.S. at 580-81; *Clinton*, 94 F.3d at 572.

The United States is in this case and this case is in federal district court *only* because of the premature claims. Section 2675(a), even when combined with Fed. R. Civ. P. 14, does not nullify Article III of the Constitution, does not supersede the holdings in cases such as *Maryland Casualty*, 312 U.S. at 273 and *Clinton*, 94 F.3d at 572, and does not remove the existing predicate contingency which is fatal to the instant case.

**F. There is no subject matter jurisdiction provided by the allegations seeking declaratory relief**

Cross-complainant may assert that the request for declaratory relief provides a basis for jurisdiction. Such an assertion would be incorrect. The Declaratory Judgment Act, 28 U.S.C. § 2201-02, does not provide independent

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subject matter jurisdiction. Nor does the Act provide an alternative to the FTCA for recovery of money damages based on tort. The FTCA is the *exclusive* process for recovery of tort-based money damages from the United States. As stated in 28 U.S.C. § 2679(b), in part: "The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death . . . is exclusive of any other civil action or proceeding for money damages . . . ."

The Declaratory Judgment Act relies upon the prior existence of a separate jurisdictional basis in any case where its remedy is sought. As stated in the very first sentence of the Act: "In a case of actual controversy within its jurisdiction . . . [a] court of the United States . . . may declare the rights and legal relations of any interested party . . . ." It has long been recognized that the Declaratory Judgment Act does not confer jurisdiction where none previously existed. *United States v. King*, 395 U.S. 1, 4-5 (1969) (A longevity retired Army officer sought, through the Court of Claims, a declaration that he should have been retired for disability, not longevity. The Supreme Court held the Declaratory Judgment Act was not a grant of jurisdiction from Congress.). See also *Government Employees Insurance Co. v. Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998). In *Dizol*, a suit between the underinsured motorist insurer and the insured, the Court of Appeals, in discussing ripeness and the federal Declaratory Judgment Act, stated:

A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2, of the United States Constitution. *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239-40 . . . (1937). [FN 2] It must also fulfill statutory jurisdictional prerequisites. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 . . . (1950).

In the case of *Bellefonte*, 590 F. Supp. 190-91, an action by an insurer seeking, among other things, declaratory relief, the court confirmed the limitations of a federal district court to hear only, "concrete legal issues, presented in actual cases, not abstractions. . . ." The court further stated:

"This is as true of declaratory judgments as any other field. *Golden v. Zwickler*, *supra*, 394 U.S. at 108 . . . quoting *United Pub. Workers of Am. v. Mitchell*, *supra*, 330 U.S. at 89. . . ."

**G. Conclusion: the premature indemnity and contribution claims against the United States must be dismissed and the action against the United States must be dismissed, without prejudice**

Cross-complainant's attempt to engage in premature litigation must fail because the limited jurisdiction of federal courts does not allow for hypothetical litigation. In the case of *Johns-Manville Sales Corp. v. United States of America*, 690 F.2d 721, 722 (9th Cir. 1982), an asbestos manufacturer brought an action for "indemnification under the Federal Tort Claims Act . . . for any judgments that might eventually become final against it, in certain state court actions. . . ." On appeal, the Court of Appeals affirmed the district court's dismissal of the premature action:

We affirm the district court's dismissal of all claims of the complaint for lack of subject matter jurisdiction. We do not hold that Johns-Manville can never recover anything; we express no views as to that. Whatever right Johns-Manville may have against the United States, we hold: not yet.

The need for ripeness derives from Article III of the Constitution and acts to prevent federal courts from adjudicating cases that have been brought prematurely. A case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur. The existence of the dispute in the instant case, like the premature claim ordered dismissed in *Clinton*, 94 F.3d at 572, wholly depends on the existence of a future contingency that may never occur. At this point, neither judgment nor settlement exists upon which to base any indemnity or contribution claim.

For the reasons set forth above, there is no current case nor current controversy and Cross-complainant's premature claims and action cannot survive. The premature indemnity and contribution claims against the United States and

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the action against the United States must be dismissed, without prejudice. (The balance of the matter should be remanded to state court.)❖

*The views expressed in this article are solely those of the author and do not necessarily reflect the views of the Department of Justice.*

#### ABOUT THE AUTHOR

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# The Soldiers' and Sailors' Civil Relief Act – Legal Protections for Those Who Go in Harm's Way

*Lt. Col. Gregory M. Huckabee  
Judge Advocate General Corps  
United States Army*

The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief. Much more numerous are cases where, between the soldier and his creditor, there is an honest difference of opinion as to the proper division of the burden, which the war brings to all in a greater or lesser degree. The letters which have come to the committee...show that this is a real menace and can not be left to care for itself. The need for this protection is urgent. It is immediate.... These men should know what is to be done for them. It needs no argument that freedom from harassing debts will make them better and more effective, more eager soldiers than if their loyalty and zeal is tempered with the knowledge that their country, which demands the supreme sacrifice from them, grudges a small measure of protection to their families and homes.

HOUSE COMM. ON THE JUDICIARY,  
SOLDIERS' AND SAILORS' CIVIL RELIEF  
BILL, H.R. REP. No. 181, 65th Cong., 1st Sess. 3  
(1917).

A number of American myths pass from one generation of our countrymen to another without demise. A popular one, with an endless lifespan, is the existence of "a free lunch." Another is that only members of the armed forces endure the hardship and consequences of war.

#### I. Introduction

Congress came to the same conclusion in 1918 when it enacted the Soldiers' and Sailors' Civil Relief Act (SSCRA). 50 U.S.C.A. app. §501(2001). In World War I, the celebrated legal author who penned "Wigmore on Evidence," Major John Wigmore of Northwestern University School of Law, found himself activated and appointed a major in the United States Army

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Judge Advocate General's Corps. He was directed to draft a bill for Congress that would provide a comprehensive set of civil protections for service members in World War I. *Soldiers' and Sailors' Civil Relief Bill: Hearings and Memoranda Before the House Subcomm. on the Judiciary, 65th Cong. 9 (1917)*. As war appeared on the horizon again in 1940, Congress re-enacted the SSCRA almost verbatim. *Soldiers' and Sailors' Civil Relief Act: Hearings on H.R. 9029 Before the House Committee on Military Affairs, 77th Cong. 11 (1942)*. It remains in force with a number of amendments.

The SSCRA is silent with respect to its enforcement. This is where the Department of Justice (DOJ) comes in. In page 2 of a memorandum to United States Attorneys, dated March 11, 1991, the Assistant Attorney General, Civil Division, Stuart Gerson, addressing DOJ representation of military personnel, wrote: "The Act does not provide for such representation. . . . Title 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Civil Relief Act benefits would warrant such representation." More on this later.

While not intended to be comprehensive, this article provides an overview, with references for more research, addressing the SSCRA provisions used most frequently by mobilized Reserve Component (RC) personnel. Reserve Component includes members of the United States Army Reserve and the Army National Guard.

What is the purpose of the SSCRA? The purpose of the Act is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. As the Supreme Court of the United States noted, the SSCRA should be read "with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). This seminal SSCRA case stands for the proposition that where application of a SSCRA protection is ambiguous, the military member receives the benefit of the doubt.

To whom does the SSCRA apply? Any person in military service, which includes any person on

active federal duty (Title 10) with any branch of service and any member of a Reserve Component ordered to report for military service, is entitled to SSCRA relief and protections. 50 USC app. §516. Unfortunately, the SSCRA does not apply to those in the National Guard, unless they are serving on federal active duty. State active duty does not qualify. Opinion Memorandum, Office of the Judge Advocate General - AL 1991/1884 (June 21, 1991). Nevertheless, the Veterans' Affairs Committees of the United States Senate and United States House of Representatives will hold hearings this spring on whether SSCRA protections should be made applicable to Guardsmen called to state active duty (Title 32) to perform such important duties as airport and nuclear-facility security. Be alert for this development.

When do SSCRA protections apply and for how long? For active duty military personnel, the date of entry onto active duty triggers SSCRA coverage. For inductees, it is the date military orders, ordering the person to report to a specific location, are received. For Reserve Component members, the date begins upon receipt of orders calling them to active duty. Some SSCRA coverage expires upon discharge or release from active duty. Other protections, however, extend for a limited time beyond discharge or release from active duty. 50 USC app. §516. Each protection should be examined to determine if it has extended coverage beyond release from active duty because many provisions were added over time to the Act and contain variations.

Who enforces the SSCRA? During Operation DESERT STORM, the Department of Justice (DOJ) volunteered to enforce the SSCRA for military members under 28 U.S.C. §517. This provision authorizes the Department to represent individuals when such representation is in the interests of the United States. In a letter to all United States Attorneys, the Assistant Attorney General, Civil Division, observed, "The Department of Justice views the protection of the benefits of the Act as a very serious matter particularly in this time of reliance on our reserve forces." Memorandum from the Assistant Attorney General, Civil Division, to all United States Attorneys 2 (March 11, 1991) (on

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file with Dep't of Justice). DOJ has zealously represented numerous military members with successful results. Separate from DOJ's SSCRA enforcement, federal district courts are now recognizing a private cause of action that may be brought against SSCRA violators by injured military members. *See Moll v. Ford Consumer Finance Co., Inc.*, No. 97-C-5044, 1998 WL 142411 (N.D. Ill. March 23, 1998); *Cathey v. First Republic Bank*, No. 00-2001-M (W.D. La August 14, 2001).

## II. Litigation

Reservists are involved in as much litigation as their nonmilitary counterparts, especially in domestic relations cases. Litigators representing military personnel, or parties involved in actions with service members, need to consider three important civil protections. The first involves suspension of statutes of limitations. This protection suspends state and federal statutes of limitations with respect to civil and administrative proceedings during the period of a military member's service. 50 USC app. §525 (applying the statute to all Statutes of Limitations except internal revenue laws, *see* §527.) This is an automatic protection that requires no showing that the military member's duty impacts the ability to prosecute or defend the action within a specific period.

A second civil protection addresses stays of proceedings. Under this provision, military members, who are either plaintiffs or defendants, may request a stay because their military service materially affects their ability to prosecute or defend the action. 50 USC app. §521. The stay request may be made at any stage in the proceedings. The stay is not automatic. The burden is on the military member to provide sufficient information to enable a judge to make an informed decision that military duty prevents the member's appearance. A stay and its duration are discretionary on the judge's part. *See Boone v. Lightner*, 319 U.S. 561 (1943). A request for a stay by either the military member or his attorney may constitute an appearance, preventing reopening a default judgment at a later time if the stay is denied, and the member does not appear.

If a stay request is made, a military member's commanding officer should make it and include a copy of the member's orders. The stay request should include a date that the member will be available. Open-ended requests such as "when the national emergency is over or when demobilized" have proven inadequate, resulting in stay denials. Trial courts want continuances to specific dates. Indefinite ones are unpopular. Additional stay requests due to prolonged deployments, if accompanied by military orders verifying the military member's assignment and duty theater, are always possible.

A third protection permits reopening a default judgment in cases where the military member has not appeared. 50 USC app. §520. Section 520(1) requires that the plaintiff file an affidavit stating facts that show whether the defendant is in military service before judgment in any court may be taken. Failing to do so renders the judgment voidable if the judgment is entered during the military member's term of service, or within thirty days after termination of service. Besides having failed to appear, a military member must also have a meritorious defense to all or part of the original action in order to reopen a default judgment. Otherwise, reopening the default action would be pointless.

As discussed above, a letter from a military member or even a legal assistance attorney may constitute an appearance, thus depriving the member of this protection. *See Skates v. Stockton*, 683 P.2d 304 (Ariz. Ct. App. 1984). In litigation involving an absent reservist defendant, the defendant's attorney will have to weigh the advantages and disadvantages of requesting a stay versus the opportunity to reopen a default judgment. The facts of each case will present different considerations.

## III. Loan interest reduction

While armed services personnel are now compensated better than in previous decades, many reservists suffer income loss upon call to active duty. Also, expenses may increase for reservists' and their families because they now duplicate food and personal-maintenance costs. In 1940, Congress sought to ameliorate the loss of income when it recognized that the SSCRA does

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not contain a provision preventing an accumulation of excess interest on military members' indebtedness.

Concerned about prevailing interest rates during the Depression era, Congress provided relief in 1942. Section 526 provides that the rate of interest on indebtedness incurred by military members prior to active duty shall not exceed six percent per year during their period of service. 50 USC app. §526. This interest cap does not apply to any new indebtedness incurred while on active duty. Under this protection, a creditor is required to reduce the interest rate to six percent unless the creditor makes application to a court. This application must seek a judgment, finding that the ability of the military member to pay interest upon their obligation or liability, at a rate in excess of six percent per year, is not materially affected by reason of such service.

The section is silent on the necessity for a military member to make application for the interest rate reduction to the creditor, but obviously it can only be implemented if the creditor has notice of the military member's call to active duty and request for interest rate reduction. The armed services routinely provide such SSCRA interest rate reduction letters during inprocessing of reservists, advising them to include a copy of their military orders indicating the start and end date of military service and the statutory authority under which they have been called. If the creditor believes the member's military duty does not materially affect their ability to pay the higher contracted rate, their only recourse is to seek a court judgment reflecting this. Absent this recourse, the creditor is required to apply the reduced rate. The interest above six percent may not be accumulated like a balloon note but rather, must be forgiven. 88 CONG. REC. H 5366 (1942). *See also* Congressional Research Memorandum, "The Interest Rate Cap of the Soldiers and Sailors Civil Relief Act of 1940 (Aug. 27, 1990).

#### **IV. Automobile leases**

Automobile leases are a common feature in today's consumer economy. Deployments present reservists with a serious financial obligation but frequently no ability to use their auto. If there is an option-to-purchase clause in the lease agreement, the SSCRA's installment contracts civil protection may apply. 50 USC app. §531. While the SSCRA does not terminate automobile leases, it prohibits self-help repossession of items purchased on an installment contract, and provides criminal penalties for violation of this section. This leaves the lessor only the recourse of judicial action—to repossess upon obtaining a judgment on the debt. However, a military member may request a stay of a judicial repossession action by showing material affect of military service. 50 USC app. §532. As a practical matter, armed with these civil protections, an attorney representing the reservist can suggest a settlement of the matter by allowing the member to surrender the vehicle in return for the creditor waiving all early lease termination penalties.

#### **V. Eviction**

This section protects military members and their families from eviction, without a court order, for nonpayment of rent, regardless of rental agreement provisions or state landlord-tenant law to the contrary. It provides criminal sanctions for those who knowingly take part in the eviction or attempted eviction of a military member or his family. The only requirement, for the protection to apply, is that the monthly rent must not exceed \$1200. 50 USC app. §530. With the rapid transition from citizen to soldier and the impact on family finances, including termination of civilian employment salary and delay in receipt of military pay, reservists frequently face immediate cash flow shortages. Congress injected statutory delay and judicial process into the landlord tenant relationship of military members to prevent distraction of the reservists' attention from duty to family welfare concerns back home.

#### **VI. Professional liability insurance**

As a result of mobilizing many reserve healthcare professionals during Operation DESERT STORM, Congress created new civil protections in the area of professional liability

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insurance. 50 USC app. §592. The new amendment authorized the Secretary of Defense to designate other professionals for coverage under this provision. He specifically designated lawyers as entitled to this protection in 1999. Secretary of Defense Memorandum, May 3, 1999 (unpublished).

This protection allows for suspension of a professional liability policy while on active duty, a refund of premiums attributable to active duty time, and guarantees reinstatement of insurance upon termination of active duty. It also stays any civil or administrative action for damages on the basis of alleged professional negligence or other professional liability when coverage has been suspended while on active duty. Another amendment requires reinstatement of health-insurance coverage upon release from active service. 50 USC app. §593. These sections allow health and legal professionals to concentrate on the important military work facing them, relieving them of preoccupation with legal actions back home.

### **VII. Powers of attorney**

A number of immutable rules exist in warfare. One rule is that some soldiers will become prisoners of war or missing in action. While standard procedure for reservists during in-processing and preparation for overseas movement is to execute powers of attorney (POA) with expiration dates, the SSCRA converts or extends them into a durable POA when the member is in a missing status. 50 USC app. §591. The POA remains in effect, extending indefinitely the termination date for the period the member remains in a missing status. This can, in some cases, be for a number of years. Hence, a military member must be exceptionally careful when appointing a representative in the POA. All reservists are briefed on the legal characteristics, liabilities, and powers of a special, versus a general, power of attorney during their legal assistance briefings required under the SSCRA.

### **VIII. Further relief**

Congress could not possibly foresee all the legal problems a military member might face, thus it created a general relief protection. This authorizes a military member at any time during

military service, or within six months thereafter, to apply to a court for relief from any obligation or liability incurred by the member before active duty, or in respect to any tax or assessment whether falling due before or during active military service. This provision empowered the court to grant stays of enforcement during which no fine or penalty shall accrue, if military service materially affected the member's ability to comply with the obligation or pay the tax or assessment. 50 USC app. §590. Family members also receive this protection. *See Morris Plan Indus. Bank of N.Y. v. Petluck*, 60 N.Y.S.2d 162 (Sup. Ct. 1946). In a sense, Congress created a court of equity to protect the legal vulnerability of military members and their families when they are least able to represent their interests, while at the same time preserving a creditor's legitimate property rights.

### **IX. Conclusion**

This brief SSCRA synopsis is by no means intended to be exhaustive. On the contrary, attorneys representing reservists are encouraged to visit United States Army Judge Advocate General's Corps web site at [www.jagcnet@army.mil](mailto:www.jagcnet@army.mil) and also the Department of Defense Reserve Affairs web site at <http://www.defenselink.mil/ra/family/toolkit/>.

We conclude where we began. The society, which reservists and active duty members represent, bears the responsibility and cost for sending them off to war. The SSCRA embodies that responsibility and seeks to equitably apportion the economic burden of a nation at war. It is not only those wearing uniforms that must endure the hardship of war. Major (Professor) John Wigmore stated the military members's case well, observing "You drop everything you have; drop all your relations and all your business affairs, and all the property you have, and we will take you, and maybe your life." We say to him, "Leave your family; leave your affairs, and sacrifice a great deal actually and sacrifice everything potentially." House Comm. on the Judiciary Soldiers' and Sailors' Civil Relief Bill, H.R. Rep. No. 181, 65th Cong., 1st Sess. 9 (1917).

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Since 1918, America's response to this sacrifice and need for legal consideration is the SSCRA. Armed with these civil protections, lawyers within the Department of Justice have given much of themselves to protect, and zealously represent, those who must go in harm's way. The most common aid is in response to a telephone call from a service member's attorney requesting informal assistance. The call usually involves a request for help in contacting a credit institution or its legal counsel to explain SSCRA interpretation and application to a respective service member and/or his family. This informal contact by an AUSA, for example, usually resolves the difficulty.

Infrequently, recalcitrant third parties failing to respond cooperatively, may require formal representation by DOJ. In those rare instances, after unsuccessful use of the informal approach, a military legal assistance attorney must send a formal request for DOJ representation to their respective Office of The Judge Advocate General,

Legal Assistance Division. This office will confirm the facts and forward a Department request to DOJ for formal representation. The DOJ representation committee will make a final determination and forward such cases to local United States Attorneys as appropriate. We, the armed forces of our nation, are grateful for your assistance. Your service makes a difference to us. ❖

#### **ABOUT THE AUTHOR**

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