Managing the Case of a Lifetime: How to Survive and Prosper Without Imperiling Your Sanity, Personal and Client Relationships, and the Self-Insured Retention on Your E&O Policy[†]

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I.
Introduction

If it has not already occurred, at some time in the future you may suddenly receive the "case of a lifetime." Both a blessing and a curse, the case will be both profitable and all consuming of both your time and your firm's resources. If left uncontrolled and unmanaged, this "blessing" can ruin your sanity, your relationships with your family, co-workers, and other clients. The case, and the resulting stress, can swallow your practice and leave you at risk of being accused of malpractice not only in that case, but in your other cases as well.

Fortunately, you can control and manage this case, and you can thrive. In this article, we hope to offer you some help in doing so. We first provide factors to help you determine whether a case really is the "case of a lifetime." We then offer guidance on managing both your overall practice and the case itself. Finally, we consider the case of a lifetime from an insurer's perspective, including advice on using defensive discovery practices that may be necessary if an insured initiates a bad faith claim as a result of the insurer's handling of the case.

[†] Submitted by the authors on behalf of the Property Insurance and Extra-Contractual Liability sections.

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II.
The Case of a Lifetime

What is the case of a lifetime? It is any case that is significantly larger and more complex than the cases you customarily handle. In most instances, it will have many of the following characteristics:

- The case will require significantly more staffing than the "one partner, one associate, one paralegal" norm enshrined in many insurers' billing guidelines.
- The case will be highly visible to the client, and you or the person to whom you report are likely to be working with relatively high-level executives.
- There may be multiple lawsuits in multiple jurisdictions.
- The discovery and electronic discovery issues in the case are not present in your "run of the mill" cases.

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- The plaintiff(s) will have the time, resources, and motivation to litigate far more aggressively than the typical plaintiff.
- How the case is defended and resolved will have a collateral impact on other matters that you may be handling.
- Some or all of the litigation will be outside your local area.
- You and your team may need to learn and adapt to technology tools that you do not use on a daily basis.
- You may be working with a second firm that also represents your client.
- Speed is of the essence.

How can the case of a lifetime turn into a problem? The answer lies in how the business of law is currently practiced. More than ever, the business of law is a relationship-driven enterprise where clients hire lawyers, not firms. Thus, suddenly focusing much of your atten-

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tion to a single matter for an extended period of time imperils your relationships with your other clients, who have faithfully supported you in the past. Long hours can cost as much in relationship deterioration as they add to the bottom line. Handling cases out of town for extended periods of time is difficult. The problem is not that all Marriotts look alike inside; it is that none of them look like your home or your office. With such extensive time devoted to a single case, it becomes easy to lose track of your other cases. Not surprisingly, neglect is a major cause of malpractice suits. Accordingly, if you are ill-prepared to handle the case of a lifetime, you may face difficulties in that case and in your practice as a whole.

III.
Managing Your Practice When Confronted with the Case of a Lifetime

Luckily, successfully tackling the case of a lifetime need not come at the expense of the rest of your practice and potential exposure to malpractice suits. What follows are several

steps and considerations to ensure that your practice is adequately prepared to handle the case and that your practice will continue to thrive once the case is concluded.

A. *Assessment*

As with any case, quick assessment is necessary. Equally important, however, is a measured response. Before devoting significant resources to pursuing the case, determine what the issues and priorities are. Keep in mind that what seems important at the beginning of a case can be less important at the end. A prompt assessment from a practice management perspective covering these topics is essential, whether or not litigation is already pending:

- What issues and activities are most likely to consume significant resources in the next thirty, sixty, and ninety days, and six months from now?
- What type of time commitments will be needed by various categories of time keepers?
- What organizational work, if done now, will save significant time and money in six to twelve months?
- Do you need local counsel? What characteristics do you need in that attorney and firm? What role does the client need local counsel to play?
- Does your firm have the technical infrastructure needed for an effective defense? If not, can you outsource it? Will your system work with local counsel, if local counsel is hired?
- How much will the litigation cost the client?

The answers to these questions will dictate both your short and long-term staffing needs and also how you organize the case.

B. *Local Counsel*

Whether or not you are licensed in the jurisdiction where the case is pending, if the case is outside your immediate area, you should seriously consider retaining local counsel. Before you retain local counsel, decide what role local counsel will play. There are several common alternatives: (1) The Mailbox: Local counsel does nothing but act as a conduit for service and court filings; (2) The Public Face: Local counsel is well known in the community and will serve as the client's public face in court and in the local press; (3) The Counselor: Local counsel will not be lead trial counsel but will contribute advice regarding the defense of the case based on their knowledge of the local community and courts.

Hiring "mailbox counsel" is rarely a good idea. Unless you practice regularly in a jurisdiction, you are unlikely to know the unwritten rules and mores of a community and court system. You will need local counsel to provide you with that information.

Therefore, it is usually better to hire local counsel to act as a public face and/or counselor. Whoever you hire, make them a meaningful part of your litigation team. Local counsel

should be involved in strategic and tactical discussions. They should participate meaningfully in all aspects of the defense so that they have sufficient knowledge to offer meaningful advice. Finally, listen to local counsel. Even if they are not specialists in the particular area of the law, and even if they do not have the ear and confidence of your client's home office or general counsel, your local counsel should be first-class lawyers who will have ideas and insights different from yours.

Even if litigation is not yet pending, if you believe you will need local counsel, hire them quickly before your opponents do.

C. *Staffing*

The case of a lifetime needs paralegals, and it needs them early. Assign a paralegal to serve as the lead or coordinating paralegal, and let him or her serve as the principal, but non-exclusive, conduit of communications between you and the other paralegals who will eventually be recruited to join your team.

The lead or coordinating paralegal needs to know the case as well as you do, if not better. This person's primary role is organization. You must develop a document management protocol early for both substantive documents and pleadings and correspondence. You need a unified system that allows for quick and easy retrieval of relevant documents, correspondence, and pleadings by any member of the litigation team.

If you anticipate e-discovery issues (and you should), assign a paralegal and an attorney other than you to take the lead position on all e-discovery issues, both offensive and defensive. Hire an outside e-discovery consultant who can serve as your expert witness in e-discovery disputes early. Talk to your client before you hire this consultant because the client may have had past experience with various e-discovery companies. The e-discovery paralegal will play a crucial role if you do "offensive" e-discovery against your opponents because he or she should be the primary person searching the electronic data produced by other parties.

Assign another attorney to take the lead role in legal research and briefing. While this attorney may also have other roles, you and your client will benefit from consistency in this role. This person should also be your first choice for drafting pleadings.

Unless depositions start immediately, you do not need to assign attorneys to deposition coverage at the outset. Similarly, you are likely to need one or more paralegals for deposition preparation and document database work. Again, you can wait until you have sufficient information or documents before making those assignments. Wait and see how the case develops before you do so. You may be able to free resources by using Joint Defense Agreements that will give you greater flexibility in staffing depositions.

Finally, get one of your partners involved early, so that there is someone of comparable skill available to cover critical hearings, mediations, and depositions when you are unavailable. Not only does this arrangement benefit the client by having backup, but it is an important part of preserving your sanity.

If your firm does not have people with the appropriate levels of expertise to spare, give serious consideration to assigning certain of these roles to your local counsel. Doing so is

an excellent method of leveraging your resources and skills, and it helps ensure that local counsel is able to provide meaningful assistance.

D. *Client Management*

1. Develop a Common Strategy and Set of Expectations

In many instances you will be fortunate to be working with employees of your client who have the experience and authority to deal with problems of the magnitude that the case of a lifetime presents. But, now and again, that will not be the case, and it is important to understand and manage client expectations at the outset.

First, whether or not the client requires a written budget in a particular format, prepare one for your own use. Then, with appropriate contingencies and qualifications, tell your client what the case is likely to cost in the next month, quarter, and year. Clients understand that budgets can change, so as the case enters new stages, like depositions, close of discovery, eve of trial, and so on, update that budget and communicate the changes to your client.

Second, educate the client regarding the degree to which defending the case will consume the client's internal resources. Will there be e-discovery requests? If so, not only do you need to manage the litigation-hold process, but you also need to identify who on the client's end will be responsible for complying with those requests. Similarly, educate the client early regarding the resources necessary to prepare the client's employees for depositions. Meet with the witnesses, in person if at all possible, at an early date so that you can discuss any special preparation needs (such as witnesses who need more extensive preparation than is customary). Make sure that the likely witnesses' immediate supervisors understand and agree to the time commitment that will be required of each witness. Find out if the witnesses have any special time constraints that will make them unavailable (pregnancies, night school classes, etc.). Find out from your contact whether any of the prospective witnesses are likely to be separated from employment, either by layoff or termination.

Third, find out early how the client defines "victory." Is the client's goal to settle the case, or is it prepared to go to trial even if the demand is not outrageous? While the client's views may change, the earlier you know what the client really wants, the better off you are.

Fourth, ask whether the client faces possible or actual collateral consequences related to the case. Are there cases in other jurisdictions that raise similar issues? Would an adverse result force a change in business practices elsewhere? Would discovery into certain issues expose institutional issues that the client would prefer to keep private? Are there reinsurance market consequences? Any of these collateral consequences, or others, can play a very important role in determining the best strategy as the case develops.

2. Avoid Well-Intentioned Interference

Everyone wants to be helpful, especially when a case like the case of a lifetime comes around. However, well-intentioned interference from your client's employees can create inadvertent consequences. While some may legitimately need to be involved in certain aspects of the business' operation that have some relation to the case, others simply are

unaware of the potential collateral consequences of their actions. It is important that you discuss with the client the need to designate someone (whether it is the person to whom you report or someone else) who is the hub or point person for internal communications relating to the case. Ideally, all communications from your client regarding the case will be filtered through this point person.

Well-intentioned collateral risks can come from many directions. For example, in an insurance company, what happens with a claim (or group of claims) can have an impact on the business activities of groups outside the claims department, including underwriters, people responsible for relationships with agents and brokers, people responsible for reinsurance, the IT Department, the internal training department, and regional administrative claims managers who do not have technical supervision responsibilities. All of these constituencies need to be informed that even the most seemingly innocuous internal communications and external actions can have a collateral impact on the lawsuit against the client. All these constituencies also need to understand that defending the case may require the use of resources from their areas of responsibility, which they will be required to provide when requested, even if it is inconvenient for their operations.

Regardless of their internal roles, the corporate employees outside the case management chain need to be politely advised that unnecessary involvement in the case increases the likelihood that they will become witnesses. This risk is particularly true in connection with internal communication. Both the client contact and the affected employees need to be reminded that in many instances, the fact that litigation is pending does not make internal communications non-discoverable.

You and your client should also discuss establishing some type of internal protocol that identifies the type of ordinary business decisions that can have an impact on the case (and are not so important to the client that the consequences to the case are a secondary consideration) and identifies the employees who may be faced with those decisions. If it is already likely that these employees will be witnesses, they need to be advised to take into consideration the fact that they are likely to be testifying in the future when they are making or receiving communications regarding decisions that may have an impact on the case.

E. *Technology*

It is difficult to handle the case of a lifetime in today's world without the assistance of technology. If you are not tech-savvy yourself, make sure that other members of your team are. If you do not have the technology infrastructure in house (and most firms do not), hire an outside consultant at the outset.

Technology makes it possible to have people in different places or different firms working together on the same case. It also can prove a lifesaver when depositions are progressing on multiple tracks, as they often do in large cases.

1. Types of Technology

Today, almost everyone uses e-mail and word processors, but not everyone uses litigation support software beyond the Microsoft Office suite. You should consider four types

of technology support when handling any large case: (1) litigation document software; (2) case organization software; (3) deposition testimony software; and (4) e-discovery tools.

a. Litigation Document Software

This category of software includes a variety of database programs that are used to organize and maintain documents. If your firm uses a document management program for its word processing and related documents (such as iManage, Interwoven FileSite, or PC Docs), that software is important, but it is not the solution.

Litigation document software includes both "pure" database programs, such as dbText, and litigation support programs, such as Summation (which can also handle deposition transcripts) or Concordance. These programs allow the electronic storage of evidentiary documents, and in most instances they have optical character recognition qualities that allow full-text searching.[1]

Storing documents in electronic form has several benefits: (1) It saves a substantial amount of storage space (the typical records company storage box holds 2,000 to 2,500 pages); (2) It allows for document review by people who are in different locations without incurring the cost of making full duplicate sets of documents (scanning costs about the same as an initial photocopied set); (3) With full text searching and proper coding, specific documents can be found rapidly; and (4) The documents can be made accessible to an attorney sitting in a deposition with a laptop computer without the need to physically carry all of them.

Electronic document storage does carry costs. Aside from the software costs and any media costs for storage (a recent matter with more than one million pages of documents and more than 150 video depositions occupied over 300 GB of storage space), the documents need to be "coded" with at least basic information such as author, recipient, date, type, description, and so on. Time and expense considerations permitting, they can also be coded with attorney notes, and tagged to issues and witnesses. Coding is typically done either by paralegals or dedicated "coders" who are less expensive than paralegals. Depending on the nature of the documents (handwritten documents slow the process), a good paralegal or coder can code twenty to twenty-five records per hour

In some cases, whether because there are multiple firms involved in the defense, or due to a Joint Defense Agreement, the document database should be hosted by an offsite provider and accessed via the Internet.

b. Deposition Testimony Software

Deposition testimony software is available in two types: software that allows for the annotation and searching of electronic transcripts, such as LiveNote or Summation, and

[1] This article does not review or endorse any of these programs. Rather, how they are used is what is important.

software for working with videotaped depositions, such as Sanction II or Trial Director. There are pros and cons to each product, and to some degree which is preferable depends on the end user's personal preferences.

In any mega-case (and for some of us, in any case) the attorney should obtain an electronic (ASCII, eTran, or Amicus) copy of each deposition transcript. Most larger reporting firms will also provide imaged copies of the exhibits that, in some software applications (such as LiveNote) can be linked to the electronic transcript. If you can obtain these copies in your case, it is worth doing. Again, by putting the transcripts on the laptop computers of the attorneys attending depositions, the amount of paper that needs to be carried can be reduced significantly, and relevant testimony can be quickly located.

In addition, if it is available, you should seriously consider using real-time reporting. When depositions are occurring on a daily basis, sometimes on multiple tracks, having real-time reporting allows you to share the depositions among team members. It also can be a lifesaver when there are fifteen to twenty lawyers in the room examining, and portions of the testimony have no bearing on the claims against your client. Finally, some court reporters are able to stream depositions over the Internet. While this service is expensive (LiveNote is the primary vendor), with video depositions, it is an effective way for an attorney to attend a deposition remotely when that deposition is not of critical importance to the client, thus saving travel time and expenses. The stream will include the transcript as well as the video and audio. To have an internet stream, you must have real-time reporting. In addition, in most court reporting agencies, the real-time reporters are among the best reporters the agency has, thus ensuring that you get better transcripts.

In a mega case (and for some of us, in most cases) depositions should also be videotaped. Video is the most effective way of presenting deposition testimony at trial, whether to impeach or to present the testimony of unavailable witnesses. The video recording should be purchased in a software compatible format (usually MPEG1), not in a traditional television DVD format. Software such as Sanction and Trial Director can then be used to present the testimony at trial.

c. Organizational Software

Software such as the CaseMap suite from Lexis (CaseMap, TimeMap, TextMap) can assist in organizing the factual aspects of the case. The software can be linked to particular documents, permitting easy reference. Its greatest value may be for paralegals to compile information in a more attorney-friendly output that an attorney may then use as a checklist for depositions or as a way to keep track of the facts relevant to a particular issue.

d. E-Discovery

Any time e-discovery is used, the e-discovery consultant is critical. Whether you are producing or receiving electronic discovery, someone needs to search it. Competent e-discovery consultants will provide software tools to permit those searches to be made more easily, generally via a secure Internet site.

IV.
Managing the Case of a lifetime

Once you have taken the proper steps to ensure that your practice can handle the case of a lifetime, it will be time to consider the best way to manage the case itself. It may seem obvious, but in the case of a lifetime, just as in most other cases, being proactive pays off. Indeed, in the case of a lifetime, getting behind can create insurmountable problems. Fortunately, by taking a number of steps, counsel can keep the case manageable.

First and foremost, obtain and at least skim the *Manual for Complex Litigation* by the Federal Judicial Center and published by West.[2] It is full of information that will help the parties and the judiciary manage a complex case. If you are in state court before a judge unfamiliar with complex litigation, refer the judge to it. Some of the more important case management strategies that the *Manual* refers to are discussed below. These include the use of Liaison Counsel and coordinating committees, Case Management Orders, and Joint Defense Agreements. Each of these strategies can help facilitate communication between parties, establish agreed-upon protocols, and keep you and your team sane.

A. *Case Organization, Liaison Counsel, Coordinating Committees and the Like*

The case of a lifetime is likely to involve multiple parties. In these circumstances, organizing the lawyers is a critical first step toward maintaining your sanity. Depending on the number of parties and the degree to which their interests diverge, it may be appropriate for the court to appoint Liaison Counsel for each side or group of parties, or to appoint coordinating committees to manage the litigation. If your client is anything other than a peripheral party, attempt to be appointed to a committee – that way you are in the room when the decisions that will affect you and your client are being made. Liaison Counsel needs to be someone who is trusted by all the parties and his or her client, and that attorney also needs to have personal credibility with the court. It is a time-consuming job. If you barely have sufficient resources in your firm to handle the case, you should not seek this position. The same is true for a position on a coordinating committee – if you and your client are not prepared for you to do the work, do not seek the position.

If you are a peripheral party and part of your defense strategy is to be inconspicuous, then you should not seek committee appointment. At the same time, beware of the risk that the more significant parties may settle shortly before trial, leaving your client at risk of being a target defendant. Thus, even if you are a peripheral party, prepare as if you will be defending the case with few if any allies; just do not advertise the scope of your preparation.

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[2] Manual for Complex Litigation (Fourth) (2004).

B. *Case Management Orders*

If possible, volunteer to write the initial draft of the Case Management Order as well as any amendments to that Order. In preparing an order, consider including provisions relating to the following issues:

- Document production protocols, including the establishment of a central document depository whose costs are shared by all parties, and a requirement that all documents be deposited in electronic form (the depository should be capable of making the documents accessible through a password-protected website).
- Deposition protocols, including the following:
  - Centralized scheduling under the auspices of the Case Management Committee or Liaison Counsel.
  - The selection of a single court reporting vendor.
  - Provisions for video depositions.
  - Provisions for real-time reporting.
  - Provisions for a common and mandatory exhibit-numbering system.
  - Provisions regarding where depositions will be taken.
  - Provisions regarding the beginning and ending hours for depositions.
- Written discovery protocols, including requiring the provision of electronic copies of interrogatories, requests for admissions and requests for production when those requests are served (your secretary will thank you).
- Provisions regarding law and motions, in particular the designation of a common and ordinarily exclusive date each month for motion hearings.
- If permissible in the jurisdiction and not already mandatory (as it is in the federal courts), electronic filing and service of all documents.

In particular, the establishment of deposition protocols can make a significant contribution to your sanity. The scheduling protocols should allow sufficient lead time so that the Case Management Committee or Liaison Counsel can transmit a monthly schedule in advance of the depositions. If you are the committee member responsible for that schedule, you can protect your own calendar by scheduling depositions of minimal interest to you when you need to be elsewhere. Also, in the case of a lifetime, it is likely that a significant portion of the witness depositions will require travel by you. Controlling the schedule permits a more rational travel schedule (for example, for a case with west coast lawyers, avoid setting depositions for Mondays on the east coast; conversely for a case with lawyers from the east coast, avoid setting depositions for Fridays on the west coast).

Having a single court reporting firm (and paying the reporters to travel to out-of-town depositions) is also beneficial because the reporters learn the case and will provide better transcripts.

A common exhibit-numbering protocol (if not already mandated, as it is by some courts) is necessary to avoid confusion. If there are multiple tracks, set up the numbering protocol to keep the numbers for each track separate.

Deposition location protocols help prevent discovery disputes over whether a party will produce an out-of-town witness in the jurisdiction. Generally, if you represent an out-of-town client with out-of-town witnesses, it is in your client's best interest to have the Case Management Order provide that all depositions will be taken within seventy-five miles of the witness's residence or business address.

Deposition time protocols are an important consideration both for traveling attorneys and local ones, particularly those with child care responsibilities. To get maximum use of the day, try to persuade the parties to start your depositions at 9:00 a.m., not the more customary 9:30 a.m. or 10:00 a.m. Provide that they must end by 5:30 p.m. absent agreement by all counsel present. This arrangement provides certainty for those booking return airline reservations and for the local attorneys who have child care obligations. It will go a long way to keeping the relations between counsel cordial and towards keeping you and your team sane.

Having a common law and motion date (if the court has not already set one) allows counsel to turn what could be four to six separate appearances every month into a single, albeit longer, appearance.

Electronic filing and service are a boon to out-of-town counsel who need to be kept apprised of litigation developments. Even if the court is unable to accept electronic filing, attempt to have the Case Management Order mandate e-mail service of documents in pdf format. The paper flow in large cases can quickly overcome both attorneys and support staff. Therefore, electronic storage and organization are necessary to keep documents quickly accessible. You should not need to conduct a manual search of forty volumes of pleadings to find a particular discovery request or pleading.

C. *Joint Defense Agreements*

If there are similarly-situated defendants with whom your client does not have a conflict of interest (at least on certain issues), give serious consideration to entering into a Joint Defense Agreement with these parties. Whether the agreement is as informal as simply coordinating who will take the lead on particular depositions or is more complex with common document databases or expert sharing, a Joint Defense Agreement can reduce defense costs and the burden on any one attorney or firm.[3]

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[3] The drafting of Joint Defense Agreements is beyond the scope of this paper. However, if one is used, make sure that it includes provisions for the protection of work product and experts in the event that one of the participants settles before the remaining participants.

V.
Managing the Case of a Lifetime: An Insurer's Perspective

For a Claims Professional, what is a "case of a lifetime?" Is it a case that has a value up to the limit (whatever that may be) of that claim professional's authority? Is it a claim whose file material is contained in multiple volumes that consume several shelves in the file room? Is it a claim that has gone through several layers of appeal in the courts? Is it a complex Directors & Officers class action securities claim with billions of dollars in damages? Is it a class action product liability claim venued in a "judicial hellhole" with the class represented by a nationally-known plaintiffs' attorney?

All of these claims will present challenges to the Claims Professional assigned to manage them, dependent in part on his or her experience and level of authority. To some, it will be a case of a lifetime; to others, it will be just another claim in a career of endless claims that will need to be managed with too little time and too few resources. Ultimately, no matter how complicated the case may be or what the quantum of damages might be, the Claims Professional knows that he or she will have to resolve it for an amount at or within the policy limits of the insurer for which he or she works.

From the insurer's perspective (not the perspective of the Claims Professional assigned to handle the claim) the case of a lifetime is a case that exposes the insurer itself to damages that are not limited to the proceeds of an insurance policy. For an insurer, any claim, no matter how big or small, can turn into the case of a lifetime if the Claims Professional handling it is not conversant with and attentive to the need to handle each of his or her claims reasonably and in good faith. Doing so will certainly not prevent the filing of bad faith litigation against the insurer, but it will make such litigation more defensible and should mitigate the damages that might flow from it.

Not every claim that is processed by an insurance company results in a bad faith claim. Countless thousands of claims of every size, type, and description are handled by insurers every day and do not result in controversy or contention because the insurer handles the claims in a manner that meets the insured's expectations of what was due him under the deal he struck with his insurer when he paid his premium for coverage.

Problems arise, and bad faith litigation often ensues, when the insured's expectations are not met, forcing the insured to deal with whatever financial shortfall results from those missed expectations. Stated plainly, bad faith litigation often arises when the insured has to find a way to force the insurer to pay something it does not owe.

Insured versus Insurer litigation is the inevitable result of a dispute that cannot be resolved amicably. However, the complaint generally does not allege bad faith in isolation. It typically includes a cause of action for a breach of contract pertaining to the insurance policy. It will undoubtedly allege that the insurer was contractually bound to have done something that it did not do, to the detriment of the insured. The most commonly alleged breaches are the following:

- Wrongful denial of coverage, in whole or in part.
- Wrongful refusal to defend the insured or someone claiming insured status.
- Wrongful refusal to settle a claim within the policy limits, thus exposing the insured's personal assets.

In addition to these causes of action, the insured will likely state a separate cause of action (where permitted) that alleges that the insurer breached the contract in violation of existing insurance law and/or in bad faith for which separate (and often punitive) damages are sought against the insurer. Those damages, of course, are in no way limited by the policy under which the original claim arose.

Once the insurer receives the suit against it, the Claims Professional will almost certainly need to notify supervising management that the company has been sued for bad faith. Sometimes the Claims Professional will be named as a defendant as well. Every insurer will have very specific (and likely different) procedures in place to address these circumstances, but they will have these commonalities:

- Claim handling of the underlying claim will come under very close scrutiny – the claim may be reassigned away from the "offending" claim handler.
- Counsel to defend the insurer (and perhaps the claim handler, if named) will have to be identified and the case sent to them for appearance and answer.
- The defense of the company will very likely be managed by someone other than the claim handler. At many insurers, the General Counsel's Office will take over handling of the bad faith aspects of the case. At others, it will be a senior claims officer.
- Once preliminary opinions are received from defense counsel, the insurer may need to provide notice to its E&O insurer. It may also need to put reinsurers on notice if the reinsurance coverage applies to these circumstances.
- As the matter progresses, if the exposure to the insurer is deemed material, it may retain independent counsel to provide an opinion about the exposure to be included in the insurer's annual statements.

As noted above, whoever is charged at the insurer with the responsibility for managing this bad faith case of a lifetime, he or she must engage defense counsel. The selection of defense counsel is not always made with an eye toward economy or even necessarily subject matter expertise. Counsel selection may instead be made based on the application of forward-looking hindsight. That is, in the future, if things have gone really wrong, and the Board of Directors wants to know why panel counsel was used in a case that returned a headline-grabbing multi-million dollar punitive damages verdict against the company, it may have been wiser to have retained a high profile or politically-connected lawyer or firm with an unassailable reputation so that Monday morning quarterbacking or second-guessing is minimized.

Once outside counsel has been engaged and the defense effort has begun, it will become necessary to create claim management solutions to address two primary goals:

1. Providing for a clear and relatively simple chain of responsibility and authority at the insurer/client; and
2. Reducing the risk of harm to the defense effort by officious intermeddlers elsewhere in the organization. In order to accomplish the second goal, the chain of responsibility must be endorsed at a relatively senior level in the organization and must be communicated to would-be officious intermeddlers.

The internal point person for the case needs to have time to handle it, so it may be necessary to move other work off that person's desk. Given the realities of insurance company staffing, that solution will likely be unavailable. The claim handler will instead have to find a way to manage the case of a lifetime along with whatever else he or she is working on.

Ideally, that claim handler would also have sufficient authority to make day-to-day decisions and sufficient assistance from lower authority levels to avoid handling ministerial issues such as filing and invoice payment. This should not be a problem in most insurance companies since the claim handler on a bad faith case of a lifetime will almost certainly be fairly high up in the claims or legal department pecking order.

In addition to managing the claim, the claim handler must also manage the flow of information about the claim, particularly if it is in any way newsworthy. In an insurance company, what happens with a claim (or group of claims) can have an impact on the business activities of groups outside the claims department, including underwriters, people responsible for relationships with agents and brokers, people responsible for reinsurance, the IT Department, the internal training department, and regional administrative claims managers who do not have technical supervision responsibilities. All of these constituencies need to understand that they are not authorized to speak for the company in response to external inquiries without going through the internal point person. They also need to appreciate that the defense of the case may require the use of resources from their areas of responsibility, which they will be required to provide when requested even if it is inconvenient for their operations.

Well-meaning employees who have some peripheral knowledge of or tangential responsibility for some aspect of the claim also need to be politely advised that unnecessary involvement in the case increases the likelihood that they will become witnesses. If it is already likely that they will be witnesses, they need to be advised when making or receiving communications regarding a claim to take into consideration the fact that they are likely to be testifying in the future.

At the same time, outside counsel needs to be managed. There needs to be a steady flow of communication, regarding both litigation events and strategy and the company's expectations for outside counsel. Steady communication can be achieved by conducting conference calls, video conferences, or even face-to-face meetings at specified intervals.

These events should not be so frequent as to become significant time-wasting activities, but serious substantive and strategic discussions and re-evaluation should occur at least quarterly.

VI.
Managing Discovery in a Bad Faith Case of a Lifetime

The boom in plaintiffs' bad faith litigation against insurers has given new meaning to the term "fishing expedition." Not only are plaintiff-insureds requesting more documents and information, well beyond the limits of their own individual claims and policies, but the courts are going along with them. Moreover, in many instances, the plaintiffs' attorneys already possess the documents and information they request, and the discovery is aimed not at obtaining admissible evidence but at catching the insurer in a misstep based on its actions elsewhere in unrelated litigation. This is particularly true in the case of a lifetime, where the plaintiffs' attorneys can afford to do the extra work, and there can be significant collateral consequences of a mistake on the defendant's part.

A. *Scope of Discovery*

1. Broad Scope of Plaintiffs' Discovery Requests

Plaintiffs are going on fishing expeditions and coming back with quite the catch. Among the broad requests for production insurers routinely confront are the following:

- The claims file concerning the insured plaintiff
- All claims files concerning similarly-situated plaintiffs
- All claims files concerning claims arising out of similar provisions and policies
- All claims files concerning claims which were denied on grounds similar to the plaintiffs.

The insurer's claims files are unmined treasure to the insured. The files may include a hotbed of information that the plaintiff can relate to his or her claim, the insurer's practices in general, and how or whether the practices were followed in the insured-plaintiffs' particular case. Even if ultimately not useful in the case of a lifetime, the discovery can be shared with other policyholders' attorneys for their possible use in other actions.

In addition, in their effort to paint the insurer as an "evil empire," plaintiffs will also request the following:

- Underwriting Guidelines
- All claims manuals, directives, correspondence, letters, e-mail, newsletters, and interoffice memoranda
- All claims control/containment/severity policies
- All promotional materials from print, radio, television, websites, etc.

- All reinsurance materials
- All materials related to compensation systems for all involved in the claim
- All re-engineering surveys or evaluations
- All materials used or promulgated by the state's special investigations unit (SIU) or its equivalent
- All regional plans or statistics that relate in any way to claim denial, claim reduction, claim severity, including but not limited to goals and behavior of adjusters
- All progress development summaries by regions or otherwise
- All human resources manuals and materials, including job descriptions, personnel files, training manuals and materials, and organizational charts by company, department, and personnel
- All bad faith grievances, complaints, notices, claims, or other communications in which bad faith was alleged
- All bad faith judgments or settlements
- All documents relating to criticism, reprimand, penalty, discharge, or improper claims handling of particular adjusters and supervisors
- All documents of whatever nature that directly or indirectly reflect payments of or for punitive damages on any and all types of insurance claims throughout the United States, whether as a result of an agreement, settlement, appraisal, arbitration, trial, judgment, or appeal
- All documents relating to loss reserve histories on the claim as well as to all materials relating in any way to the evaluating and setting of reserves
- All documents relating in any way to programs or the like, designed to control claim costs and/or claim severity (e.g., severity cost containment management, peer review, bill review, financial claims budgets, financial forecasts, management by objectives or management by goals, claims costs, claims severity, goals for average pay claims, etc.)
- All guidelines for letter writing and form letters; and
- All documents relating to quality control audits (e.g., identifying and measuring leakage or "overpayment" of claims).[4]

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[4] John J. Pappas, Presentation at the Defense Research Institute Extra-Contractual Liability Seminar: Institutional Bad Faith Claims, at C- 22-23 (Sept. 17, 1998) (citing Jonathan Gross, *Defending "Pattern and Practice" Evidence in Punitive Damages Cases,* 61 Def. Couns. J. 403 (1994)) (presentation outline available from authors).

When confronted with the plaintiffs' discovery requests, the courts look to the broad terms of Rule 26(b)(1) of the Federal Rules of Civil Procedure,[5] which gives the courts vast leeway in deciding what is permissible discovery. For nearly sixty years, the courts have recognized that "the discovery rules are given 'a broad and liberal treatment.'"[6] In addressing the plaintiffs' requests, and analyzing the insurers' objections, the courts start with Rule 26(b), which, by its own terms, ensures the parties may cast a wide net:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In General. Parties may obtain discovery *regarding any matter*, not privileged, *that is relevant to the claim* or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.* All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[7]

The terms of Rule 26 are broad, permitting discovery of "any matter" so long as it is "relevant." This expansive language leads to abuse by the plaintiffs' attorneys and liberal orders from the judiciary. Courts often recognize that if they order the discovery, settlement is more likely to occur; if settlement does not occur and the matter goes to trial, the issue of admissibility can be addressed at that time. Thus, in the mind of the court, permitting broad discovery and denying limitations on the same is more time efficient and is a better allocation of judicial resources.

The far-reaching scope of permitted discovery arises, in large part, from the proof requirements to prevail in a bad faith case against an insurance company. To prevail, the plaintiff must typically prove a general business practice or, at a minimum, more than a single incident. In other words, the *allegations* drive the discovery; the broader the allegations, the broader the discovery permitted. Accordingly, courts allow evidence of past activities. For example, in *Miller v. Pruneda*, the insured-plaintiff was required to prove a general business practice to establish a bad faith claim. The court permitted discovery of all files relating to claims

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[5] Fed. R. Civ. P. 26(b)(1).

[6] Miller v. Pruneda, 236 F.R.D. 277, 280–81 (N.D. W. Va. 2004) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

[7] Fed. R. Civ. P. 26(b)(1) (emphasis added).

brought directly against the defendant for bad faith, unfair claims settlement practices, or other extra-contractual damages, in the State of West Virginia, from 1998 to 2004.[8] Just how much leeway do the courts allow? In *Cozort v. State Farm Mutual Automobile Insurance Co.*,[9] the court declared that "Florida recognizes no privileges or limitation with respect to claim file materials in [a bad faith] action."[10]

The distinction between relevance for purposes of discovery and relevance for trial admissibility plays a significant role in the courts' permitting liberal discovery. For discovery purposes, the standard of what is relevant is necessarily broader:

> A court must strike a balance between the broad scope of the rules of discovery and the discovery of relevant evidence that is ultimately deemed admissible or inadmissible at trial. . . . In striking the appropriate balance between these two tensions, "[d]istrict courts enjoy nearly unfettered discretion to control the timing and scope of discovery and impose sanctions for failure to comply with its discovery orders."[11]

For the most part, all the insured need establish is that the information is necessary to prove a certain business practice, and the information sought will be deemed relevant and, therefore, discoverable. In *Miller v. Liberty Mutual Fire Insurance Co.*,[12] the plaintiffs requested information concerning all of the insurers' bad faith complaints for all of its lines of insurance, not just that line related to the insured-plaintiff. The State of West Virginia required insurers to maintain a record of complaints filed against it, which includes "any written communication primarily expressing a grievance."[13] The State Insurance Commissioner is required to keep some of this information confidential, and the defendant-insurer tried to protect the information from the insured based on this confidentiality provision. The court held that the confidentiality protection did not cover all of the insurer's records. The party could obtain the information from the insurer-defendant, even if the Commissioner was required to maintain its confidentiality.[14]

Though the courts often allow seemingly endless amounts of discovery, some are cognizant of (at least some of) the discovered material's sensitivity. Though a court will require the insurer to produce the requested materials, some courts will conduct a balancing test to

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[8] *Miller*, 236 F.R.D. at 285.

[9] 233 F.R.D. 674 (M.D. Fla. 2005).

[10] *Id.* at 676 (relying on Allstate Indem. Co. v. Ruiz*,* 899 So. 2d 1121 (Fla. 2005)).

[11] *Pruneda,* 236 F.R.D. at 281(quoting Hinkle v. City of Clarksburg, W. Va., 81 F.3d 416, 426 (4th Cir. 1996) (citations omitted).

[12] No. Civ.A. 2:03-2325, 2004 WL 897086 (S.D. W.Va. Apr. 27, 2004).

[13] *Id.* at *3.

[14] *Id.* at *4.

determine whether to issue confidentiality orders. For example, the Third Circuit's standard is as follows:

> [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c) (7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.[15]

At the end of the day, the plaintiff-insured will likely not find it difficult to compel the discovery he seeks. In fact, the district court in *Saldi v. Paul Revere Life Insurance Co.* issued a fifty-one-page decision that was hailed by the plaintiff's attorney as a "road map" for bad faith discovery litigation.[16] In that case, the court allowed the plaintiff-insured to gain access to training materials, claims management studies, personnel files, "profitability analyses," and many other documents in connection with hundreds of document requests. In response to the requests, the insurers objected and attempted to convince the court that the Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* limited the scope of discovery in bad faith litigation to those documents concerning the particular plaintiff's own case.[17] The district court rejected that argument and ordered production and responses to most of the discovery requests, noting the distinction between admissibility for trial versus discovery.

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[15] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 175 (E.D. Pa. 2004) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994)).

[16] *See generally id.; see also* Jean Hellwege, *Insurers Must Comply with Broad Discovery Requests, Judge Rules*, Trial, Nov. 2004, at 16.

[17] *See Saldi*, 224 F.R.D. at 176 (discussing State Farm Mut. Auto. Ins. Co., 538 U.S. 408 (2003)).

B. *Responding to Broad Discovery Requests*

The plaintiff's broad discovery requests can be a bit overwhelming. What follows are several tips on how to manage and respond to these requests when they inevitably come.

1. Reacting to the Broad Discovery Requests

When the insurer receives the discovery requests, it must take them seriously. Do not put off commencing the search for responsive documents or preparing the interrogatory responses. Time is of the essence. "Be comprehensive, candid and careful in both research and response. . . . [B]e diligent, forthcoming, and sincere."[18] The documents compiled should be indexed and organized into a central system for retrieval and control. Do not play games with the court or counsel. "Parties must respond truthfully, fully and completely to discovery or explain truthfully, fully and completely why they cannot respond. Gamesmanship to evade answering as required is not allowed."[19] The courts are not concerned about the difficulties for the insurer in compiling the requested information and documents. Rightly or wrongly, organizations with tens of thousands of employees and vast computer networks are believed capable of assembling almost any category of documents.

Generally no one employee or group of employees within the corporation has knowledge of the documents' existence or where they are located. Many documents are retained in unlabeled boxes; some are kept by certain employees but not by others. Some are maintained in official "libraries." Many are not. Various drafts are retained and final copies disposed of. There is often no unanimity within the company with regard to handling or retention and no method to ensure consistency. This lack of document-management policy, too, can be construed by the able plaintiff's lawyer as some kind of bad faith scheme to mislead the court or cheat the insureds.

It is important to note that at least one court has recognized that the manner in which the insurer conducts its defense during the pendency of the litigation may be evidence of bad faith.[20] Fortunately, however, the court acknowledged that discovery practices likely would not support the bad faith claim since the rules of civil procedure provide a remedy for improper discovery practices.[21]

2. Don't Get Caught in an Inconsistency

Be careful. Be organized. Be prepared. Why? Because the plaintiffs' bar is all of these things, and its members communicate with one another at the speed of light. The plaintiffs'

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[18] John J. Pappas, *Oops,* 15-18 Mealey's Litig. Rep.: Insurance Bad Faith (2002).

[19] Miller v. Pruneda*,* 236 F.R.D. 277, 281 (N.D. W. Va. 2004).

[20] Hollock v. Erie Ins. Exch.*,* 842 A.2d 409, 415 (Pa. Super. Ct. 2004).

[21] *Id.*

requests for documents are not only overbroad and burdensome, but are particularly daunting because plaintiffs' counsel knows exactly what they are doing when they ask for these materials and information. They ask for materials they know the insurer has, and they ask for information they know the insurer does not want to provide. Their goal is for the insurer to either settle the case to avoid providing the information, or for the insurer to hide the documents from the plaintiff and the court. In either instance, the plaintiff has "caught" the insurer because the plaintiff knows the insurer has the information and documents. In fact, more often than not, the plaintiff already has the information and documents and doesn't even need to get them from the insurer.[22]

With the growth of the Internet and the development of technology, in any given case, a plaintiff-insured's attorney may know more about the insurance client than the particular defense counsel representing that client in that case. Moreover, any given defense counsel, along with any particular adjuster, may respond to written discovery, ignorant of facts known to others within the company. This ignorance of all the facts, coupled with the plaintiffs' knowledge of those facts, can and does result in a devastatingly adverse impact before a judge during the litigation process. Any mistake or oversight is seen not as human error, but as strong evidence of institutional deceit and "bad faith." Although untrue, it is a difficult burden to overcome and is best defeated by being avoided in the first instance.

Plaintiffs handling large-scale litigation claims, including insurance bad faith cases, share information and discovery materials about insurance companies.[23] By pooling their resources, the lawyers save money and also improve their ability to finance higher-level litigation. They work together to plan their strategy, conduct discovery, retain experts, perform jury assessments, and other various litigation activities.[24]

Among the various online resources available to plaintiffs' attorneys is the American Association for Justice's (formerly the American Trial Lawyers Association) document exchange where "[m]embers [can] share their case strategies, court documents, depositions, experts, and other case-specific knowledge," which is then made available to all of the association's other members.[25] The website invites viewers to "Send Us Your Documents" and provides a section called "Litigation Group Document Libraries," which provides access to a group's documents any time in an "easy-to-use environment." In light of the strength of the plaintiffs' bar, the insurance client and its counsel must be prepared.

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[22] Pappas, *supra* note 4.

[23] Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits,* 50 Duke L.J. 381, 392 (2000) (citing Guide to ATLA Litigation Groups, July 1998, at 7.

[24] *Id.*

[25] *See* AAJ Exchange, www.justice.org/exchange.

In *Saldi*,[26] the plaintiffs' attorney used documents from other cases against the same insurers, in which verdicts had been rendered against them, and presented the documents to the defendants with requests for admissions. The court found the documents from the other cases provided the requisite nexus for relevance. The opinion declared that

> for any evidence of Defendants' actions outside of the instant case to be relevant and potentially admissible in the instant case, there must be some nexus or connection between those actions and the instant case. Here, Plaintiff has submitted a number of documents obtained in similar litigation that provide a proffer of evidence of the defendants' bad faith actions. . . . The evidence proffered by Plaintiff provides support for the instant allegations of a pattern and practice of bad faith and supports further investigation into Defendants' internal business practices and policies.[27]

The large advantage the insurance industry may once have had in defending against a claim by an individual policyholder no longer exists in light of these collective efforts by plaintiffs' counsel against the corporate defendant. However, juries, and often judges, still perceive that the imbalance exists and make their decisions with this non-existent inequality in mind.

B. *Objections*

1. In General

The burden is on the party resisting discovery to specifically show how the information sought is not relevant or how the request is overly broad, burdensome, or oppressive, or to establish some evidentiary privilege.[28] It is important to keep in mind that a party "'cannot escape responsibility of providing direct, complete and honest answers to interrogatories with the cavalier assertion that required information can be found in this massive amount of material. Rather [a party] must state specifically and identify precisely which documents will provide the desired information.'"[29]

2. Burdensome

A blanket statement that the discovery request is overly broad, burdensome, or irrelevant is not sufficient to avoid discovery, even if the request is, in fact, overly broad, burdensome, or irrelevant.[30] Instead, the insurer must be prepared to demonstrate factually, by affidavit

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[26] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169 (E.D. Pa. 2004).

[27] *Id.* at 177–78.

[28] McCrink v. Peoples Benefit Life Ins. Co., No. Civ.A.2:04CV01068LDD, 2004 WL 2743420, at *1 (E.D. Pa. Nov. 29, 2004).

[29] *Pruneda,* 236 F.R.D. at 284 (quoting Martin v. Easton Publ'g Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980)).

[30] *Id.* at 281; Hussey v. State Farm Lloyds Ins. Co., 216 F.R.D. 591, 595 (E.D. Tex. 2003).

or deposition, the extent of the burden claimed. In *Hussey v. State Farm Lloyds Insurance Co.*, the insurer defendant claimed it would be unduly burdensome to provide the information requested by the plaintiffs and that the plaintiffs could obtain the information through deposition. The court disagreed and held that a conclusory statement of burden and expense is not sufficient to avoid disclosure.[31]

The court in *Hussey* also held that an expert's engineering reports prepared for the defendant-insurer over the preceding five years were discoverable in a case for bad faith failure to pay for damage from plumbing leaks under a homeowners' policy. In *Hussey,* the plaintiff filed a Notice of Intention to Take Deposition by Written Interrogatories of George Perdue, the defendant-insurer's testifying expert. The Notice sought "[a]ny and all engineering reports prepared by State Farm for the past five years on residential foundation claims where damage was alleged to be caused by a plumbing leak."[32] The defendant insurer argued the discovery of reports prepared but not connected with the case for the sole purpose of impeaching the expert should not be permitted where the expert's credibility is not at issue. In addition, it asserted the request was burdensome, oppressive, and calculated to cause undue expense. The insured argued the reports were relevant to determine if there was a breach of the duty of good faith and fair dealing. In allowing the discovery of the expert reports, the court considered what elements the insured had to prove to prevail in its bad faith case. The court declared that

> [t]he previous expert reports conducted by Perdue could potentially allow the fact-finder to logically infer that Perdue's reports were not objectively prepared, that State Farm was aware of Perdue's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual. Accordingly, expert reports are discoverable because they are relevant to the general subject matter of this case and are likely to lead to the discovery of admissible evidence.[33]

Do not object on the grounds that the production or response would be burdensome if the insurer has already produced the materials in another case. In *Saldi*, the insurer objected to certain responses on the grounds the requests were unduly burdensome and would interfere with its "confidential internal practices."[34] The court responded that "[d]ue to the highly relevant nature of many of these requests, . . . it [wa]s permissible to burden the Defendants with this discovery, especially in light of the fact that it appears Defendants. . . already had to produce much of this discovery in earlier litigation."[35] In addition to losing the motion, such a finding will cost valuable credibility with the court.

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[31] *Hussey*, 216 F.R.D. at 595.

[32] *Id.* at 593.

[33] *Id.* at 594.

[34] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 176 (E.D. Pa. 2004).

[35] *Id.* at 176 n.5.

If the insurer claims it is burdensome to produce the documents requested, be certain that there is no easier way to comply with the discovery request. In *State Farm Mutual Automobile Insurance Co. v. Engelke*,[36] the plaintiff sued State Farm for bad faith arising out of its handling of her personal injuries. State Farm objected to certain interrogatories and requests for production. At the hearing, the State Farm representative testified that providing responses to the interrogatories regarding other lawsuits would involve manually examining individual claim files, requiring full-time work by twenty-seven employees for one year, costing approximately $2.7 million. On cross-examination, however, the representative testified the information could be compiled with the use of a computer program. The court ordered the insurer to respond to the extent the information was available through computer-generated information.[37]

3. Privilege

For the most part, the protection of the attorney-client privilege and work product doctrine remains sacrosanct, even in the context of the broad scope of bad faith discovery. For example, in *McCrink v. Peoples Benefit Life Insurance Co.*,[38] the court rejected the insureds' argument that the attorney-client privilege and the work product doctrine do not apply in bad faith insurance cases if the defendants' attorney's opinion is in question. Where, as in *McCrink,* the defendant does not plead advice of counsel as an affirmative defense and does not assert counterclaims relying on advice of counsel, there is no waiver of the attorney-client privilege or the work product doctrine.[39] Similarly, in the case of *Nicholas v. Bituminous Casualty Corp.*, the court held that asserting the defense of advice of counsel did not result in a waiver of the work product doctrine.[40]

On the other hand, the court in *Roehrs v. Minnesota Life Insurance Co.* held that memorandum notes prepared by claims adjusters for the insurers' attorneys and the attorneys' written responses to the adjusters' questions were discoverable to the extent the adjusters relied on them.[41] The *Roehrs* case was an action for breach of the covenant of good faith and fair dealing in connection with the handling of a pulmonologist's claim on a disability income insurance policy. The plaintiff filed a motion to compel production of documents from the claims file after three of the insurers' claims adjusters relied, at least in part, on written legal

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[36] 824 S.W. 2d 747 (Tex. App. 1992).

[37] *Id.* at 750–51.

[38] McCrink v. Peoples Benefit Life Ins. Co., No. Civ.A.2:04CV01068LDD, 2004 WL 2743420, at *1 (E.D. Pa. Nov. 29, 2004).

[39] *Id.* at *3–4.

[40] 235 F.R.D. 325, 333 (N.D. W.Va. 2006).

[41] 228 F.R.D. 642, 646–47 (D. Ariz. 2005).

advice in deciding to deny the insureds' claims. The court applied Arizona state law to find the attorney-client and work product privileges were waived. It held the documents would be discoverable because (1) the assertion of the privilege was the result of an affirmative act by the party asserting it; (2) through the affirmative act, the party asserting the privilege made the information relevant by putting it at issue; and (3) the application of the privilege would deprive the opposing party of access to information vital to its case.[42]

C. *Accept What You Cannot Change*

1. Negotiation and Cooperation

Once litigation commences, protecting information from disclosure is initially a matter that counsel for the parties should try to negotiate. Agreed-upon restrictions may be submitted to the court as a stipulated protective order which may then be endorsed with the court's signature of approval. Obviously, if the parties can reach an agreement without court intervention, some expense may be saved, and some goodwill may be earned. The court will generally favor stipulated orders and permit the parties significant latitude in drafting them. One method of addressing protective orders is through the case management process at the outset. Negotiate and submit to the court a stipulated Master Protective Order that applies to all parties and contains appropriate triggering mechanisms as well as clawback provisions.

Protective orders may be very broad or very narrow with respect to what they protect. They can be drafted to cover only particular documents or categories of documents, which are identified within the order's terms. Alternatively, the parties may agree to an umbrella protective order, which might provide for all of the parties' discovery materials to be treated as confidential. These will be hard to come by and might not pass the court's scrutiny. The parties will likely reach some sort of middle-ground that permits each party to designate at the time of production the materials that it deems to be confidential or otherwise protected. The requesting party would then reserve the right to dispute the designation of confidentiality or privilege.

Further, the parties may agree to certain permissible uses of confidential materials. The least restrictive form of protective order would limit use of the discovery materials for purposes related to the case in which the discovery is produced. To avoid disputes, the agreement should endeavor to specify what constitutes matters "related to" the litigation. Perhaps the most common and efficient form of protective order limits the disclosure of confidential material to specific individuals and types of individuals expressly identified in the order and who are required to sign confidentiality orders. In the agreement, the signatories acknowledge reading the confidentiality agreement and consent to its provisions.

[42] *Id.* at 646.

Another form of protective order would permit the receiving party to retain, use, and disclose the materials, but not disseminate them to specific parties. An order of this sort is difficult to enforce. Although the parties to the order are prohibited from disclosing the materials to the forbidden entities, there is no way to prevent them from disclosing to third parties, who may in turn disclose the information to the prohibited parties.

Other protective orders require the receiving party to return the materials or to certify that the materials have been destroyed by a specific time after the conclusion of the litigation. This requirement also would apply to copies, summaries, and excerpts of confidential materials. Plaintiffs' counsel will often resist orders of this nature as they significantly impact counsel's ability to share the documents with others.

In responding to the discovery requests, rather than making flat-out objections, it is often helpful to establish acceptable limitations on the scope of what the insurer is willing to provide. In this way, when the insurer first appears before the court in response to the inevitable motion to compel, it appears as a reasonable defendant who is willing to turn over some materials and provide some information, within certain reasonable parameters. For example, in a long-running bad faith action arising out of a sinkhole claim, the insurer-defendant responded to the insureds' first set of requests for production with the following "Preliminary Statement of General Objection":

> Based on the above and subject to the specific detail set forth in each individual response, it is [the insurer's] position that Plaintiffs' requests are not reasonably calculated to lead to admissible evidence in this case and production, if required at all, should be limited temporally, geographically and with respect to type of claim as follows:
>
> TIME PERIOD: With regard to the claim file - documents from the date of loss (1/19/98) through the date Plaintiffs served their Civil Remedy Notice Of Insurer Violation (9/21/98) and any non-privileged documents contained within the claim file after that date.
>
> With regard to training manuals, personnel/administrative procedural manuals and guides - documents in use in 1998.
>
> With regard to personnel files - documents pertaining to the education, training and licensing of the adjusters who handled this claim and the annual evaluations of the adjusters who handled Plaintiffs' claim for the year of the loss (1998) and two years prior to the loss (1996 and 1997).
>
> With regard to advertising documents displayed, circulated or broadcast for two years prior to loss (1996 and 1997).

GEOGRAPHIC LOCATION:	Pasco County or the State of Florida, depending on the particular request.
TYPE OF CLAIM OR SUBJECT MATTER:	Claims for a sinkhole loss under a homeowners' policy issued by [the insurer].

> With respect to production of documents which fall within these parameters (assuming production is required), considerable time and expense will be incurred in locating and identifying responsive documents. Some documents may need to have portions redacted. Some documents may be confidential and/or proprietary in nature. Therefore, [the insurer] is agreeable to producing documents after Plaintiffs post the cost estimated to reasonably be incurred and the entry of an appropriate confidentiality order. Subject to the general objections stated above, [the insurer] responds to each individual request as follows: . . .

Well-drafted protective orders are the key to successfully avoiding being caught in the insured-plaintiffs' fishing expeditions. Even the *Saldi* court recognized that the courts can provide protections:

> Most commonly, courts condition discovery of confidential documents by preventing the party obtaining the documents from sharing that document with others and by using that document for any use, other than the present litigation. Courts are given broad discretion in evaluating the competing interests in discovery disputes so that they have the necessary flexibility to "justly and properly consider the factors of each case."[43]

In *Saldi*, although the court required the insurers to produce a vast array of materials, the court did impose some limits on the use and dissemination of the documents and information that it ordered the insurers to provide.[44] Among other things, the court limited the time period during which the plaintiff's discovery requests would apply to the period after the plaintiff had filed his first claim for benefits, but the court allowed discovery prior to the claim with regard to the formation of the policy and for any documents the plaintiffs' attorney had already obtained from other sources. Further, plaintiffs were prohibited from disclosing or exchanging the documents and information with anyone not associated with

[43] Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 175 (E.D. Pa. 2004) (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 789 (3d Cir. 1994)).

[44] *Id.* at 179–197.

the case unless by specific request to the court.[45] The court also found plaintiffs had not established the relevance of certain documents or their connection to the case, including "board of directors' packages," "scoping team meetings," "telephone templates for initial interview and recommendations from the Psychiatric Disability Consultants."[46]

2. Settlement

Responding to the written discovery requests is expensive. Privilege logs and motions for protective orders increase the costs of litigation. Gathering and producing the documents adds to the usual litigation costs as well as the costs incurred for the insurance company personnel who must devote their time to providing the responses rather than their primary job responsibilities.

Often, the insurer elects to settle the bad faith case for an exorbitant amount in an effort to avoid the intrusive and burdensome nature of the discovery foisted upon it. Among the insurance companies that are targeted by these cases, a strong corporate culture has developed in which the insurer resists paying litigation expenses. When the insurer reaches a point where it expects its litigation expenses will exceed the dollar amount necessary to settle, it is inclined to take the less expensive alternative by paying out the settlement. Although the settlement may be the cheaper choice in dollars and cents, a reputation for settlement to avoid production may ultimately be much more costly to the insurer. Often this assessment leads to a determination that the nuisance value of the case, which is the expected cost to defend it, constitutes a settlement value in the six-figure range.[47] Because the nature of the claim is, in essence, against the corporate infrastructure, not the individual claims handler, the insureds' attorneys expect that the insurer will treat all of the bad faith cases in the same manner. Thus, they expect that if the insurer settles one case, it will settle them all, and in at least the same amount, even if the case is devoid of merit. Some consider this to be "legal extortion."

V.
Conclusion

You can handle the case of a lifetime without imperiling your sanity, your relationships or your E&O policy, but doing so requires proactive action, discipline, and a long-term strategy. Know your strengths and limitations, and do not fear asking for help. With this advice, and the other pointers in this article, you will not only handle the case of a lifetime, but thrive and eagerly await the next.

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[45] *Id.* at 178.

[46] *Id.* at 181 n.9.

[47] *See,* John J. Pappas, *Bad- Faith Should be Difficult to Prove,* 19-22 Mealey's Litig. Rep.: Ins. Bad Faith 22 (2006).