

A. INTRODUCTION

It is the middle of the night. You arrive at the airport of a strange city in a foreign country you have never visited. You are jet-lagged. Your flight was late. You are not sure where your destination is located. It is raining and you cannot tell where you are. You do not speak the language and cannot read the road signs. You suspect that the driver might be taking you for a ride. You wonder whether you have enough currency with you. The taxi meter continues to run . . .

This nightmare is not unlike the world of litigation. Being served with a summons often seems like a journey in which you do not know where you stand, how you got there, or how you can get to where you want to be. It can challenge even experienced trial lawyers. The purpose of this volume of the *Toolkit* is to give in-house counsel new to litigation some degree of comfort with the process. Attorneys who already are familiar with the basic concepts of litigation, however, may elect to turn directly to the sample litigation forms following this introduction.

Below is a description of some of the basics, which should assist you in identifying the first steps in handling a claim.

1. The Basics

The U.S. judicial system consists of federal and state courts. In general, federal courts have subject matter jurisdiction over two types of lawsuits—cases brought under federal law and those involving citizens of different states where the amount in controversy exceeds \$75,000. Federal district and appellate judges and Supreme Court justices are appointed for life.

A defendant generally can remove a case from state to federal court if the case could have been filed in federal court, but was not. Under 28 U.S.C. § 1441, removal requires an independent basis for federal court jurisdiction such as diversity jurisdiction, federal question jurisdiction, or another other grant of federal jurisdiction. If your case was filed in state court, you should consult with outside litigation counsel as to whether the company can or should remove it to federal court. Keep in mind that a defendant has only 30 days from receipt of a pleading, through service or otherwise, to file a notice of removal. 28 U.S.C. § 1446(b).

2. Personal Jurisdiction

A plaintiff who brings a lawsuit voluntarily submits to the court's jurisdiction. Accordingly, the plaintiff is subject to the court's rules and its power to enter orders and judgments, including on any counterclaim the defendant may assert.

A defendant can subject itself to jurisdiction by voluntarily appearing in the lawsuit without objecting to the lack of personal jurisdiction. For this reason, before responding to a lawsuit, defendants should consult with outside litigation counsel as to whether the company can move to dismiss on the ground that the court lacks personal jurisdiction over it.

3. Venue

Even if a court has jurisdiction, it may not be the proper court to hear a dispute. When more than one court could exercise jurisdiction over a case, which of these courts should hear it is a question of venue.

The parties to a contract can agree on the venue in which any litigation must be brought. Absent an agreement, courts generally give substantial deference to a plaintiff's choice of venue. However, statutes often specify where venue is proper, such as the location where the events at issue occurred. If the plaintiff has not chosen a proper venue under the applicable rules, the defendant may ask the court to dismiss or transfer the case.

In deciding whether venue is proper, courts will consider many factors, including the convenience of the parties and witnesses, the law governing the disputes, and the location of the events giving rise to the dispute. A court has substantial discretion in deciding whether venue is proper.

If the case is in federal court but venue is improper, the federal court may transfer the case to another federal court where venue is proper. If a case was improperly filed in the courts of one state but venue would be appropriate in another state, the state court may dismiss the case. The plaintiff may then be required to file the case in the courts of the state where venue is proper.

4. The Complaint

A lawsuit starts with the filing of the complaint, which identifies the parties, states the facts from the plaintiff's perspective, and sets out the

plaintiff's claims. The defendant may move to dismiss the complaint, arguing that there is no legal basis for the claim, or file an answer denying the complaint. A defendant also may assert a counterclaim against the plaintiff, a cross-claim against another defendant, or a third-party complaint against another party that the defendant contends is liable to it. Like a complaint, a counterclaim or cross-claim states affirmative claims against the other parties to the litigation—a counterclaim against the plaintiff, a cross-claim by one defendant against another.

When you receive a complaint, there are many issues to consider. An illustrative list includes without limitation:

- (a) Immediately instruct the company to preserve all electronic and paper documents. Suspend all document retention or backup policies or practices that might otherwise lead to the deletion or overwriting of any information. (For more information on records retention, refer to Volume 3 of the *Toolkit*, Corporate Compliance, as well as the litigation hold policy later in this volume.)
- (b) What is the due date to answer or otherwise plead? Review the applicable rules of the forum, and docket the date.
- (c) When and how was service made? Was service proper?
- (d) Is there insurance that covers plaintiff's claims? Read the policies. Notify the insurers in writing.
- (e) Has anything already occurred in the case? Check the docket sheet, a listing of the filings in the action maintained by the court. You typically can obtain docket sheets electronically or through the court clerk.
- (f) Is there an arbitration agreement?
- (g) Is there a forum selection clause?
- (h) Is there a choice of law clause?
- (i) Can you move to dismiss on the ground that the company is not subject to personal jurisdiction where it was sued?
- (j) If in federal court, is there federal subject matter jurisdiction? Is diversity properly pled?
- (k) If in state court, is the action removable? What is the due date to remove the case to federal court? Docket the date.
- (l) Is there a better forum? Consider a motion to dismiss on the grounds of *forum non conveniens*, or to transfer pursuant to 28 U.S.C. § 1404 or 1406.

- (m) Is there a prior pending or related action?
- (n) Did the plaintiff make a jury demand? If not, should the defendant make a jury demand?
- (o) Was the proper defendant named?
- (p) Are there other necessary parties that should or must be joined?
- (q) Who is the plaintiff? Who is plaintiff's counsel? Collect available information.
- (r) What is the court? Many courts have "local rules" that apply specifically to actions in that court. Find and read the local rules, which should be available on the court website (if online) or by calling the clerk of the court.
- (s) Who is the judge? Read her or his biography. Does he or she have any standing orders?
- (t) What are the plaintiff's claims? What are the company's potential defenses? What are the facts? Who are the witnesses? Where are the documents? Summarize this information in a memorandum to the file for your, and your outside counsel's, future reference.
- (u) Does your company have any counterclaims against the plaintiff, cross-claims against other defendants, or third-party complaints against other parties?

As the length of this noncomprehensive list suggests, hiring experienced counsel generally is an essential initial step in protecting the company's interests.

Think twice before you simply call plaintiff's counsel to attempt to settle the lawsuit or to seek an extension of time to answer. Rule 408 of the Federal Rules of Evidence limits the admissibility of statements made in the context of compromise negotiations. Make sure first that all parties agree in writing that all statements are made for the purpose of settlement pursuant to Rule 408 and other applicable law, without admission of any fact or liability, and without waiver of any right to assert a different position. Otherwise, any statements that you make can and likely will be used against the company.

Before you ask plaintiff's counsel for additional time to answer or otherwise plead, remember that the 30-day clock for removal of a lawsuit from state to federal court starts ticking no later than the receipt by the defendant, through service or otherwise, of the complaint. *See* 28 U.S.C. § 1446(b). If you take full advantage of an extension, you

might inadvertently waive the company's right to remove the litigation to federal court unless the company retains counsel promptly.

5. Discovery

At the outset of a case, even before any formal discovery requests are made, Rule 26(a) of the Federal Rules of Civil Procedure, as well as similar rules of many states, requires the parties to exchange initial disclosures regarding witnesses likely to have discoverable information, documents supporting their respective claims or defenses, computations of the plaintiff's damages, and insurance policies that may indemnify a defendant.

In addition to these required initial disclosures, litigation provides for an elaborate process called discovery for the parties to collect evidence. The scope of discovery is extremely broad. The Federal Rules of Civil Procedure and similar state rules generally allow discovery into any unprivileged information that is relevant to the claim or defense of any party. Discovery is not limited to evidence admissible at trial. Any party can obtain discovery of information if it appears that it may be reasonably calculated to lead to the discovery of admissible evidence. Discovery frequently determines whether a properly pled complaint will grow into a large judgment or evaporate into a dismissal.

Discovery consists of a variety of tools, including:

- requests for documents;
- written questions (interrogatories);
- requests that another party admit certain facts;
- questioning witnesses under oath in depositions;
- disclosures regarding the report, opinions, and qualifications of, data and information considered by, and compensation paid to each party's expert witnesses;
- examining persons or inspecting property; and
- obtaining evidence from third parties through subpoenas.

It is common that all relevant files, correspondence, e-mails, and other paper and electronic documents will be required to be turned over to the other side in a lawsuit. Similarly, the parties, any current or former employees, and other witnesses can be required to submit to

lengthy questioning, under oath, concerning all issues relevant to the lawsuit in advance of any trial.

Given discovery's broad scope, the parties often agree to the entry of a stipulated protective order to protect the confidentiality of their respective trade secrets or other proprietary information. A party also may object to another party's discovery requests on the grounds that they are overly broad, unduly burdensome, or seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. If they are not resolved between counsel, such discovery disputes can lead to motions to compel discovery, as well as motions for sanctions for violations of court orders regarding discovery.

Discovery has three important effects. First, it can be very intrusive to any individual or entity involved in any way with the events underlying the lawsuit, whether as a plaintiff, defendant, or non-party witness. Second, it comprises a large part of the cost of prosecuting or defending a lawsuit. The time and effort it takes to assemble and review relevant documents and information, interview witnesses who are scheduled to give depositions, participate in depositions, and conduct all other aspects of the discovery process can be substantial. Third, because it takes time, discovery can delay the resolution of the dispute. In many federal courts, for example, it commonly takes two years or more from the filing of the complaint to trial. See the 2006 Annual Report of the Directors of the U.S. Courts, Table C-10, which is posted at www.uscourts.gov/JudBus2006/APPENDICES/c10.PDF.

a. Electronic Discovery

E-discovery is integral to discovery. More than 90% of the information that companies generate is created in electronic form.¹ As recently as the mid-1990s, evidence consisted largely of correspondence, faxes, and other paper records. Now, most "documents" produced in discovery are e-mails, databases, and electronic files, or printed copies of those electronic files. Document discovery has been transformed from the production and review of paper files to the retrieval and examination of mostly electronic files.

¹Albert Barsocchini, "Electronic Data Discovery Primer," *Law Technology News*, August 28, 2002.

Courts, which in the past had decided discovery disputes based mainly on physical paper, now face issues relating to the form in which electronic “documents” are produced, the preservation of metadata (electronic data that describes the characteristics, origins, usages, and validity of other electronic data), the retrieval of data in electronic archives or backup tapes, and identifying the party or parties that will bear the costs of collecting and producing such information.

Parties that conceal electronic evidence face severe sanctions. *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (S.D.N.Y. 2005) (\$29.3 million verdict after court gave adverse inference instruction based upon failure to produce e-mails); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Company*, No. CA 03-5045 (15th Judicial Circuit, Palm Beach County, Fla. 2005) (\$1.454 billion verdict after court gave adverse inference instruction based on failure to produce e-mails, rev'd on other grounds, No.4D05-2606 (Fla. Dist. Ct. App. Mar. 21, 2007). This is increasingly true even where deletions or failures to collect electronic data were inadvertent. *See, for example, Prudential Insurance Company of America Sales Practices Litigation*, 169 F.R.D. 598, 600 (D.N.J. 1997) (\$1 million sanction). Such sanctions, which can include monetary sanctions, dismissal of claims, striking of defenses, exclusion of evidence, and adverse inference instructions, can win or lose the entire case.

Accordingly, once you learn of a lawsuit or even the threat of litigation, it is essential to take immediate steps to properly preserve all electronic data and documents that reasonably can be anticipated to be relevant to the litigation. This includes immediately suspending document retention or electronic information backup policies or practices that might otherwise lead to documents or information being destroyed, deleted, or overwritten.

If your practice involves any litigation management (or if it might in the future), then we highly recommend you delve further into the areas of document retention and e-discovery.²

² For a fuller discussion of the issues, you may wish to consult the Sedona Conference’s “Guidelines on the Management of Electronic Information” (www.thesedonaconference.org), as well as *The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines* (American Bar Association, 2006).

6. Motion Practice

During a lawsuit, either side may file motions to secure rulings from the court. Some motions, such as motions to dismiss brought at the outset of a case, may address purely legal questions. Dispositive motions, such as motions for judgment on the pleadings or for summary judgment, may seek a final decision without having to try the case. Other motions may seek interim or interlocutory relief, such as a motion for a temporary restraining order or a preliminary injunction or a motion to compel the other side to produce discovery.

7. Settlement

If not decided by a dispositive motion, the vast majority of cases are settled before trial. Parties settle for a wide variety of reasons, but it usually involves some combination of the following factors:

- the fees and costs to prepare and try the case, including the opportunity cost of distracting executives from managing the company's business;
- the relative strength of the parties' respective claims or defenses;
- the risk in the form or amount of the damages that a judge or a jury may award;
- the uncertainty and unpredictability of a judge or a jury deciding the dispute;
- the impact of a verdict or a judgment upon the parties, including other cases, the company's business practices, public image, stock price, etc.; and
- the parties' relative risk preferences (is one party more risk-averse than another?).

Before you attempt to settle a dispute without engaging outside counsel, be aware that negotiating and documenting settlement agreements present issues beyond those involved in a contract, a license, or an acquisition agreement. As discussed above, make sure that all parties agree in writing beforehand that all statements are made for the purpose of settlement pursuant to Rule 408 of the Federal Rules of Evidence or other applicable law. Federal Rule 408 and analogous state court rules provide that evidence of an offer to compromise or statements made in compromise negotiations are not admissible.

If you are attempting to settle a dispute before or at the start of a lawsuit, be aware that you—and likely the other side—do not know all of the facts. Identifying the facts is the first step in evaluating the company's claims or defenses. Interview potential witnesses and collect and review the company's documents before you negotiate a settlement.

Be sure that you fully understand the substantive law at issue. For example, to obtain an effective release of an employee's claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626, imposes specific requirements for a release, including, among others, that the release must refer specifically to claims under the ADEA, that it does not waive rights that may arise after it is executed, that the employee must be advised in writing to consult an attorney before signing the agreement, and that the employee is given at least 21 days to consider the agreement and at least seven days after acceptance to revoke the agreement. If the release does not comply with the OWBPA, then the potential plaintiff may sign the release, cash the settlement check, and still sue the company under the ADEA.

Be certain that you fully understand the law governing the scope of releases. For example, under California law, a general release does not release unknown claims, unless the parties expressly waive the provisions of section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The goals, strategies, tactics, and dynamics of every settlement negotiation vary.³

8. Trial

In the federal courts, approximately only one out of every 50 cases is tried. Nonetheless, unless the court grants a dispositive motion,

³ For a fuller discussion of this subject, see *The Lawyer's Guide to Negotiation: A Strategic Approach to Better Contracts and Settlements* (American Bar Association, 2001).

the parties settle, or the plaintiff withdraws the claim, the suit will be tried. The trial may come before a judge (depending on the nature of the claims and whether any party demanded a jury trial) or before both a judge and jury. In most cases in which damages are sought, both sides have a right to a jury trial, and the case will be decided by a jury unless all parties waive that right. If tried before a judge alone, he or she presides over the trial, interprets and applies the law, and decides the facts. If the case is tried before both a judge and jury, the judge presides over the trial and instructs the jury on the law. The jury, in turn, decides the facts.

9. Alternative Dispute Resolution

Alternative dispute resolution (ADR) offers a range of methods—including arbitration, mediation, early neutral evaluation, summary or mini-trials, etc.—to resolve disputes outside of traditional litigation and trial. The two most commonly used forms of ADR are arbitration and mediation. ADR can be used at almost any point in a dispute, including when a dispute first arises, even before a lawsuit is filed, during a lawsuit, after trial, and during an appeal. The goals of ADR are to:

- save time and legal expenses;
- provide greater control over the dispute resolution process;
- permit the parties to resolve their conflict in a more creative way than might be possible if it were left to a decision by a judge or jury; and
- give the parties greater privacy in resolving their dispute than is afforded in a public courtroom.

Increasingly, companies are turning to arbitration as an alternative to litigation. Like litigation, arbitration can be binding, provided that the parties agree to be bound by the result. A neutral third party conducts the proceeding, hears the evidence, and decides the dispute. Unlike litigation, which is public, arbitration is a private proceeding. A party cannot be compelled to arbitrate unless it has agreed to do so. Arbitration generally is less formal than litigation, with relaxed rules of procedure and evidence. An arbitrator's decision, called an award, is a final decision, subject only to limited review by a court as allowed

by law. Judgment can be entered on an arbitral award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, or state law. It often is more difficult to overturn an arbitration award than it is to reverse a trial court's judgment or even a jury verdict. Many arbitration organizations, such as the American Arbitration Association (www.adr.org), JAMS (www.jamsadr.com), and the CPR Institute for Dispute Resolution (www.cpradr.org), operate with their own sets of rules and regulations. You may wish to consult with outside counsel to determine which body's rules are best suited for your purposes.

Mediation often is used as a supplement to litigation. Unlike litigation or arbitration, mediation is nonbinding. A neutral third party assists the parties in communicating with each other to identify the issues that need to be decided, and to reach a settlement that is satisfactory to both of them, but a mediator cannot decide the dispute. Accordingly, it is even more informal than arbitration. However, in theory, parties come away from mediation feeling more satisfied because the parties themselves, rather than a third party, arrived at the resolution of the dispute. Additionally, unlike litigation or arbitration, statements made during mediation are confidential under the Uniform Mediation Act, which a number of states have enacted. Many courts require the parties to participate in mediation or a settlement conference as part of litigation.

Neutral evaluation often occurs in the early stages of a lawsuit. The parties and their counsel meet with a neutral third party to present summaries of their respective cases. The third-party neutral asks questions and assesses the strengths and weaknesses of each side's positions and the likely outcome of the case in court. To encourage negotiation and settlement, the mediator also may identify areas of common ground, help each side understand the case from the other's perspective, and offer to facilitate settlement discussions. Neutral evaluation sessions are confidential, and the mediator's recommendations are nonbinding. Even if this process does not result in a settlement, it may serve to narrow the issues in dispute and to give the parties a more realistic view of their prospects in the event of a trial.

10. The Forms

Each business dispute presents unique factual and legal issues. Different state and federal forums across the country apply different legal

standards and procedures. The law of each forum changes with time. Moreover, business disputes can raise widely disparate issues, including antitrust, contract, employment, intellectual property, products liability, securities, tax, tort, UCC, and other potentially applicable bodies of law. A pleading filed in an antitrust case in New York will be of little use to a company facing an employment lawsuit in California or a products liability action in Florida. Accordingly, this publication does not attempt to provide form “pleadings” for use in business litigation.

Rather, this volume provides forms to enable a company to develop a structure to manage its business litigation, and to take initial steps to respond to a claim. We’ve included a sample retention letter and an outside counsel policy to be used to develop a consistent system to manage a company’s relationship with its outside counsel. This volume also contains form notices for use early in a litigation: a sample insurance notice letter, document preservation directive, and conflict waiver letter. Finally, there are sample objections and responses to a subpoena, for use by a non-litigant who receives a subpoena for the production of documents.

If you are considering using these forms, you should review and modify them to fit your company’s procedures, practices, culture, and business. You also should bear in mind the unique nature of each case, and remain open to adjusting procedures to deal with the circumstances presented by a particular fact pattern, legal issue, or forum. Last, but not least, you should consult with litigation counsel.

11. The Sample Retention Letter, Outside Counsel Policy, and Conflict Waiver

As in-house counsel, you should make every effort to communicate clearly what expectations you have of outside counsel. Many companies utilize retention letters, “outside counsel policies,” and conflict waivers during these communications. When adapted to the particular circumstances of a given claim, these forms create a framework for the relationship between inside and outside counsel. In certain circumstances, it may not be necessary to require outside counsel to use an organization’s own retention letter, outside counsel policy, or conflict waiver letter. At a minimum, however, you should consider whether to issue one or all of these forms, which effectively serve as

contracts between the company and outside counsel. Once the terms of your relationship are negotiated, you and outside counsel can work together to develop the response to the pending claim.

The retention letter memorializes the terms of the agreement between the company and outside counsel. Although many outside counsel prepare their own retention letters, companies should consider issuing their own letter. Together with an outside counsel policy, a form retention letter allows an organization to define its relationships with its outside counsel consistently.

The retention letter should describe the scope of the outside counsel's engagement, explaining whether the representation is limited to a single case, a group of cases, or even a limited role within a particular litigation. The retention letter also should define the terms of the parties' fee arrangement, and should dictate whether outside counsel will submit bills on a weekly, monthly, or some other basis. Because document preservation is an important consideration at the beginning of a lawsuit or investigation, the retention letter should allocate responsibility for initial document searches.

Through an outside counsel policy, your company has the opportunity to shape the contours of its relationship with outside counsel at the outset of the litigation. The policy may set guidelines for communications between inside and outside counsel regarding strategy, budgeting, document preservation and production, and contacts between outside counsel and the company's employees. Companies may also issue billing requirements regarding travel and meal expenses, copying costs, legal research, and overhead expenses. All of these issues are sure to arise during a lengthy litigation. By setting expectations early, you will avoid unhappy surprises when reviewing future bills, and sometimes contentious discussions regarding outside counsel's approach to strategy and billing.

The conflict waiver letter serves as an agreement between your company and its outside counsel regarding an actual or potential conflict arising from the representation of the company and another party. Conflicts may arise from a variety of circumstances. Perhaps the preferred outside counsel formerly represented the company's current adversary, or even a party whose interests appear to be aligned with the company. In many cases, a claimant sues both a company and its executives or employees, and all defendants benefit from using the

same outside counsel. If there is any possibility of a future conflict, however, all parties and inside and outside counsel avoid future disputes through a written agreement recording the steps that will be taken if the conflict later requires outside counsel to discontinue its representation of one of the parties.

12. Insurance Notice Letter and Document Preservation Directive

Upon receipt of a claim, you immediately should determine whether insurance is available, and take steps to preserve relevant evidence. In order to respond to a potential claim or dispute effectively, you should issue notice to your company's insurer(s) and take steps to preserve evidence. Insurers often require companies to provide early notice of a potential claim. The insurance notice letter serves as a reminder to inside counsel to consider the insurance ramifications of a potential dispute or claim immediately.

In many recent lawsuits, an organization's efforts to preserve relevant evidence (or lack thereof) have become hotly disputed issues. If a company fails to preserve critical evidence, it risks adverse evidentiary rulings at trial, or even loss of claims or defenses. You may utilize the document preservation notice as a model to initiate the preservation of documents, e-mails, and other evidence relevant to a potential litigation or government investigation.

13. Sample Objections and Responses to Subpoena

Finally, this volume contains sample objections and responses to a subpoena for documents. Companies often receive requests for documents from parties to litigation. Those requests often are broadly phrased, and require substantial resources to formulate a response. You should consider objecting to certain requests for documents, particularly when the requests seek confidential business information.

14. Conclusion

The following sample forms are intended to be general suggestions and sources of ideas. Any company that is considering using these forms

should review them carefully and modify them to fit the company's procedures, practices, and corporate culture, as well as the particular legal issues faced in that company's line(s) of business. Note that these forms are designed for litigation matters in particular.

B. LAW FIRM RETENTION LETTER

1. Introduction

The retention letter documents the fact that the company has retained outside counsel and memorializes the terms of the engagement. Except in extraordinary circumstances, your company should not authorize outside counsel to begin work until both the company and outside counsel have executed a retention letter. The letter sets forth your expectations for the outside counsel's work—including its agreement to the company's outside counsel policy. The retention letter also may be used to set the terms of outside counsel's billing, and the rate at which outside counsel will be paid.

2. Form: Law Firm Retention Letter

[Company's Letterhead]

[Date]

[Address for Company's Outside Counsel]

Re: Retention Letter

Dear [Outside Counsel]:

This letter confirms that _____ (the "Company") has retained _____ (the "Firm") to represent us in the above-captioned matter. In connection with your representation, we have engaged you to [describe scope of the engagement].

I am enclosing the Company's Outside Counsel Policy (the "Policy"). Except as set forth in this letter or except as I specifically agree in writing, the Policy governs the Firm's representation of the Company in this matter and all subsequent matters in which you are retained. We ask that you share this letter with all professionals in the Firm who will work on this matter. If you have any questions about these terms, please contact me as soon as possible.

We have agreed that you will be the lead outside counsel on this matter and will be responsible for ensuring adherence to the Policy. I [or name

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of appropriate inside counsel] will be lead inside counsel primarily responsible for this matter. We believe that providing the Firm with a clear statement of the principles that apply to the Firm's representation of the Company will assist us both in providing effective, high-quality legal representation responsive to the needs of the Company.

We have agreed that the Firm will be compensated for its work on this matter [describe terms of fee arrangement]. We have agreed that the Firm will submit its bills [monthly, quarterly, or at the completion of this matter].

The Company takes seriously its obligation to preserve documents that may be relevant to pending litigation, and we require the Firm to assist us in the performance of this obligation. The Company asks that the Firm carefully review as soon as possible the Complaint or other initial pleading in this matter, along with any attachments, to determine whether any files or documents require preservation. If so, please send a list of the items to be preserved to me immediately. As the case develops, on each occasion that the Firm identifies additional categories of documents that should be preserved, it must promptly notify me of those categories in writing.

The Firm will refrain from discussing with any media representatives either the Company or any matters involving the Company unless specifically authorized in advance by the Company's corporate relations department, and the Firm must notify me immediately of such inquiries from the media.

[If the Company engages in any of the types of business covered by the Gramm-Leach-Bliley Financial Modernization Act of 1999, 15 U.S.C. § 6801, *et seq.* (Gramm-Leach-Bliley Act), and the Firm has never worked for the Company before, add this paragraph: "The Company requires that the first time any law firm represents the Company, the Firm must sign the enclosed 'Gramm-Leach-Bliley' letter regarding confidentiality of customer information. Please have the Firm execute the enclosed letter and return it to me."]

NOTE: *If the above paragraph is included, enclose a copy of your company's standard Gramm-Leach-Bliley letter.*

I look forward to working with you and the Firm on this matter. Please confirm that the Firm agrees to comply with the Policy and the requirements set forth in this letter by returning a signed copy of this letter to me at your earliest convenience.

Sincerely,

[In-house counsel for the company]

We have received the Company's Outside Counsel Policy and agree to comply with that Policy and the requirements set forth in this letter in our representation of the Company and its affiliates.

[Firm name]

By: _____

[Outside counsel at law firm]

Date: _____

NOTE: *For comparison, please also see the form retention letter in the Training Your Outside Counsel volume of the Toolkit.*

C. OUTSIDE COUNSEL POLICY

1. Introduction

The outside counsel policy states your company's expectations for its outside counsel. These guidelines, which are intended to be shared with outside counsel, serve as a communications tool to keep in-house and outside counsel focused on the company's goals of enhancing the quality of legal services and managing legal fees and expenses.

You should review and revise carefully the sample outside counsel policy to fit your company's procedures and culture. For example, a company may require its outside counsel to submit weekly or monthly reports regarding the status of a litigation and future strategy. Another organization may view such reports as unnecessary and costly, and instead rely on periodic teleconferences to keep apprised of a particular lawsuit. Similarly, you may benefit from a highly detailed budget and written strategy memorandum at the outset of each case—but keep in mind that you will pay for the preparation of that memorandum.

In summary, more so than many of the other forms included in this volume of the *Toolkit*, a company's outside counsel policy reflects the particular interests of an individual organization. Your company may realize significant benefits from consistent reporting and billing by its outside counsel, but should take time to consider carefully the form of its requirements.

2. Form: Outside Counsel Policy

INTRODUCTION

This outside counsel policy (this "Policy") outlines _____ [the "Company's"] expectations of the law firm working on a matter ("Outside Counsel"), as well as Outside Counsel's responsibilities. Unless the Company agrees otherwise in writing, this Policy is subject to and does not supersede the law firm retention letter between the Company and Outside Counsel's law firm (the "Firm").

I. RESPONSIBILITIES OF IN-HOUSE COUNSEL

The Company will designate a supervising in-house attorney (“In-House Counsel”), who will be Outside Counsel’s contact and will facilitate Outside Counsel’s access to employees, managers, executives, and records, as appropriate. In-House Counsel will be responsible for approving Outside Counsel’s strategy, staffing, plan, budget, and billing.

II. RESPONSIBILITIES OF OUTSIDE COUNSEL

A. Strategy

Outside Counsel is responsible for developing the strategy to achieve the Company’s objectives, obtaining In-House Counsel’s approval for that strategy, and informing In-House Counsel of the progress in implementing that strategy. All decisions regarding litigation strategy, discovery, settlement, and trial are to be made at the direction of or with the prior approval of In-House Counsel. Although Outside Counsel often will have direct contact with the Company’s personnel who may provide input regarding litigation strategy, any final decisions on all litigation matters must come from or have the prior approval of In-House Counsel.

NOTE: *You need to consider the extent of approval rights you need for a particular project. For instance, for smaller, low-dollar projects, approval at every step might be burdensome.*

B. Staffing and Rates

It is vitally important an agreement be reached between In-House Counsel and Outside Counsel regarding the Firm’s billing rates at the time of its retention. Outside Counsel is responsible for identifying the names, experience levels, expertise, and proposed hourly rates of each attorney and staff member expected to be assigned to the matter.

In proposing hourly rates for a matter, please consider the Company’s reputation and its ability to pay bills promptly, and consider proposing rates that are lower than Outside Counsel’s

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standard rates in order to take such factors into account. In-House Counsel assigned to each matter must, in advance, approve staffing and rates for the matter, as well as any increases in the rates for each matter. As a general rule, rates for a matter may not be increased once they are set at the beginning of the matter. In the event that a substitution must be made for reasons beyond the Company's control (for example, because an attorney has left the Firm), the Company will not pay for time spent by a new attorney to familiarize himself or herself with the file or the subject matter.

The Company is interested in results, not effort. The Company solicits Outside Counsel's input on alternative billing arrangements that reward results rather than time devoted to a matter. In consideration for the Company placing its business with Outside Counsel, the Company also solicits proposals regarding reduced hourly rates and volume discounts.

C. Plan and Budget

Within sixty (60) days of the Firm being assigned a matter, Outside Counsel, in consultation with In-House Counsel, should develop a plan and budget for the matter. The plan should provide: (1) a brief factual summary noting key issues or areas of inquiry; (2) an assessment of potential damages, i.e., whether insurance coverage exists and the range of potential damages; (3) anticipated future activity; and (4) a strategy for resolution of the matter. The budget should include anticipated fees and disbursements, including those for local counsel and consulting and testifying experts. The Company expects Outside Counsel's plan to include an assessment of whether settlement or other early resolution is in the best interests of the Company.

The Company recognizes that it is difficult early in litigation to project accurately what will be required for discovery, motion practice, trial preparation, and trial, but the Company asks that Outside Counsel's plan and budget reflect his/her best judgment for each category of activity as of the time it is prepared.

When unpredicted events occur, the Company wants Outside Counsel to consider the effects on the case budget and make appropriate revisions. For active litigation matters, monthly reports should be made noting significant developments and changes to budget and the plan. For non-litigation or inactive litigation

matters, such reports may be made on a quarterly basis. It is Outside Counsel's responsibility to keep current the plan and budget.

D. Billing

The Company requires detailed monthly bills. The bills should include the name or initials of the attorney (or other time-biller) providing services, the date of service and time allocated to the service, a full description of the service rendered, and the billing rate of the attorney (or other time-biller).

NOTE: *Consider requesting a two-part invoice. The first part would contain a detailed description for the law department files. The second part would contain a summary of billed amounts for accounts payable purposes. This allows you to control disclosure of certain confidential matters to a limited number within the company.*

Disbursements should be specifically detailed as to date, purpose/payee, amount, etc.

Disbursements for significant charges, including without limitation extensive computerized research services, extensive copying, computerization of documents, and the like will not be reimbursed unless approved by In-House Counsel in advance.

The Company does not expect to be charged for and will not pay for any nonreimbursable overhead, including without limitation (1) computer, e-mail, or word processing charges, (2) conference room charges or rent, (3) office supplies, (4) library use and staff, (5) meals (except during approved business travel), (6) taxis or limousines to and from Firm office (even at night), (7) secretarial, word processing, clerical, proofreading, filing, indexing, and/or other support salaries or time, including overtime, (8) local telephone calls, (9) fax charges, and/or (10) photocopying above \$0.10 per page or the Firm's actual per-page cost if lower.

NOTE: *For travel expenses, use one of the two following paragraphs:*

Out-of-town travel must be approved in advance by In-House Counsel. The Company does not authorize and will not pay for first-class air transportation, luxury hotel accommodations,

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and lavish meals. The Company will compensate for time spent in transit. However, if work is done for another client in transit, the Company will not reimburse for transit time. If travel time is devoted to working for one or more clients in addition to the Company, the Company should be billed only for the proportionate time spent on its behalf.

OR

The Company will pay for travel time.

Also include specific instructions about how, when, and where to submit bills.

E. Legal Research

The Company expects to be billed only for that legal research necessary to defend the Company's interests. Any significant legal research must be authorized in advance by In-House Counsel. The Company requires that a copy of any significant legal memoranda or opinions be provided to In-House Counsel. The Company will not pay for, and expects not to be billed for, legal research to educate attorneys in basic fields or in the expertise on the basis of which Outside Counsel was chosen. The Company will not pay for, and expects not to be billed for, time spent on conflicts checks or on responses to information requests from the Company's outside auditors.

F. Conflict Checks

The Company expects that the Firm's conflict check will encompass both *client* and *issue* conflicts. This includes without limitation whether the Firm has represented or is representing (a) any other clients in pursuing objectives that are in conflict with the Company's business or legal interests, or (b) any persons or entities who [are] officers, directors, managers, members, or shareholders of the Company's opposing party.

Outside Counsel is responsible for notifying In-House Counsel of any actual or potential conflict prior to the engagement of the Firm or as soon as the conflict becomes known. Notice and waivers of conflicts must be acknowledged in writing. To assist

the Firm in identifying possible conflicts, a list of the Company's affiliates is attached hereto as Exhibit A. As this matter proceeds, the Company expects that Outside Counsel will advise In-House Counsel of any potential conflicts, positional or otherwise, that may come to the Firm's attention.

G. ADR and Settlement

The Company seeks to resolve cases as expeditiously and economically as possible without jeopardizing its position on legal issues of significance and important policies, practices, and principles. Accordingly, Outside Counsel should identify cases that may be subject to early disposition or that may be handled more effectively through mediation, arbitration, or other means of alternative dispute resolution.

All settlement offers and requests for settlement authority must be submitted to In-House Counsel. Outside Counsel must obtain prior written authority from In-House Counsel to enter into settlement negotiations and/or to settle any claim.

H. Communications

The Company expects Outside Counsel to return its phone calls promptly.

Consultation with and approval by In-House Counsel is required before making any substantive motion, conducting discovery (whether in the form of interrogatories, document demands, requests to admit, depositions, or otherwise), or filing any claim, counterclaim, or cross-claim. All draft pleadings, briefs, and other work products shall be forwarded to In-House Counsel at least one week in advance of the due date (or as directed) to enable consideration, comment, and approval. The Company expects to receive advance notice of important meetings, hearings, depositions, settlement conferences, pretrial conferences, and trial dates, and to be provided with copies of all pleadings served by any party and all legal memoranda prepared by the Firm. Neither Outside Counsel nor the Firm is to take positions on behalf of Company without authorization from In-House Counsel. Please carefully review discovery requests before sending them to In-House Counsel and identify those items to which the Company will object and those that will require an answer. Discovery requests should be forwarded with sufficient

time to prepare responses. No document should be produced without a thorough review by an Outside Counsel familiar with the case or without consideration being given to a protective order where appropriate.

Generally, In-House Counsel exclusively will communicate on behalf of the Company with Outside Counsel. The Company recognizes the time constraints of discovery deadlines or trial preparation may make it impractical at times to channel all communication through In-House Counsel. When it is necessary for Outside Counsel to work directly with Company personnel who are assisting on a case, it is essential for Outside Counsel promptly to advise In-House Counsel of what has been discussed. Accordingly, it is the responsibility of Outside Counsel to advise In-House Counsel as soon as possible the nature of any direct communications with the Company's personnel. Copies of all correspondence and documents sent to Company personnel also must be sent to In-House Counsel. Outside Counsel shall never take or act upon instructions from any Company personnel without first obtaining approval of In-House Counsel.

NOTE: *Include a paragraph with information about how to communicate and all necessary information to do so: e-mail, fax number, address, internal case identification numbers, case name, venue, etc.*

I. Diversity Policy

NOTE: *You may customize the diversity policy section of the outside counsel policy depending on the terms of each company's own internal policies.*

The Company has explained its policy of promoting full and equal participation by minorities and women. In this regard, the Company encourages Outside Counsel to hire minority and female professionals and to assign them to participate in the Company's work. In addition, the Company encourages its Outside Counsel

and their Firms to associate with minority firms, as well as organizations that provide legal support services. The Firm has indicated that it understands the significance of this diversity policy to the Company and that the Firm is equally committed to this policy and will adhere to it in performing services for the Company.

III. TERMINATION

The Company shall have the right to terminate the engagement of the Firm at any time. To the extent permitted by the Rules of Professional Conduct, the Firm may terminate its representation of the Company. In the event of any termination, the Firm will take all reasonable measures to protect the Company's interests. The Firm will provide reasonable assistance at the rates applicable to the engagement in effecting a transfer of responsibilities. At the Company's request, the Firm shall forward its entire file either to the Company or to successor counsel as the Company may direct.

D. INSURANCE NOTICE LETTER

1. Introduction

Rule 26(a)(1)(D) of the Federal Rules of Civil Procedure requires each party at the start of each case to disclose any insurance policy that may be liable to satisfy part or all of a judgment that may be entered in the action, or to indemnify or reimburse for payments made to satisfy the judgment. Depending on the terms of the insurance policy and applicable law, an insurer may attempt to rely on an alleged failure to give prompt notice as a basis upon which it may attempt to deny coverage or reserve rights.

Accordingly, as soon as your company learns of a claim or potential claim, you should place your company's insurers on notice in accordance with the terms of the applicable insurance policies. In so doing, you should work closely with the company's risk manager and insurance broker to identify all potentially applicable insurance policies. When appropriate, consideration should be given to alternative lines of coverage, multiple years of coverage, and excess layers of coverage.

When appropriate, consider engaging outside counsel to analyze the company's coverage claims and any reservations of rights or grounds for denial of coverage asserted by any of its insurers.

2. Form: Insurance Notice Letter

[Company's Letterhead]

[Date]

[Address for company's insurance broker]

Re: Insurer: [Insert name of insurer]
Policy No.: [Insert policy no.]
Insured: [Insert name of company or other applicable insured]
Matter: [Insert name of case or claim]

Dear [broker]:

Enclosed please find [the summons and complaint or a demand letter] against _____ (the "Company") in the above-captioned matter,

which were [served upon *or* received by] the Company on [date]. Accordingly, the Company is notifying [insurer], through you, of this claim. Please notify [insurer] of this claim at your earliest convenience and copy me on your notice letter.

Thank you for your prompt attention to this matter.

Sincerely,

[In-house counsel for company]

E. DOCUMENT PRESERVATION DIRECTIVE OR LITIGATION HOLD

1. Introduction

a. Records Management Programs

Records retention is crucial to disciplined corporate governance. Its importance is highlighted with each new jury verdict and court decision that metes out severe punishments to a prominent company for mishandling its records. Implementing a compliant records management program can be daunting. Businesses find themselves inundated with bulging file cabinets, their employees busy clicking away on e-mail, exchanging voice mails, and saving to network servers terabytes of computer-generated documents.

Most companies have some form of record retention system to respond to the ever-growing accumulation of records, ranging from an employee-by-employee method for retaining records to a formal written record retention policy with a detailed retention schedule. The trend has moved away from a company's reliance on its employees' individual judgments toward the adoption of a formal, enterprise-wide, written record retention policy and schedule. This move makes good business sense. Absent a compliant record retention policy, companies have found themselves burdened with inconsistencies, with some individuals retaining certain records while others are purging the same categories of documents.

Records should be purged regularly pursuant to the record retention schedule. Records that should be purged—whether paper or electronic—include both those on premises and those in offsite storage. Purging must be performed in a manner that ensures continued confidentiality or privilege of appropriate records during the destruction process. Although specific records may warrant different treatment, in general, shredding confidential paper documents is sufficient. The company should work with its information technology personnel to determine how best to ensure the permanent deletion of electronic records, because many computer systems retain deleted files on the hard drive until that portion of the hard drive is overwritten, which can sometimes take several months or years.

b. Litigation Holds

A procedure for implementing a litigation hold is vital to managing corporate records. A company must have a clear mechanism to preserve potentially relevant evidence that ensures that record purging can be suspended promptly to prevent loss of records: upon notice of potential litigation, bankruptcy in which the company may be the debtor or creditor, or the receipt of service of legal process for which those records may be relevant; upon learning of a government inquiry; and/or during the course of voluntary cooperation with governmental authorities.

Paper documents long have been sought through the litigation discovery process. Electronically stored information now is a central target for discovery in litigation (“e-discovery”).

For parties in litigation, courts impose high standards for management and production of electronic stored information. Failure to produce such records, even due to inadvertent data destruction, has resulted in tough sanctions, including adverse jury instructions, exclusion of evidence, monetary penalties, and entry of default judgments.

NOTE: *As soon as your company reasonably believes that a claim may be filed by or against the company, your organization has an affirmative duty to preserve relevant records, both electronic and hard copy. The company should impose a litigation hold as its policy of preserving potentially relevant evidence.*

In implementing a litigation hold, a company should work with litigation counsel to ensure a properly scaled approach. A person should be designated to evaluate the preservation of potentially relevant electronic evidence. Preservation should be broad. The investigation should include:

- a review of the company’s electronic information retention architecture and system;
- a meeting with company information technology (IT) personnel to understand systemwide backup procedures and the company’s electronic information recycling policy;

- a meeting with key players in the litigation to discuss how they manage electronic information;
- the preservation of potentially relevant electronic evidence; and
- instruction to all pertinent employees to produce copies of their relevant active files and ensure that all backup media, such as backup tapes, are identified and preserved.

The following is a practical form that may be used for communicating a litigation hold to employees. The company should determine the most efficient, effective, and timely means to distribute the litigation hold. Regardless of which means it uses, it should maintain copies of the litigation hold and a record of when, how, and to whom it was distributed.

2. Form: Litigation Hold

Litigation Hold Notice

To: [Company managers—relevant departments, related IT managers, specific persons involved with dispute]

From: [General counsel, risk management, or other senior management]

Re: **Litigation Hold**
Preservation of Relevant Information:
Paper Documents and Electronically Stored Information

Date: [Date]

From time to time, our company is involved with litigation. We currently are involved in a dispute involving [basic description of case]. The parties to the lawsuit allege, among other things, [basic description of subject matter or allegations]. We intend to vigorously [defend against these allegations and/or pursue establishing our claims/counterclaims].

During the course of litigation, our company may be required to make certain of its paper files and electronically stored information available both to our own lawyers and to the legal staff representing the other parties in the case. ***It is crucial that you take affirmative steps to preserve both paper documents and electronically stored information that are relevant to this dispute and that are in your custody or control.*** The failure to preserve these materials could be detrimental to our position in the litigation. We direct that you preserve electronically stored information, including e-mail, electronic calendars, financial spreadsheets, Word documents, CAD documents, and other information created and/or stored on your computer.

The time period at issue in this case is [insert date span]. Although this time period might be adjusted as the litigation proceeds, this date span is a good starting point to assess the materials you should preserve.

Please note that our company has in place a records retention schedule. By this notice, you are directed to suspend compliance with the records retention schedule that otherwise would require you to discard or destroy those documents and electronically stored information that you determine are relevant. ***Do not discard documents or electronically stored information that are relevant. Do not delete, overwrite, alter, or destroy such materials, even if the records retention schedule otherwise would direct you to do so.***

Our IT staff has been notified of this litigation hold. IT will be working with our legal department to ensure we implement the litigation hold. We will follow up with more information as the litigation proceeds, including advising you when the litigation hold is lifting. In the meantime, if you have questions, please contact [insert name and phone number].

F. CONFLICT WAIVER LETTER

1. Introduction

Actual and potential conflicts of interest are now a common occurrence for in-house and outside counsel. It is important to document notice and waivers of conflicts in writing. In so doing, you should ensure that the conflict waiver preserves the company's right to continue to retain the outside counsel of its choice. Courts increasingly are enforcing such waivers of potential future conflicts of interest. For an example, see *Visa U.S.A., Inc. v. First Data Corporation*, 241 F. Supp. 1100 (N.D. Cal. 2003).

2. Form: Conflict Waiver Letter

[Company's Letterhead]

[Date]

[Address for company's outside law firm requesting a conflict waiver]

Re: Waiver of Conflict of Interest

Dear [Outside counsel]:

I am writing in response to your request for [name of company]'s (the "Company") waiver of [a potential or an actual] conflict of interest in connection with [name of law firm]'s (the "Firm") representation of [the Firm's other client] ("Other Client"). The Company does not object to the Firm's representation of Other Client subject to the following conditions:

1. Other Client agrees not to object to the Firm's continued representation of the Company or its affiliates in any existing and future matters, including without limitation any matters in which the Company is or may be adverse to Other Client.
2. In representing Other Client, the Firm will not assert any claim, counterclaim, cross-claim, third-party claim, defense, or other

position adverse to the Company, nor will it direct any discovery against the Company.

3. The Firm is representing Other Client for the sole purpose of [describe limited engagement to which the Company is consenting]. The Firm and Other Client understand and agree that the Company reserves the right to assert any potential or actual conflict of interest and take appropriate action regarding any representation of Other Client by the Firm that is broader than specified in this conflict waiver letter.
4. The Firm and Other Client acknowledge that other conflicts might arise that are not presently foreseeable. In the event of such a conflict, the Firm and Other Client agree that, at the request and in the sole discretion of the Company, the Firm shall withdraw from representing Other Client, but shall continue to represent the Company. Other Client waives any conflict of interest, whether actual or potential, whether known or unknown, or any other objection whatsoever, including without limitation any objection based upon a duty of loyalty, confidentiality, or otherwise, to the Firm's continued representation of the Company in any current or future matter, including any matter in which the Company is adverse to Other Client, and agrees not to seek to disqualify the Firm from representing the Company.
5. The Firm's personnel providing services to Other Client will not be among those providing services to the Company or any of its affiliates. The Firm will keep confidential from Other Client all privileged communications and confidential information relating to the Company, and will keep confidential from the Company all privileged communications and confidential information relating to Other Client. Before representing Other Client, the Firm agrees to implement an ethical screen satisfactory to the Company.
6. This letter agreement contains the complete and entire agreement between and among the Company, the Firm, and Other Client relating to the waiver of conflicts of interest. It shall not be construed more strictly against one party than against another by virtue of the fact that it was initially prepared by one party, but rather should be construed to afford the broadest protection to the Company's right to retain the Firm. This letter agreement may be executed in two or more counterparts, each of which shall be

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deemed an original, but all of which together shall constitute a single agreement.

7. Other Client has been informed of the conditions set forth in this letter and has agreed to these conditions by signing below.

If these terms are acceptable, please sign this letter on behalf of your Firm, obtain your Other Client's signature, and return the fully executed letter agreement to me.

Sincerely,

[In-house counsel for company]

Received and agreed to:

[Name of firm]

By: _____

[Outside counsel at firm]

Date: _____

Received and agreed to:

[Name of the firm's other client]

[The firm's other client]

Date: _____

G. BRIEF DISCUSSION REGARDING OBJECTIONS AND RESPONSE TO SUBPOENA

1. Introduction

One of the areas that in-house counsel often handles on their own involves subpoenas served on the company. Rule 45 of the Federal Rules of Civil Procedure, which governs subpoenas, can be a malpractice trap for the unwary. Rule 45 requires that a person served with a subpoena serve on the party that issued the subpoena any objections within 14 days after service of the subpoena or before the time specified in the subpoena for compliance if such time is less than 14 days after service. Accordingly, it can be easy to waive inadvertently the company's right to object to a subpoena if objections are not timely served. These standard objections can serve as a useful checklist for in-house counsel when preparing a response.

2. General Objections

In most jurisdictions, general objections alone will not satisfy a company's obligation to respond. However, including general objections preserves those objections and may be incorporated by reference in the responses to each individual request.

Common general objections include:

1. Company objects to this subpoena to the extent it requires responses beyond the scope authorized by the Federal Rules of Civil Procedure or this Court's Local Rules.
2. Company objects to this subpoena to the extent that it purports to impose any obligations upon Company beyond those required by the Federal Rules of Civil Procedure or this Court's Local Rules.
3. Company objects to this subpoena to the extent it requests documents that are not in Company's possession, custody, or control.
4. Company objects to this subpoena to the extent it seeks documents already in the possession, custody, or control of one or more parties in the above-captioned action, and/or are a matter of public record, and/or can be more conveniently, less burdensomely, or less expensively obtained from some source other than the Company.

5. Company objects to this subpoena to the extent it seeks documents that are protected by the attorney-client privilege, were prepared in anticipation of litigation or for trial, and/or are otherwise protected by the work product doctrine, self-critical analysis privilege, and/or other applicable privilege or doctrine. [NOTE: *This objection often is accompanied by the following reservation of rights:* Inadvertent production by Company of any documents that contain confidential or privileged information, were prepared in anticipation of litigation, or are otherwise immune from discovery shall not constitute a waiver of any privilege or of any ground for objection to discovery with respect to such documents, or the subject matter thereof or the information contained therein, or of Company's right to object to use of any such document or information in this or any other action.]
6. Company objects to this subpoena to the extent it calls for the production of any information related to regulatory audits by, or communications with, any government entity or regulator.
7. Company objects to the subpoena to the extent it is phrased in absolute terms. [NOTE: *This objection is often accompanied by the following limitation:* In responding to this subpoena, Company will undertake only to supply information or documents known to the Company at the time of the response or located after a reasonably diligent search, and will not undertake any obligation, express or implied, to represent that the response includes all of the information or all of the documents that may exist.]
8. Company objects to each request to the extent that it purports to require it to produce electronically stored information from sources that are not reasonably accessible because of undue burden and/or cost. Such sources include without limitation [identify sources not reasonably accessible, such as server backup tapes or legacy systems]. Company does not assume and specifically disclaims any obligation to search or produce any and all sources of electronically stored information that is not reasonably accessible.
9. All specific responses to this subpoena are provided without waiver of, and with express reservation of: (a) all objections as to the competency, relevancy, materiality, and admissibility of the responses and the subject matter thereof as evidence in any further

- proceedings in this action, including trial, or in any other action; (b) all privileges, including the attorney-client privilege and the work product doctrine; (c) the right to object on any ground at any time to a demand or request for further responses to these or any other discovery requests; and (d) the right to move for a protective order to protect the confidentiality of any information disclosed or for any other purpose provided by law.
10. Notwithstanding these objections, Company's response to this subpoena is based upon a diligent search by Company and its counsel. Company reserves the right to amend or supplement its responses at any time in light of deposition testimony, further investigation, research, or analysis, to the extent permitted or required by law, and to introduce at trial any and all evidence.

3. Specific Objections

Specific objections should be tailored to the particular request. To do so, it is advisable to include the specific basis for the objection. For example, when objecting to a request as vague and ambiguous, include the element of the request that is vague and ambiguous (a particular term(s) is unclear or unknown, or the type of documents requested could be interpreted in several different ways).

Common specific objections include:

1. Company objects to this request as vague and ambiguous.
2. Company objects to this request as overly broad and unduly burdensome.
3. Company objects to this request as duplicative of prior requests.
4. Company objects to this request as calling for a legal conclusion.
5. Company objects to the extent this request seeks information that is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence.
6. Company objects to this request because it fails to specify the relevant time frame and/or is not limited to a reasonable time frame and, therefore, is overly broad and unduly burdensome.
7. Company objects to this request as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

8. Company objects to this request to the extent it calls for the production of documents and/or information that contain proprietary and confidential business and financial information, disclosure of which would be harmful to the legitimate business interests of Company or any other person or entity that has a legitimate expectation or right of privacy pursuant to applicable law.
9. Company objects to the request to the extent that it calls for the production of any confidential information. [**NOTE:** *This objection is often accompanied with the following:* Subject to and without waiving any other objections Company may assert, Company will make available for inspection and copying nonprivileged confidential documents responsive to the request and genuinely relevant to the issues in the above-captioned case only upon entry of an appropriate protective order satisfactory to Company.]

H. CONCLUSION

The facts and circumstances of each lawsuit are unique. Accordingly, you should modify these forms in a manner most appropriate for your company's dispute.

Litigation is inherently complex. These forms provide a foundation to address issues that commonly arise at the outset of a dispute, but cannot cover every issue that may arise in a lawsuit. Unless you routinely practice in litigation, you may wish to consult outside litigation counsel.

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