

WILLIAMS &
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Complex Litigation – Tips for Winning Efficiently

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Today's Topics

- Preparing now for your next litigation
- Best practices in litigation
- Mediation and settlement
- We lost, what now?

Preparing now for your next litigation

Prepare Now – Document Retention, Preservation, and Hygiene

- **Retention in the ordinary course**
 - Have a clear, written document retention policy
 - How long will documents be retained?
 - Where and how will they be stored?
 - How will they be disposed of?
 - Address company devices and personal devices
 - Specify if and what types of business communications are permitted on personal devices
 - Make employees aware that personal devices may be subject to legal holds if they use them for business purposes

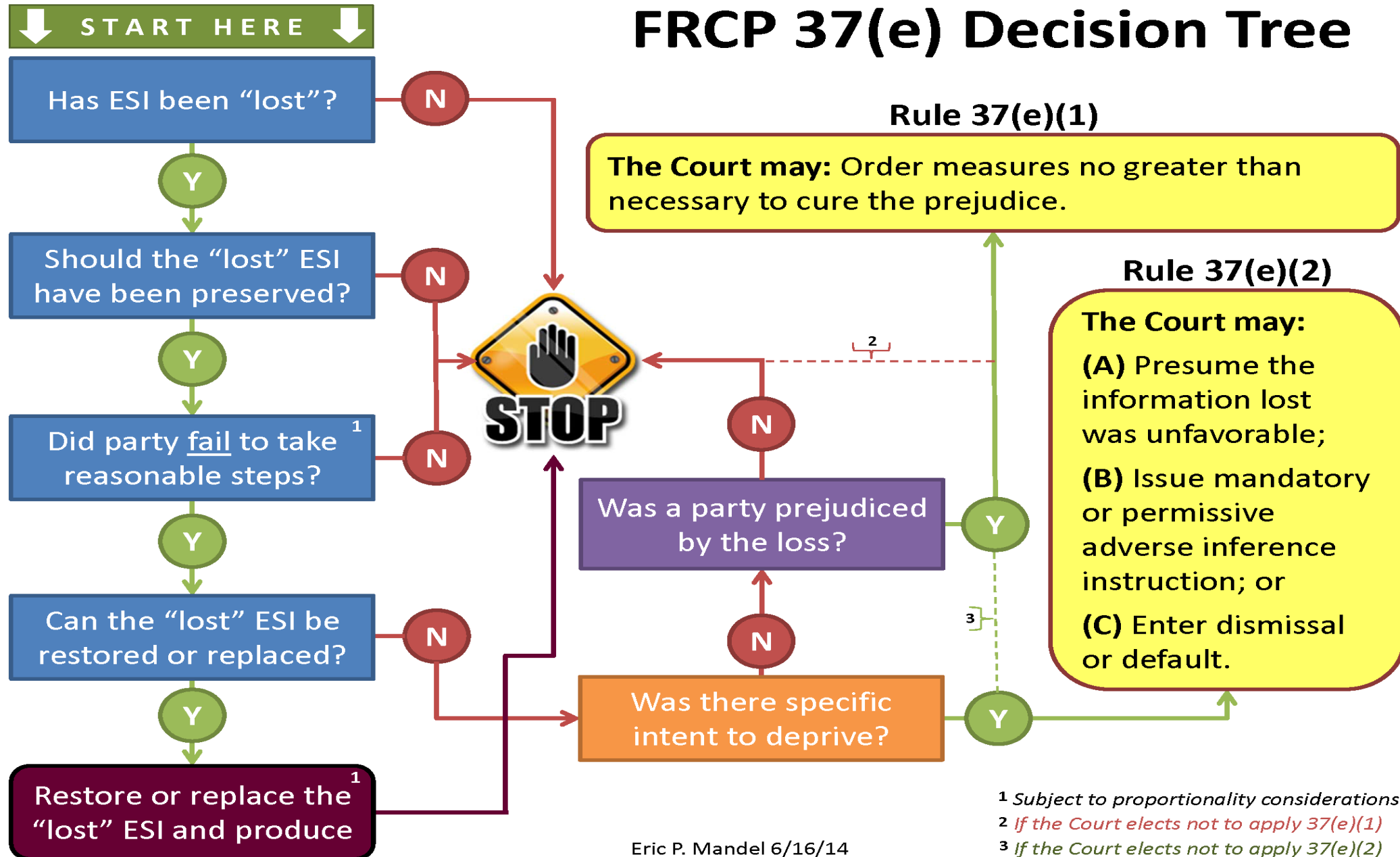
Prepare Now – Document Retention, Preservation, and Hygiene

- **Preservation in anticipation of litigation**
 - The duty to preserve arises when litigation is reasonably anticipated
 - Often before a complaint is filed
 - See Federal Rule of Civil Procedure 37(e) – Failure to Preserve Electronically Stored Information
 - Rule 37(e) is not about perfection, but reasonableness
 - Did the parties take reasonable steps in good faith to preserve and produce requested ESI?

Prepare Now – Document Retention, Preservation, and Hygiene

- **Hygiene before, during, and after litigation**
 - Before litigation:
 - Are internal procedures and practices aligned with reasonable business needs?
 - During litigation:
 - Do you have a process for updating lit holds and recipient lists?
 - After litigation:
 - Do you have a process for complying with retention/destruction requirements of any protective orders?

FRCP 37(e) Decision Tree



Prepare Now – Contractual Provisions

Arbitration Clauses, Jury Waivers, Class Action Waivers, and Venue Provisions

- Do you have them where you want them?
- Do they still make sense?
- Are they enforceable?
 - Assume scrutiny by a court
 - Be clear, specific, and fair
 - Consider severability clauses
 - Keep state law variations in mind

Prepare Now – Establishing Privilege (But Not Overreaching)

Importance of the attorney-client privilege:

- Allows candid evaluation of claims
- Allows *legal* strategy to be shielded from opponent
- Promotes informed advice and decision-making

Elements of the privilege vary by jurisdiction, but typically include:

- Communication with an attorney (who is acting in that capacity)
- For the purpose of obtaining legal advice
- That is kept confidential

Prepare Now – Establishing Privilege (But Not Overreaching)

What does attorney-client privilege protect?

- Application of the privilege is limited to communications and does not protect the underlying facts
- Usually limited to legal (as opposed to business) advice
 - Majority test: communications must be primarily or predominantly of a legal (rather than a business or personal) character
 - See *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007)
 - Employees' communications with in-house counsel may be privileged, but courts scrutinize such communications carefully because in-house counsel often have “dual role” – business and legal

Prepare Now – Establishing Privilege (But Not Overreaching)

Who does attorney-client privilege protect?

- Agents of the attorney (paralegals, administrative assistants, interpreters, etc.)
 - Necessary to facilitate the confidential communication for the purpose of obtaining or providing legal advice?
- Third parties
 - Necessary, or at least highly useful, for the effective consultation between the client and the lawyer?
 - *U.S. v. Kovel*, 296 F.2d 918, 922 (2d. Cir. 1961)
- In-house counsel – it depends

Prepare Now – Establishing Privilege (But Not Overreaching)

- Legal functions may include:
 - Advising company on existing law
 - Undertaking and reporting legal research
 - Advising on legal implications of business conduct or plans
 - Advising on imminent litigation
 - Opining on applicable law
- Business functions may include:
 - Negotiating terms of a contract
 - Attending business meetings
 - Soliciting advice from outside professional

But it's a fact-specific inquiry.

Prepare Now – Establishing Privilege (But Not Overreaching)

Best Practices:

- Whenever possible, separate legal and business advice
- When serving in both legal and non-legal roles:
 - Segregate legal files from non-legal files
 - Maintain a written record of the legal aspects of a communication
- Mark e-mails seeking legal advice appropriately
 - “Privileged and Confidential” – “Attorney-Client Communication”
 - The marking does not create the privilege
 - Use labels/designations consistently and correctly – do not overuse
 - Can facilitate sorting in the event of litigation

Prepare Now – Establishing Privilege (But Not Overreaching)

What Will Not Suffice:

- The mere physical presence of in-house counsel during a conversation
- Copying in-house counsel when sending an email or circulating a memorandum

Prepare Now – Employee Relations, Policies, and Contracts

- Have policies and procedures in place ahead of time
 - Confidentiality
 - Cooperation
 - Whistleblowing
 - Get to know the federal statutes:
 - Sarbanes-Oxley Act, 18 U.S.C. § 1514A; Dodd-Frank Act, 15 U.S.C. § 78u–6; Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) and (b)(9); False Claims Act, 31 U.S.C. §§ 3729–3733
- Be strategic about employee relations.
 - Will someone be a key witness down the road?

Best practices in litigation

Best Practices in Litigation – Communicating with the Company

Privilege (and potential waiver) should be front of mind.

- Attorney-Client Privilege
 - Protects confidential communications between an attorney and a client for the purpose of seeking legal advice
- Work Product Doctrine
 - Protects documents or tangible items prepared in anticipation of litigation

Best Practices in Litigation – Communicating with the Company

Federal Rule of Civil Procedure 26. Duty to Disclose; General Provisions Governing Discovery

- **Work Product Protection:** “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” (Fed. R. Civ. P. 26(b)(3)(A))
 - Exception: “substantial need for the materials” and the party “cannot, without undue hardship, obtain their substantial equivalent by other means” (Fed. R. Civ. P. 26(b)(3)(A)(ii))
 - Enhanced protection for “mental impressions, conclusions, opinions, or legal theories” (Fed. R. Civ. P. 26(b)(3)(B))
 - “substantial need” cannot overcome this enhanced protection

Best Practices in Litigation – Communicating with the Company

Think carefully about who you send communications to.

- Within the company
 - *Upjohn Co. v. United States*, 449 U.S. 383 (1981): attorney-client privilege can extend to communications between lawyers and lower-level employees if necessary to provide accurate legal advice
 - Some states follow *Upjohn*, or something similar
 - Some states follow the “control group” test: attorney-client privilege only extends to communications between lawyers and senior-level management (“necessary people” who have authority to make decisions based on the legal advice)
 - As always, check the rules of the jurisdiction
 - Privilege may (or may not) apply when you engage third parties
 - *U.S. v. Kovel*, 296 F.2d 918, 922 (2d. Cir. 1961) (client-accountant comms)

Best Practices in Litigation – Communicating with the Company

Tips for Preserving Privilege:

- Identify applicable law
- Avoid mixing legal advice with business, compliance, technical, or public relations advice
- Use privilege/work product labels where appropriate
- If you anticipate litigation, say so to create a record
- Make sure participants are protected persons and warn against sharing more broadly

Best Practices in Litigation – Initial Decisions

Be prepared for day-one decisions.

- Will you move to compel arbitration?
- Does it make sense to file a motion to dismiss?
- Will you move to transfer or dismiss based on venue?
- Consider conflicts and potential recusal

Best Practices in Litigation – Discovery

Navigating Discovery:

- Establish clear and comprehensive document preservation communications and practices ahead of time
- Be prepared for potential triggering events
 - Filing of a lawsuit
 - Receipt of subpoena or demand letters
 - Internal awareness of the possibility of a lawsuit
 - Contemplation of offensive claim

Best Practices in Litigation – Discovery

Navigating Discovery (cont'd):

- Circulate document retention notice
 - Identify potential custodians
 - Establish a procedure for recipients to confirm compliance
 - Establish procedures for IT to follow once a notice has been circulated
 - Don't forget third parties
 - ***Document the process***

Best Practices in Litigation – Discovery

Navigating Discovery (cont'd):

- Collect potentially relevant documents
 - Work with outside counsel to execute a well-documented and comprehensive process – document what was collected, from who, and when
 - Engage an outside vendor who can coordinate the process
 - Lean into the process and do not fall behind
 - It's easier to fight and win when you know what you are fighting over
 - Recovering from legacy systems – fact specific
 - Foreign discovery – it's complicated

Best Practices in Litigation – Discovery

Navigating Discovery (cont'd):

- Take the lead on protective orders and ESI protocols
- Less discovery is not always “more”
 - What documents do we think are relevant to our position?
 - What documents do we think the opposing side will reasonably be entitled to?

Best Practices in Litigation – Experts

Identify and retain experts early.

Federal Rule of Civil Procedure 26(b)(4):

- Experts retained for trial and trial preparation are subject to discovery
- If the expert is retained only as a consultant but not in anticipation of trial testimony, his or her work is probably not discoverable

Use experts to shape discovery and motions practice.

Best Practices in Litigation – Knowing When to Fight

Fight hard, but pick the right fights.

- Not every winnable fight is worth it
- Focus on impactful issues
- Conserve resources
- Preserve credibility

Best Practices in Litigation – Error and Appeal

Be vigilant to preserve error and optimize appeal.

- Lay the groundwork early and consistently
 - Appeals are won and lost in the trial court – identify and track appealable issues from day one

Prepare stakeholders for the long-game.

- Appeals take time
- Set expectations early

Best Practices in Litigation – Handling Press Inquiries

Have a plan and set ground rules

Identify a spokesperson

Be *very* cognizant of your (unintended) audiences:

- Judge
- Jury
- Shareholders
- Government/regulators

If you must speak, less is almost always more

Mediation and settlement

Mediation and Settlement – General Tips

Be reasonable and clear – Anticipate that judges talk

Take the pen

Know ahead of time what your guardrails are

- Confidentiality
- Non-disparagement
- Covenants not to sue (or assist in suits)

Mediation and Settlement – Confidentiality

Federal Rule of Evidence 408. Compromise Offers and Negotiations – limits the use of settlement offers and statements made during settlement negotiations in court

- Limitations: only inadmissible if offered “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction” (Fed. R. Evid. 408(a))
 - Admissible for other purposes (Fed. R. Evid. 408(b))
 - To show bias or prejudice
 - To negate a contention of undue delay
 - To prove an effort to obstruct a criminal investigation or prosecution

Mediation and Settlement – Confidentiality

Mediation Privilege – generally, mediation communications are privileged and not subject to discovery or admissible as evidence in a proceeding

- Uniform Mediation Act, Section 4: Privilege Against Disclosure; Admissibility; Discovery
 - 12 states and the District of Columbia have adopted the UMA
 - Many states have their own legislation
 - Know your jurisdiction
- The privilege is not absolute

Mediation and Settlement – Non-Disparagement Clauses

Carefully define scope and avoid over-reaching

Check the law in your jurisdiction

- Federal and state laws limit enforceability
- E.g. laws limiting confidentiality or non-disparagement clauses

Mediation and Settlement – Covenants Not to Sue

ABA Model Rule 5.6(b): Restrictions on Right to Practice

A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

- Be wary about preventing opposing counsel from:
 - Representing similar clients in the future
 - Filing related or follow-on claims

We lost, what now?

We Lost, What Now – Judgment & Bonding

- It's complicated
- Familiarize yourself with the rules at the outset of litigation
 - See Federal Rule of Civil Procedure 58
 - Check your jurisdiction
- Timing matters – be clear about when final judgment was entered and be prepared to move quickly
- Think through logistics early

We Lost, What Now – Appeal

- Know your deadline
 - See Federal Rule of Appellate Procedure 4
 - Generally –
 - In a civil case, the notice of appeal must be filed with the district clerk within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A)
 - But several nuances
 - Check your jurisdiction
- Prepare stakeholders for uncertainty at the outset

Questions?

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