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NAVIGATION OF COMPLEX AND MULTI-PARTY CLAIMS

Best Practices, Lessons, & Strategies

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A. Introduction

Multi-party and complex construction claims can be difficult to navigate, particularly through the early stages of litigation. This coursebook submission focuses on past experiences and best practices on how to properly wade through the challenges of complex claims, implementing procedural and substantive strategies that may mitigate issues, and streamlining the "life" of the litigation. As detailed below, the particular discussion and topics include pre-suit and claims practices, joinder, consolidation, case management orders, use of special masters, e-discovery, ESI, and settlement considerations.

B. Pre-Suit Agenda

a. Notice of Claims

Construction disputes arise for many reasons ranging from differing site conditions, design errors and omissions, disagreements surrounding change orders, force majeure, or vague contractual language. Sometimes, the parties negotiate a resolution to their dispute without moving to a formal claim posture. However, when negotiations fail, companies need to be ready.

When a company receives a claim notice, it can be via formal letter or service of a Complaint initiating litigation. While receiving a claim is never fun, a company can take steps to eliminate some of the potential hassles surrounding the process.

i. Notify Counsel

As a preliminary step, as soon as a claim is received, a company should notify its counsel (whether in-house or external). This is particularly important if the first notice of a formal claim is a Complaint because a timely response to a Complaint is vital to protecting a company's interests. Indeed, failure to respond timely to a Complaint can result in a default judgment being entered against the company. While there are potential avenues to addressing a default judgment, it is not a position in which a company should want to find itself. In short, your counsel should be the first call you make when a claim is received.

ii. Notifying Your Insurance Company

The company's attorneys will be able to help identify whether any of the company's insurance policies may cover litigation costs. Timely notice to the insurer is important to avoid any risk with respect to coverage issues. The insurer may also want to be involved in the selection of external counsel to handle any litigation. The company should consider and discuss with its insurer the company's needs and expectations with respect to the type and experience of counsel desired. If the company has a preferred and suitable external counsel

with whom it has worked with before, the company may consider discussing the use of such counsel with its insurer.

iii. Identify your Project Team and Potential Point-of-Contact

In order to provide its attorneys with relevant information in a timely manner, the company will need to identify the "players" in the project underlying the claim. The company's counsel will likely want to be involved in interviewing employees and gathering relevant documentation. The company will also want to assist its counsel in determining the employees most knowledgeable about the project to serve as a point-of-contact and to assist during discovery (particularly any organizational deposition).

Sometimes, however, identifying the project team may be difficult due to the passage of time and employee attrition. At times, a company may not have many (or any) employees left that worked on the project underlying the claim. In such circumstances, the company should work with its counsel to determine which of its former employees may have important information related to the claim and schedule time for counsel to speak with such person(s). The company will also need to have someone learn about the project and serve in a point-of-contact capacity to ensure that the counsel is supported in defending against the claim or litigation.

iv. Litigation Hold

The obligation to preserve evidence for litigation begins when a party knows or reasonably should have known that the evidence is relevant to future or current litigation. Considering this obligation, the company's attorneys will likely assist in the issuance of a "litigation hold" letter (or notice). A litigation hold letter is issued within the company and is distributed to members of the project team and all other employees who may have documents (either hard copy or electronic) related to the claim or litigation. A litigation hold letter is important, as it helps to ensure that relevant documents are maintained and that internal deletion processes are turned off during the pendency of the claim/litigation.

Litigation hold letters, and the underlying litigation hold, are of particular importance during the pendency of litigation. A failure to preserve evidence can have a myriad of consequences, such as the imposition of monetary fines, directions that certain facts be taken as established, or the provision of adverse jury instructions. The company's attorneys will help avoid such repercussions via a tailored litigation hold letter. Indeed, it is good practice to send relevant employees reminders of their litigation hold obligations throughout the claim/litigation process at various intervals.

v. Gather Documentation

Life would be easy if all project teams maintained indexed files with copies of all correspondence maintained in a flawless matrix. However, such recordkeeping is unlikely (to put it nicely). The earlier a company starts gathering relevant documentation, the better prepared it will be should formal litigation result.

When working to gather documentation, it is easy to think about email. Indeed, a great deal of information is transmitted (and stored) in employees' email inboxes. If the company has taken time to issue the litigation hold letter, it will be able to retrieve relevant files from relevant users. A company should consider making a full copy of all emails using the relevant dates of the project underlying the claim/litigation as parameters for potentially responsive documents. It can later cull down this set during discovery using, for example, key word searches.

However, email is not the only area that a company should consider in the gathering process. Relevant files may also be stored on centralized servers, cloud servers, individual hard drives or thumb drives. All of these different potential areas should be considered and, to the extent possible, the company representative should work with legal counsel and an IT resource to collect relevant documentation from such sources.

Following collection of relevant data, the company's legal counsel will likely provide the company with means for securely transmitting the data for preservation and potential production during discovery.

vi. Determine Potential Counterclaims and Third-Party Claims

One item that may be potentially overlooked early in the claims process is whether there is an opportunity for a company to point the finger back at the claimant and issue a counterclaim. The company should consider any contractually required notice provisions and any other potential conditions precedent to filing a claim. In a formal litigation posture, the company's counsel can provide advice with respect to potentially appropriate causes of action.

Alternatively, there may be a third party (e.g., a subcontractor) that a company may be able to hold responsible for any potential damages. Again, a company should consider relevant language in its subcontract and put the subcontractor on notice of the claim. If possible, the company may consider tendering its defense of the claim or litigation to the subcontractor. Again, counsel will be able to advise on avenues of recovery against third parties and these possibilities should be considered early and discussed between the company and its legal team.

b. E-Discovery

Discovery is often the most time consuming and costly stage in litigation. This is particularly true when dealing with vast quantities of electronically stored information (ESI). The meet and confer process can present an opportunity to mitigate some of these costs.

Under Federal Rule of Civil Procedure 26 (or a relevant state equivalent), parties are often required to meet and confer to discuss, among other things, "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced…" FRCP 26(f)(3)(C). The result of this process is typically called an ESI Agreement or ESI Protocols (see also CMO Section below).

ESI Protocols should address:

- the scope of electronic discovery, which may identify relevant:
    1. custodians of ESI;
    2. timeframes for production;
    3. locations (e.g., specific computer networks, servers, and hard drives); and
    4. search terms to be used to cull down the quantity of potentially relevant ESI.
- the format of production for electronically stored information; (e.g., PDF files; native file formats, .pst files); and
- Privilege issues, including the handling of the unintentional production of privileged materials.

ESI Protocols may also address other items, such as the handling of duplicate copies of email, the organization of the production, and what categories of metadata (i.e., the underlying information of the ESI – including date of creation, recipients, etc.) should be produced between the parties.

A company and its counsel should have a conversation surrounding the company's ability around the production of ESI to ensure that the company can comply with the ESI protocols negotiated between the parties.

C. Early Litigation/Procedural Strategies

a. Joinder

Parties in multi-party construction disputes face joinder issues that Federal Rules of Civil Procedure 19–21 govern in the context of litigation in federal court.

Rule 19 requires the joinder of parties without whom the court would not be able to provide relief among the parties in the suit. This required joinder is subject to the significant qualification that the party to be joined "not deprive the court of subject-matter jurisdiction," which non-diverse parties may do in diversity actions. Rule 19 lists certain factors that a court may determine in exercising its discretion as to whether an action may proceed or should be dismissed if a required party, were it feasible to join that party, cannot be joined.

Rule 20 allows for the permissible joinder of plaintiffs and defendants when the rights to relief they seek, or sought against them, are the same or arise out of the same transaction, and when there is question of law or fact that is common to either all plaintiffs or defendants, respectively.

Rule 21 governs misjoinder and permits the court to sever claims.

Parties on the outside looking in may seek to join by intervening in an action pursuant to Rule 24, which provides for both intervention as a matter of right and with permission of the court.

Parties should proactively consider issues surrounding necessary, and also interested, parties in choosing a forum prior to bringing suit. Each party should understand its end game and whether the forum will be able to provide it the remedy it seeks. A party needs to make sure it is aware of all parties against whom it seeks a judicial remedy, including other parties who may have an interest in a case.

Additionally, parties should consider the possibility of parallel litigation and dueling venues. Courts may stay litigation pending the resolution of other matters involving similar issues or parties, the resolution of which may affect the outcome the litigation in the staying court. The prospect of conflicting rulings may warrant consolidation of multiple claims into one suit as opposed to joining the same parties in multiple suits by different claimants.

Lastly, in the context of arbitration, ensure that the terms of the parties' contract discuss mandatory or permissible joinder, or restrict joinder of claims altogether.

b. Consolidation

Rule 42 allows for a federal court to consolidate all or parts of multiple cases involving common questions of law or fact. Parties should consider efficiencies in both seeking and defending discovery in related actions by consolidating the matters for discovery and then separating all or certain claims for trial pursuant to Rule 42.

Consolidation also avoids the risk of different rulings on the same issue. The court may consolidate all or parts of actions in its discretion, considering factors warranting such as the possibility of different rulings on common legal or factual questions, judicial economy, and the burden on all involved in trying a single or multiple trials.[1]

[1] *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 192-93 (4th Cir. 1982) (citing 9 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2383 (1971)).

c. Joint Defense Agreements

Large modern construction projects involve a multitude of professional services providers, contractors, subcontractors, and suppliers. Construction claims, particularly on complex projects, can involve numerous defendants, each with an interest in resolving the matter as quickly and efficiently as possible. At the early stages of multi-party litigation, there is often a flurry of crossclaims, counterclaims, and third-party actions as parties seek to assert new claims and bring potentially liable parties into the suit. As the case develops, some or all defendants may come to the realization that they have common interests in the defense of the litigation, and much to gain by cooperating with each other.[2] In such situations, a joint defense agreement ("JDA") may be warranted to allow defendants to share information and present a united defense.

i. What is a Joint Defense Agreement?

In its most basic form, a JDA, also known as a common interest agreement, is an agreement memorializing the terms under which two or more parties with a common interest in defending against a claim agree to exchange information while maintaining confidentiality pursuant to the common interest doctrine (also known as the joint defense privilege). Under the common interest doctrine, "If two or more clients with a common interest in a matter are represented by separate lawyers and they agree to exchange information about the matter, a communication which qualifies as privileged that relates to the matter is privileged against third parties."[3] A properly drafted JDA, therefore, allows co-defendants to communicate with one another as part of a coordinated defense. Although best practice is to have a written JDA, courts have enforced JDAs based on express verbal agreements or even implied by conduct.[4] The common interest doctrine is not limited to defendants, and cooperating plaintiffs may seek to protect their communications through a "joint prosecution agreement".

ii. Why Form a Joint Defense Agreement?

There are many reasons that parties might decide to cooperate and share information in defense of a claim. Sometimes parties' interests are aligned contractually, such as when one party has agreed by contract to pay for the defense of another party. Other times parties decide to cooperate with each other, even on a limited basis, for business or strategic reasons.[5] In such cases, cooperating parties need to ensure confidentiality pursuant to the common interest doctrine and a JDA allows for this. Although the traditional purpose of a JDA is to allow parties with common interests to exchange information without

[2] As examples, an Owner and its construction manager might determine they wish to cooperate in the defense of a contractor's claim for additional compensation based on alleged changes to the work. Multiple defendants in a construction site injury case might determine they wish to cooperate in attacking the plaintiff's theory of damages.

[3] Arizona Independent Redistricting Com'n v. Fields, 206 Ariz. 130, 141-42, 75 P.3d 1088, 1099-1100 (App. 2003)

[4] See *United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012).

[5] See footnote 1.

waiving privilege, co-defendants sometimes find it desirable to include other considerations in the agreement, such as allocation of defense costs or tolling of the statute of limitations on unfiled claims. A JDA can cover joint strategic decisions, such as the decision to admit liability and try the case on damages only and can allocate the cost of a future settlement or judgment.

iii. Elements of a Joint Defense Agreement

A carefully drafted JDA will generally contain the same core elements:

- Expression of Common Interest
- Confidentiality and Use of Information
- No Waiver of Privilege
- No Attorney-Client Relationship Created
- Termination/Withdrawal

Expression of Common Interest

The common interest doctrine generally requires that co-defendants exchange information in furtherance of a shared interest in the claim. Therefore, the JDA should have a clear and concise expression of the matter that is the subject of the JDA and a recognition of the parties' common interest.

Confidentiality and Use of Information

The JDA should contain a requirement that information exchanged is to be kept confidential and used for no other purpose than the furtherance of the common interest. Most JDAs will not attempt to define the specific info to be exchanged and will not require that information be exchanged. This allows co-defendants the flexibility to share information as they deem appropriate.

No Waiver of Privilege

The JDA will expressly state that the exchange of information pursuant to the JDA will not waive any applicable privilege.

No Attorney-Client Relationship Created

This is a critical provision. Interests can, and often do, shift during the course of a claim. If an attorney-client relationship is established between a party to the JDA and counsel for the other parties, counsel for the other parties could face

disqualification based on a conflict-of-interest.[6] To mitigate the risk of a disqualification scenario, the JDA should be clear in stating that no attorney-client relationship is created by the agreement, and that nothing done in furtherance of the JDA can be used as a basis to seek to disqualify counsel.

Termination/Withdrawal

A provision should be made in the JDA for how a party can withdraw from the JDA, and the circumstances under which the JDA will terminate. Confidentiality obligations regarding information exchanged should survive termination and withdrawal.

d. Suing Design Professionals – Individual Architect and Engineers

Architects, engineers, and other design professionals in the construction industry are generally involved throughout the entirety of construction projects. They prepare plans and specifications, respond to requests for information, and make recommendations throughout the course of a project. These design professionals may be sole practitioners or engaged in their profession through a limited liability company or corporation.

Unless otherwise modified through contract, the actions of design professionals are typically judged against the care and skill that is ordinarily exercised by similar professionals, performing services on the same type of project, at the same time and location, under similar circumstances and conditions. The failure to meet this standard of care may give rise to a cause of action for breach of contract or negligence (*i.e.*, a tort claim).

When design professionals do not meet their standard of care, the repercussions to a construction project, and the various parties to the project, can be costly both in terms of time and cost. At that point, the parties may seek to hold the design professionals and/or their employers responsible.

Although it does not appear to be a widespread practice, plaintiffs' attorneys occasionally choose to file claims against individual design professionals for professional negligence, as such conduct increases (potentially) the number of "pockets" for recovery for their client.

i. Lack of Privity of Contract Not a Barrier

Typically, it is not the individual design professional who signs the contract with the client. Instead, these design professionals are employees of the entity that signs that contract. However, many states specifically provide for liability of individual design professionals. For example, the Michigan Business Corporation Act maintains that individuals can be held professionally liable apart from the

[6] See *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000)

companies for which they work.[7] Similarly, in Montana, a design professional as part of a professional corporation (including an LLC), "is liable for any negligent or wrongful act or omission in which the individual personally participates to the same extent as if the individual had rendered the services as a sole practitioner."[8]

Florida also recognizes the right to proceed against an individual design professional. However, Florida also recognizes that parties may limit such liability against an individual design professional.[9] The Florida statute requires the following to shield an individual design professional from liability:

1. The contract is made between the business entity and a claimant (or another entity for the provision of professional services to the claimant);

2. The design professional is not named as a party to the contract;

3. The contract contains a statement (at least 5-point sizes larger than the rest of the text that, pursuant to the Florida statute, an individual employee or agent may not be held individually liable for negligence;

4. The business entity maintains professional liability insurance as required by the contract; and the damages are solely economic in nature and do not extend to personal injury or property damage not subject to the contract. [10]

With respect to this final point, the Florida legislature appears to be recognizing the Economic Loss Doctrine, which prohibits recovery in tort when a valid contract exists between the parties.

ii. Economic Loss Doctrine

In those states in which it applies, the Economic Loss Doctrine offers protection to design professionals. The Economic Loss Doctrine provides, generally, that design professionals have no liability to entities with whom the design professionals have no contractual privity provided that the losses or damages are of a purely economic nature (*i.e.*, not involving personal injury or property damage).[11] Traditionally, this has offered some protection for design professionals, but some

[7] Michigan Business Corporation Act, Section 450.1285 (stating, in pertinent part, "Any officer, agent, or employee of a professional corporation shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or her, or by any individual under his or her direct supervision and control, while providing professional service on behalf of the professional corporation to the person to which the professional services were provided.").

[8] Montana Professional Corporation Act, Montana Code Annotated, Section 35-4-404.

[9] Florida Statutes Section 558.0035, Regulation of Trade, Commerce, Investments, and Solicitations.

[10] *Id.*

[11] *See, e.g., Leis Family Ltd. P'Ship. v. Silversword Eng'g*, 273 P.3d 1218 (Haw. Ct. App. 2012) (noting that the purpose of the doctrine is to "shield defendants from unlimited liability for all the economic consequences of a negligent act, particularly in a commercial or professional setting…".

states have seen an erosion of the Doctrine, particularly where the parties are not in privity.[12]

iii. Contractual Protections?

In jurisdictions where design professionals can be held individually liable, a contractual clause limiting the parties against whom claims may be brought may provide some protection for these individuals. For example, in Florida, such a clause could state, as follows:

Pursuant to Section 558.0035 of the Florida Statutes, no employee, agent, officer, or director may be held individually liable for negligence arising out of the services provided under this Agreement.13

Consider, however, the situation in a state that does not explicitly recognize such a safe harbor provision by statute. Arguably, the contract provision would need to:

1. Contain similar language to that required by the Florida statute;

2. Contain a third-party beneficiary clause in favor of the individual employees, agents, officers, and directors; and

3. Specifically cite to the language as consideration for the company to enter into the contract with the client.

4. To be clear, some of the arguments that have been made in times past to hold individual design professionals liable are:

5. The design professionals are not a party to the contract and, therefore, do not benefit from its provisions[14]; and

6. The cause of action against individuals is required to avoid the repercussions of an "unfair" bargain – e.g., a limitation of liability provision in the contract.

With respect to the first argument, granting third-party beneficiary status for the individuals potentially removes the argument that the design professionals are not intended to benefit from the contract's provisions. With respect to the second bullet point, by putting the issue squarely within the bargained for

[12] See, e.g., *Sullivan v. Pulte Home Corp.,* 306 P.3d 1 (Ariz. 2013) (declining to extend the economic loss doctrine to non-contracting parties).

[13] The language noted is simply for illustration purposes. To be in accord with the statute, the provision would be provided in all capital letters and be five points larger than the surrounding text.

[14] *See, e.g., Witt v. La Gorce Country Club, Inc.*, 35 So.3d 1033 (Fla. 3rd D. Ct. App. 2010) (reasoning that any limitation of liability clause in the contract did not apply to the design professional's negligence).

agreement, the client would have a harder time arguing that they did not contemplate such a result.

iv. Insurance Protection

One final method of addressing the potential for individual liability is to purchase professional liability insurance covering the individual (in addition to the company). Of course, this "belt and suspenders" approach may be too costly for some clients. It does, however, provide the largest degree of protection for the individual design professional (particularly if the company that the design professional works for goes out of business).

v. Conclusion

A design professional may be subject to claims for damages and state law may not offer adequate protection (particularly where the economic loss doctrine does not apply). Consequently, parties should specifically address whether individual design professionals may be held liable to the client and further mitigate such risk by procuring separate insurance, where possible.

D. Managing Litigation–Best Practices

a. Case Management Orders

The Case Management Order (CMO) is the lifeblood and key to effectively navigating through multi-party, complex construction litigation. It is likely the single most important factor in assisting the parties. The underlying purpose of a CMO is to manage, expedite, and dictate the schedule and discovery protocols by which all parties must abide. Most importantly, it sets the expectations of the parties (and counsel) of when tasks will be accomplished and when the case may be prepared to go to trial. While a CMO may not be procedurally mandated, the parties would be hard pressed to work effectively and efficiently without one. Likewise, a generic scheduling order—while of some assistance–will not suffice to cover the number of issues that evolve throughout a complex construction defect case.

i. When to Prepare a CMO

It behooves the parties to begin preparing a draft of a CMO at the preliminary stages of the litigation once all parties are joined and before any discovery commences. Depending on the number of parties and the extent of the issues, it can take many weeks (or even months) for the parties to consent to all terms of the CMO. Alternatively, in the likely chance that the parties cannot agree to all terms, protocols or deadlines, the Court's (or Special Master - see below) assistance will become necessary to finalize the CMO. This, of course, further delays the true commencement of the case. So, the sooner a draft CMO can be circulated the closer the parties are to moving the case forward.

ii. Phasing–Multiple CMO's

In overly complex matters where the issues are too difficult to predict, a phased CMO approach might best suit the needs of the litigants. Thus, instead of attempting to predict every issue or deadline in one CMO, the parties craft several, smaller CMOs over the course of the matter. For example, the first CMO may outline the first 90–180 days with the plan of exchanging initial disclosures and Electronically Stored Information (ESI). Thereafter, a second CMO can preside over written discovery and expert report cutoffs; and a third CMO can outline deposition dates, mediation, and trial. This phasing allows better management and streamlines the case step by step.

iii. Clarity–A Vital Component

A true criticism of lawyers is that they love to overanalyze, overwrite, and make pleadings too lengthy. However, in the case of CMO's, this general criticism is overstated. While the parties should avoid an overly complex CMO (a benefit of phasing!), it is vital for the CMO to be clear and unambiguous. Thus, a barebones order without context and explanation is likely insufficient. The parties must ensure that the CMO covers as many relevant topics as possible and gives guidance on how to proceed. While there are always going to be issues that arise that the parties cannot reasonably foresee, potential landmines can be neutralized by preparing a well-constructed and clear CMO.

iv. Key Provisions

Again, the CMO is the case roadmap. In complex construction cases, the CMO generally establishes protocols for initial disclosures, guidelines for ESI, discovery timeframes, expert deadlines, and discovery disputes resolution. The CMO can be as exhaustive as the parties' desire, but the following are several key terms that should be in all CMOs:

a. Discovery Cutoffs, Limitation of Witnesses, Expert Deadlines

These are staples of all scheduling orders—not just CMOs. As such, this coursebook will not address these items in detail. However, it is important to remember that with so many issues, documents, and potential depositions, the importance of establishing time constraints, reporting deadlines and limitation on the number of deponents is vital in multiparty litigation. Otherwise, discovery will become a runaway train and the case will never progress in a timely manner. While no party wants its discovery rights to be restricted, limitations and expectations need to be set.

b. Initial Disclosure

Multi-party and complex matters come with an amalgamation of issues. Of course, this means that not only will there be a significant number of witnesses to discover, but a plethora of documents to review. To this end, initial disclosures help jumpstart the production of the relevant project materials and identify the most knowledgeable individuals regarding the project. Thus, instead of waiting months for parties to propound and respond to written discovery, the parties can start gathering and sorting the relevant project documents and identifying who may need to be deposed.

There is no question that parties must identify those individuals who have knowledge of the subject matter issues, who worked on the project, or who may be ESI custodians. Likewise, there is a staple of documents that all parties concur are relevant and need to be produced: contracts, change orders, specifications, drawings, program manuals, etc. Thus, it behooves the parties to avoid wasted time in the discovery process and produce those core materials and lists at the outset of the matter. Further, this provides the breadcrumbs to more efficient and pinpointed discovery thereafter.

c. ESI Protocols

All companies store, save, and share electronic information differently. Thus, the production of same can be a cumbersome process. By engaging in reasonable and proportional identification, collection, and processing of responsive ESI, the parties can more effectively (and impartially) identify the locations of potentially relevant ESI and hardcopy files. The parties should likewise take steps to preserve and collect relevant ESI by using similar methodologies and preparing a thorough list of the kinds of data and their respective format. For example, if the parties merely gathered “Microsoft Word” (.doc) documents, so many potentially relevant documents would never be produced.

Equally important, the means of production needs to be uniform. If some parties produce records via share-file or download, while others produce via USB drives, keeping the documents organized becomes overly cumbersome.

d. Disclosure of Privileged Documents

While parties (through their counsel) always attempt to prevent the disclosure of privileged and confidential documents, it is common for documents to be inadvertently produced. Considering how extensive document productions may be, this should not be surprising. Even the

most advanced analytic systems and software miss documents if they are mislabeled. As such, parties should attempt to safeguard against those mistakes by including provisions that allow the parties to request the return or destruction of such inadvertent productions. Conversely, procedures need to exist for opposing parties to challenge or object to a document being labeled as "privileged." This prevents counsel making unilateral claims to protect against the production of documents that are not genuinely privileged but merely damaging to his/her case.

b. Special Masters

A Special Master is an independent "surrogate"[15] appointed to carry out certain actions for the court. However, in practice, a Special Master may be more accurately described as a facilitator or administrator to aid in pre-trial/discovery, mediation, or post-trial matters that "cannot be addressed effectively and timely" by the Court.[16]

In the realm of construction litigation, and particularly multi-party matters where voluminous discovery productions and depositions are anticipated, a Special Master can be an exceptional tool to streamline procedural issues. In a nutshell, the Special Master assists the parties with the management of the case, preparation of the CMO, and interacts with the parties on a regular basis to work efficiently and effectively together. Further, and sometimes more importantly, a Special Master's involvement hopefully prevents the parties from wasting the Court's time (and their own) with smaller, non-dispositive issues. As a result, the goal of a Special Master is to promote judicial efficiency by ensuring that the matter is not being slowed by the "wheels of justice." Every time the parties can avoid untimely delays related to hearings or rulings on a crowded court docket, a case advances expeditiously.

i. Special Master's Role and Authority

Special Masters' roles can vary from case to case depending on the complexity and number of parties. Complex matters can require the Special Master to remain involved in all aspects of the case through trial; or, the parties may decide to limit the Special Master's role to specific issues, for example: pre-discovery initial disclosures; Electronically Stored Information ("ESI") protocols; exchange of ESI; drafting of case management orders; "hold" dates for fact and expert witness depositions; and/or discovery timeframes/phasing.

Likewise, the Special Master's authority is dependent on the jurisdiction. Generally, in state courts, the Special Master does not assume the power of the judiciary and cannot issue binding rulings against the parties. Rather, the Special Master serves as an arm of the Court and makes recommendations or insight to the judge. When the parties fail to agree on a topic, the Special Master may be

[15] Chief Justice Warren Burger
[16] Fed. R. Civ. P. 53(a)

required to make a decision and rule on a particular issue. For example, if the parties agree that depositions need to be limited to a certain number of fact witnesses, but cannot decide on the appropriate number, the Special Master will ultimately rule on the matter and select the deposition limit. However, these "rulings" are still subject to the review and final decision of the Court. Thus, the parties do not hand the reigns of final authority to the Special Master. Rather, by delegating power to the Special Master on certain issues, the hope is that the Special Master will provide clarity and facilitate communication between the parties, rather than just "running to Court" to let the judge decide.

ii. Do All Parties Have a Right to a Special Master?

In federal court, a Special Master may be appointed without the consent of the parties.[17] This typically arises in situations where the Court deems that its own time will be inundated, or the issues are so complex that they are better handled by someone who can spend significant time with the parties. However, in some state courts, like Louisiana, Special Masters can only be appointed with the consent of all parties. Of course, in those particular jurisdictions, a judge's desire for a Special Master may subjugate the parties' desire to avoid a Special Master. Thus, if a judge indicates that he or she believes the appointment of a Special Master is necessary and asks the parties to consent, most parties will relent to the judge's discretion. Ultimately, in that circumstance, the non-consenting party runs a considerable risk of unfavorable rulings in the future by the Court.

iii. Selection of Special Master

Depending on the jurisdiction, Special Masters may be assigned by the Court without any input from the parties or a specific individual may be consented to by the parties. If the parties cannot agree on the selection, the hope is that the Court will at least consider the input of the parties and allow counsel to comment or file objections. Thereafter, the Court may be obliged to choose from a list of names. Either way, it should be the parties' expectation that the assigned Special Master will be a thoroughly knowledgeable and experienced construction lawyer. Much like the selection of an arbitrator, a Special Master well-versed in construction law will provide a level of comfort as he or she will have an excellent handle on the relevant issues facing the parties.

iv. Special Master Fees

In state courts, compensation rules vary. Some states follow the federal guidance, but many others vary. For example, in Louisiana, the Special Master's fees are

[17] Fed. R. Civ. P. 53(a)

taxed as costs of the court.[18] By operating in this fashion, advance notice or estimates must be provided by the Special Master before his/her appointment.[19] This requires the parties to pre-pay (a "retainer" of sorts) an amount into the registry of the Court based on the allocation of each party. Further, since the Special Master is independent from the Court and "works for" the parties, the Special Master's bills are subject to review and approval. Thus, the Special Master must submit an itemized invoice for approval before an order is issued granting the payment of said funds. This offers the parties the opportunity to object to the Special Master's invoice if they believe the requested funds are extensive or have not been properly earned.

In federal court, the Special Master's compensation terms are provided in the appointing order.[20] The court must allocate payment amongst the parties after considering the amount in controversy, the means of the parties, and the extent to which any particular party is more responsible for the appointment of the master in the case.[21] An interim allocation may be amended to reflect a decision on the merits.[22]

c. Depositions

Deposition planning should begin at the outset of a case. Certain courts may by practice limit the number of depositions parties may conduct without leave of court in their scheduling orders or by local rule. There may also be issues concerning the availability of certain key witnesses, caused by varying factors such as the witness's location or issues concerning various claimed privileges, that the parties will need to address early on in discovery. Recognizing and then raising such issues with the parties at pretrial discovery conferences and the court at the initial pretrial conference, as needed, is important.

Initial disclosures, responses to discovery to parties, and non-party discovery can all inform and change what witnesses the parties need or want to depose. As information comes in discovery, the need to depose certain witnesses can change.

Consider your client's needs and objects in deposing witnesses. Parties' litigation strategies and needs may differ before and then after mediation, and there are cost considerations in moving from stage to stage in litigation.

It is also important to understand the needs and objects of other parties in multi-party litigation. Not every party may need to depose a fact or expert witness if another party will obtain that information for your client at a deposition. Depositions also do not have to be the default of

[18] *See Overview of Special Master Appointments in Louisiana State and Federal Court,* Lara E. White, William B. Gaudet, and Thomas K. Foutz, LA Bar Journal Vol. 64, No.1 (2016).
[19] La. R.S. 13:4165
[20] Fed. R. Civ. P. 53(g)(1); Fed. R. Civ. P. 53(g)(2)
[21] Fed. R. Civ. P. 53(g)(3)
[22] *Id.*

many discovery tools. Depositions can be expensive and time consuming for clients and their attorneys. Consider other avenues of discovery of obtaining the same information that may be quicker and easier.

d. Experts

The retention and utilization of experts is fact and case sensitive. Generally, most complex matters require the retention of a qualified expert to substantiate a party's position regarding liability and/or damages and cannot be avoided. In doing so, experts lead to considerable cost increases in handling the matter - not only the expert's fees, but counsel's added hourly fees in managing the expert.

However, being named a party alone, should be taken as a mandate to hire an expert. On occasion, even when a party has a technical or skilled role (i.e., design professionals), its work may be so far removed from potential liability that the added cost of an expert is unjustified; or your client may be so well credentialed and respected in a particular industry that no party could describe or explain its position better than the client themselves.

Of course, these decisions cannot be made in a vacuum. The intricacies and personalities (who is the decider of fact, opposing counsel, mediators, etc.) may sway this decision easily. Conversely, even when an expert might not be needed, the risk to the client's reputation, setting other case precedents, or future business losses are too great to consider defending a matter without an expert.

As such, the purpose of this section is not to dissuade from the utilization of experts. Conversely, it is advisable to proceed cautiously and defend your position with the use of expert(s). Thus, when considering your potential need for an expert, do not overlook the potential benefits of cost-savings and efficiency while weighing (and explaining to the client) the risks of proceeding without one. Sometimes, the costs may not be justified.

E. Settlement Considerations – Partial Settlements and Confidentiality of Settlements

The vast majority of complex construction litigation is resolved through settlement. However, in multi-party construction litigation, a global settlement involving all parties and all claims can be difficult to achieve because co-defendants, and their insurers, often have wildly divergent perspectives on litigation and their liability exposure. Clients, believing they have little ultimate exposure, and faced with the prospect of lengthy and costly litigation, often demand that counsel find creative ways to remove them from the litigation. This section focuses narrowly on a few considerations related to scenarios where parties wish to enter into a partial settlement.

If a "homerun" dispositive motion has failed or is not feasible, and a global settlement is unlikely, it might be time to consider a partial settlement. In a partial settlement, some defendants in

multi-party litigation settle their claims, but claims against other defendants continue.[23] The plaintiff gets a partial victory, potentially streamlines its case by eliminating weak or inconsistent theories of liability, and can target the defendants it considers most culpable.[24]

One of the biggest hurdles to a partial settlement is the question of how to deal with crossclaims for contribution from non-settling defendants. Without some way to deal with crossclaims, there is little incentive for a party to enter into a partial settlement. In order to address this issue, many states have statutes that bar crossclaims upon a judicial finding that the settlement was made in good faith.[25] In other jurisdictions, plaintiff and the settling defendant can execute what has become known as a Pierringer release, under which contribution actions from non-settling defendants are barred.[26] Partial settlements may also include an indemnification clause protecting the settling party and its insurers from future claims, although this is often a point of contention during settlement agreement negotiations. Counsel for the settling party should be sure to understand the law in the relevant jurisdiction and choose the appropriate method to deal with crossclaims.

One specific type of partial settlement, known as a "Mary Carter" agreement[27] (after a Florida case involving the Mary Carter Paint Company), has proven to be controversial.[28] Mary Carter agreements can take many forms, but all generally share the following three elements:

1. The settling defendant guarantees the plaintiff a minimum amount, regardless of the trial outcome.
2. The settling defendant remains in the case, but her exposure is limited in amount by the settlement agreement.
3. The settling defendants' exposure is reduced in proportion to any increase in the non-settling defendants' liability above a set amount.

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[23] While it is possible for a settling defendant to settle only some of the plaintiff's claims against it, partial settlements are most commonly used to settle all of the plaintiff's claims against the settling defendant.

[24] As one judge put it, "From the plaintiff's point of view, settling a multi-party lawsuit is often somewhat like defrosting a refrigerator. A little heat there, a few chips there, and sooner or later large chunks start falling out." *United Farm Bureau Mut. Ins. Co. v. Blossom Chevrolet, Inc.*, 679 N.E.2d 1327 (Ind. 1997) (Boehm, J., dissenting).

[25] See Hawaii Rev. Stat. § 663-15.5 (upon determination that court settlement was made in good faith, barring cross-claims except those based on a written indemnity agreement).

[26] A Pierringer release "operates to impute to the settling plaintiff whatever liability in contribution the settling defendant may have to non-settling defendants and to bar subsequent contribution actions the non-settling defendants might assert against the settling defendants." *Fleming v. Threshermen's Mut. Ins. Co.*, 131 Wis. 2d 123, 131, 388 N.W.2d 908 (1986) (citing *Pierringer v. Hoger*, 21 Wis. 2d 182, 193, 124 N.W.2d 106 (1963)).

[27] See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d. DCA 1967) (abrogated by Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993)). Such settlement agreements have also been termed "Gallagher agreements" after *City of Tucson v. Gallagher*, 108 Ariz. 140, 493 P.2d 1197 (1972).

[28] See Benedict, John, It's *a Mistake to Tolerate the Mary Carter Agreement*, 87 Columbia Law Rev. 368 (1987) (arguing against Mary Carter Agreements); Bernstein and Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 Geo.L.J. 2215 (1995) (arguing that Mary Carter agreements have social utility).

Mary Carter agreements have traditionally been known for a fourth element, secrecy, but many courts allowing the agreements require disclosure to one degree or another.[29]

A Mary Carter agreement can be attractive to a plaintiff because it provides a guaranteed minimum recovery while still allowing plaintiff to pursue the non-settling defendants. From the settling defendant's perspective, the arrangement provides a cap on ultimate exposure while holding open the prospect that recovery against the non-settling defendants will reduce, even eliminate, the defendant's ultimate liability. Critics of such agreements argue the agreements are collusive and, by incentivizing the settling defendant to actually assist the plaintiff at trial, unfairly prejudice the non-settling defendants.[30]

It is not difficult to see the potential for mischief when one co-defendant settles and aligns with the plaintiff under a Mary Carter agreement. Consider a hypothetical construction site injury case involving contractor, contractor's subconsultant, and the engineer of record as co-defendants. The contractor and engineer would like all co-defendants to stipulate to liability and try the case on damages only, thus preventing the jury from hearing any liability evidence. Seeking to keep liability an issue in the case, and get liability evidence in front of a jury, the plaintiff offers subconsultant a Mary Carter settlement if the subconsultant agrees not to stipulate to liability. To prevent such scenarios, numerous states prohibit or restrict use of the agreements.[31] Counsel should understand the status of Mary Carter agreements in their applicable jurisdiction.

Whether a settlement involves some or all co-defendants, the issue of confidentiality always warrants consideration. Many companies consider legal settlements to be confidential business information and are concerned about damage to their reputation if a settlement is disclosed to the public. Conversely, public entity owners might insist on public disclosure of settlement in order to comply with freedom of information rules. Disclosure of each defendant's respective settlement amount to the other settling defendants can also become an issue if some defendants are inclined to measure their liability against other defendants and/or refuse to pay more than another defendant. In such situations, a third party--such as a mediator or special master—can be instrumental in setting up a "blind" process under which each party's respective contribution is not disclosed. As settlement of the multi-party dispute begins to take shape, counsel should be mindful of how to address confidentiality in a mutually acceptable way.

[29] See Benedict, supra note 26, at note 11.

[30] See *Dosdourian v. Carsten*, 627 So.2d 241 (Fla. 1993).

[31] 22 A.L.R.5th 483 § 1-4.