DOECAA

Dear DOECAA members, speakers, and conference attendees:

The DOECAA Board and I are delighted to welcome you to the Spring 2024 DOECAA conference! This conference would not have been possible without the hard work and generosity of Cindy Lovato-Farmer and Sandra Fowler, your conference co-chairs, as well as Pacific Northwest National Laboratory, operated by Battelle, and Hanford Waste Treat Plant, operated by Bechtel.

In the past, DOECAA hosted two conferences: one in Washington, D.C. and one at a DOE site. Thanks to feedback from many of you, we have restarted that tradition. As you know, there are increasingly complex and novel issues around the complex that are worthy of group discussion and we believe there are enough of those issues to warrant a second conference. We also hope that having a second conference at a rotating location will provide member attorneys an opportunity to see other sites first-hand and gain a deeper understanding of the best practices of the legal teams at various sites in the complex. It is gratifying to see that over 100 of you have registered to attend.

As we will discuss at the member meeting and communications to follow, DOECAA is planning to expand its outreach and engagement with prospective and current members, including members new to the DOE complex. We look forward to your input at the meeting and anticipate many of you will jump at the opportunity to get involved.

We hope that you will find the programming our co-chairs and their knowledgeable panelists put together useful and that you will take the opportunity to connect with peers across the complex.

Please do not hesitate to reach out to me or any of the DOECAA Board members should you have any feedback on how we can continue to serve attorneys in the DOE complex.

Sincerely,

Saurabh Anand, DOECAA President
sanand3@stanford.edu

Site Hosts Welcome

DOECAA Spring 2024 Conference Attendees:

We look forward to hosting you at the inaugural DOECAA spring conference in the beautiful Tri-Cities! Please find the conference materials attached.

The weather is expected to be sunny with highs in the mid to upper 60s. Mornings will be crisp, so a jacket is a good idea. We are pleased to have 90 individuals signed up for in-person attendance and 28 for virtual attendance. We will have coffee, pastries, and snacks available. Please arrive before 8:00 if you want to eat something before entering the auditorium for the program which will begin at 8:00.

For those signed up for PNNL tours on Wednesday, April 17, if you have a HSPD-12/PIV badge please remember to go to the badging office prior to checking in for the conference on the morning of April 17. All badges need to be verified to attend the tour. Remember to bring along your 6–8 digit PIN. For those of you who do not have a badge and have not submitted your badge form, please email Vanessa.Whitten@PNNL.gov as soon as possible.

There is a large parking lot in front of the Energy Northwest Multi-Purpose Facility at 3000 George Washington Way where the conference is located. Enter through the front doors and you will see the registration table.

Thank you.

Your 2024 DOECAA Spring Conference Site Hosts,

Cindy Lovato-Farmer
General Counsel
Pacific Northwest National Laboratory

Sandra Fowler
General Counsel WTCC
Bechtel National, Inc.

Conference Agenda

DOECAA SPRING 2024 CONFERENCE

Energy Northwest Multi-Purpose Facility
3000 George Washington Way
Richland, Washington

Site Hosts - Pacific Northwest National Laboratory & Bechtel National, Inc.

Cindy Lovato-Farmer
General Counsel
Pacific Northwest National Laboratory
clovatofarmer@pnnl.gov

Sandra Fowler
General Counsel WTCC
Bechtel National, Inc.
sbfowler@bechtel.com

Wednesday, April 17, 2024

Time	Topic/Event	Speaker(s)
8:00 am – 8:30 am	Refreshments/Opening & Welcome from PNNL Laboratory Director	Steve Ashby
8:30 am – 9:30 am	Enforcement Actions (panel)	Carrianne Zimmerman, Department of Energy Office of Security Enforcement Maxine McReynolds, Associate General Counsel, Los Alamos National Laboratory Leslie Droubay, Senior Counsel, Bechtel Global Corporation

9:30 am – 10:30 am	Managing through Potential Government Shutdowns & Debt Ceiling Threats	Eleanor Pelta & Claire Lesikar, Morgan Lewis & Bockius
10:30 am – 10:45 am	Networking Break	
10:45 am – 11:45 am	Technology & Research Security (panel),	Giovanna Cinelli, Morgan Lewis & Bockius Nelson Dong, Dorsey & Whitney *(virtual)* Derek Maughan, PNNL Deputy GC Christina Lomasney, PNNL Chief Commercialization Officer
11:45 am – 12:30 pm	Communities of Practice (working lunch PNNL hosted)	
12:30 am – 1:30 pm	False Claims	Luke Meier, Robyn Burrows, Blank Rome
1:30 pm – 2:30 pm	Evolution of Causation in Toxic Torts: From Hanford to Taiwan Break	J. Chad Mitchell, Summit Law Group, PLLC
2:30 pm – 2:40 pm	Transfers for Tours	
2:40 pm – 4:40 pm	PNNL Tours (optional- sign up required in advance)*	
5:30 pm – 8:00 pm	Water 2 Wine River Cruise w/Heavy Appetizers**	

Thursday, April 18, 2024

Time	Topic/Event	Speaker(s)
8:00 am – 8:30 am	Refreshments/Welcome from BNI WTP Project Director	Brian Hartman
8:30 am – 9:30 am	Small Modular Reactors (panel),	Eric Andrews, Energy Northwest Senior Counsel Stephen Burdick, Idaho National Laboratory Michael Schmidt, TerraPower Senior Counsel
9:30 am – 10:30 am	Government Contracts topics	Howard Roth, Smith Currie Oles
10:30 am – 10:45 am	Networking Break	
10:45 am – 11:45 am	Common Ethical Dilemmas and Recent Advisory Opinions (WSBA)	Jeanne Marie Clavere, Sr. Responsibility Counsel Washington State Bar Association
11:45 am – 1:00 pm	DOECAA Business Mtg/Lunch (BNI hosted)	
1:00 pm – 2:00 pm	Legal Claims and Investigative Trends within the DOE Complex	Marisa Bavand, Dorsey & Whitney
2:00 pm – 2:30 pm	Networking Groups	
2:30 pm – 4:00 pm	WTP DFLAW Video Tour	Scott Booth, WTCC Mission Readiness Manager

CLEs will be sought for applicable sessions in select states. More information to follow.

* PNNL tours have limited space. Free first come first served tickets. Preferences for out of town/first time participants. Please submit online signup form by April 3.

** Water 2 Wine river cruise is an optional event. Tickets are available for purchase.

DOECAA

ENFORCEMENT ACTIONS

PANEL –

Carrianne Zimmerman, Department of Energy Office of Security Enforcement

Maxine McReynolds, Associate General Counsel, Los Alamos National Laboratory

Leslie Droubay, Senior Counsel, Bechtel Global Corporation

Enforcement Program Overview and Implementation Philosophy

Carrianne Zimmerman

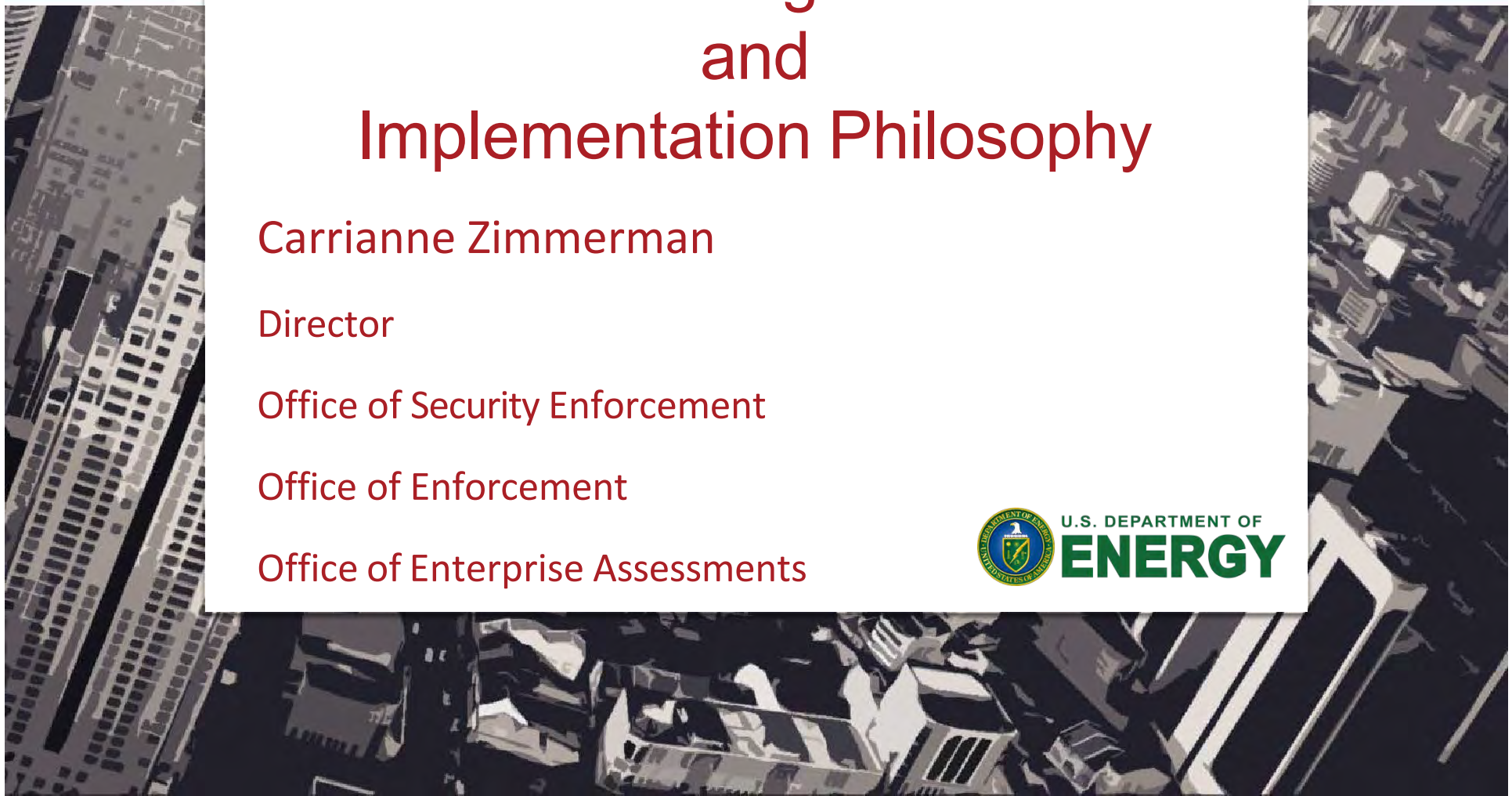
Director

Office of Security Enforcement

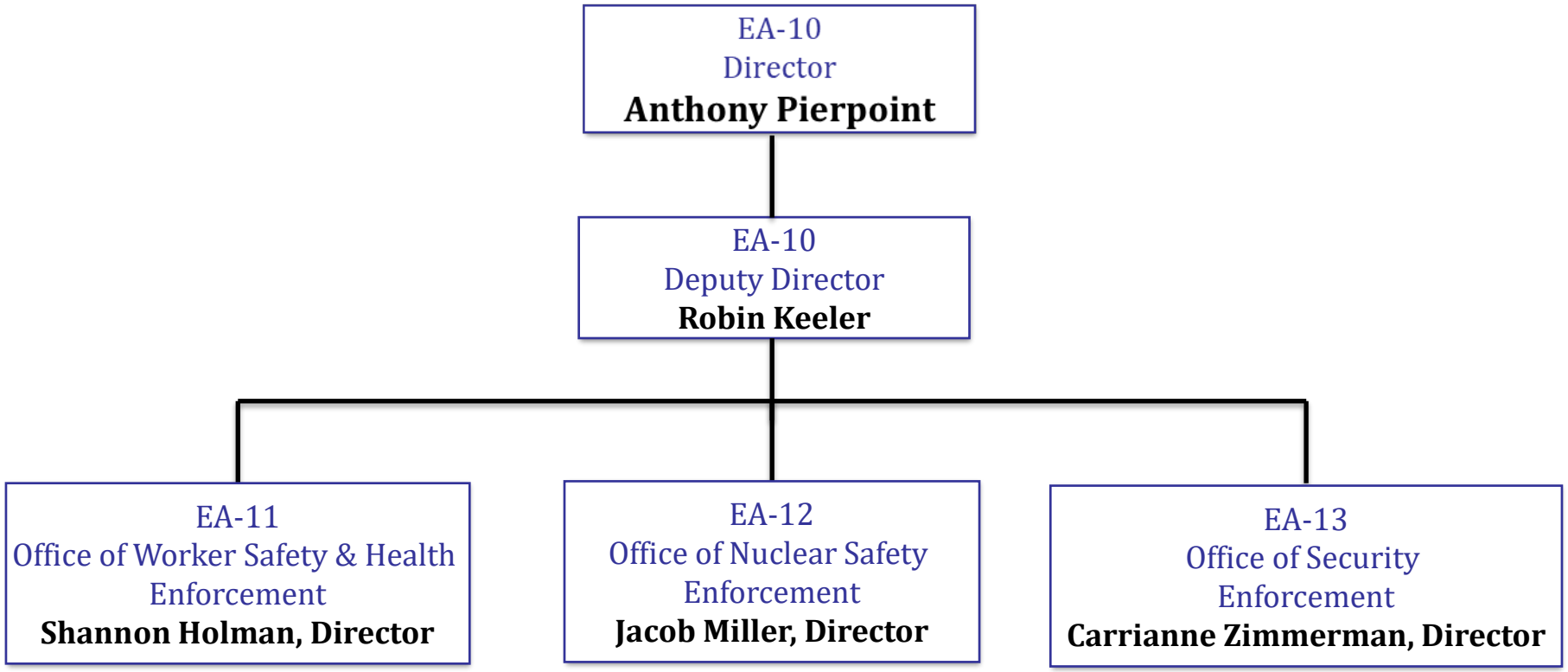
Office of Enforcement

Office of Enterprise Assessments

U.S. DEPARTMENT OF ENERGY



Office of Enforcement (EA-10) Organization



Enforcement Program Authorities and Procedural Rules

- *10 C.F.R. Part 820, Procedural Rules for DOE Nuclear Activities [Parts 830 and 835] [AEA Section 234A]*
- *10 C.F.R. Part 824, Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations [AEA Section 234B]*
- *10 C.F.R. Part 1017, Identification and Protection of Unclassified Controlled Nuclear Information [AEA Section 234B]*
- *10 C.F.R. Part 851, Worker Safety and Health Program (contains procedural rules and program requirements) [Part 850] [AEA Section 234C]*

Additional Program Information

- ***Enforcement Process Overview:*** Provides more detailed information on program approach and implementation process.

- ***Enforcement Coordinator Handbook:*** Provides guidance and expectations on coordinator roles, noncompliance screening and reporting, discipline-specific information, and assessment and corrective action observations.

- ***Enforcement Program Overview Training:*** Provides an overview of the Enforcement program and process.

This information is located at: http://energy.gov/ea/services/enforcement/enforcement-program-and-process-guidance-and-information

Why Enforce?

- The Federal Government provides almost $16.6 billion in financial protection to DOE contractors who may be liable for a nuclear incident (nuclear indemnification).
- Helps ensure that contractors meet their obligations to provide a safe and healthful workplace and demonstrates that DOE and its contractors are trustworthy guardians of classified information and unclassified controlled nuclear information.
- Promotes compliance with safety and security requirements.
- Demonstrates to Congress and the public that DOE is capable of effective self-regulation.

Enforcement Philosophy

- DOE contractors viewed as being in best position to identify and promptly correct noncompliances.
- Provide incentives to promote contractor identification, evaluation, reporting, and resolution of noncompliances before events occur.
- Proactive self-identification through contractor assessment processes creates the safest operations

Program Implementation Tenets

- Implement a framework designed to promote compliance with enforceable regulations;
- Devote limited resources to the most significant events/conditions;
- Adhere to the principles of transparency, consistency, and fairness; and
- Collaborate with DOE line management

Enforcement Approach

- Review and evaluate performance and compliance information from numerous sources.
- Pursue cases of high safety and security significance.
- Incentives include:
  - Discretion
  - Mitigation
- Mitigation for timely identification/reporting and corrective actions
  - → Effective corrective actions do not preclude enforcement action when warranted

Case Selection Considerations

- Actual/Potential Safety or Security Significance
- Contractor Performance History/Trends
- Isolated Event or Systemic Problem
- Level of Management Involvement
- Prompt Identification/Reporting
- Comprehensiveness of Corrective Actions
- Willfulness or Record Falsification (Deception)
- DOE Line Management Input

Enforcement Options

- May exercise discretion; track cases to closure
- Prepare Advisory Notes
- Consider issuance of Enforcement Letters
- Conduct fact-finding visits
- Recommend formal investigation

Notification of Intent to Investigate

- Contractor is notified by formal letter (Notice of Intent to Investigate); separate letters for any subcontractors subject to investigation
- Letter will identify requirement to segregate investigation-related costs in accordance with the Major Fraud Act
- Notice of Investigation letters are posted to EA's website until case is concluded

Enforcement Conferences

- Usually held between DOE and the contractor to discuss the investigation
- An opportunity for the contractor to provide:
  - → information to ensure the facts and potential violations noted by the Office of Enforcement in its investigation summary or other documentation are accurate;
  - → any necessary clarifications;
  - → explanation of the steps being taken to resolve the noncompliances and underlying causes; and
  - → any other relevant mitigating factors.

Enforcement Conference Attendance

- DOE personnel:
  - → Director/Deputy Director Office of Enforcement
  - → Director of the cognizant subordinate enforcement office
  - → Responsible enforcement staff
  - → Senior program office and field element management representatives
  - → Enforcement coordinators from the field/program office
- Contractor personnel:
  - → Senior contractor management
  - → Key management personnel involved in the event
  - → Contractor attorney
  - → Contractor enforcement coordinator

Possible Outcomes of a Fact-Finding or Investigation

- Enforcement Letter
- Enforcement Actions
  - → Consent Order/Settlement Agreement
  - → Notice of Violation

Los Alamos
NATIONAL LABORATORY

Role of Legal Counsel in Cooperative Enforcement

Maxine McReynolds
Associate General Counsel
Environment, Safety, and Health

DOECAA

NNSA National Nuclear Security Administration
Managed by Triad National Security, LLC, for the U.S. Department of Energy's NNSA.

Role of Legal Counsel in Cooperative Enforcements

Fundamental Principles

- Transparency and trust are fundamental to the cooperative enforcement framework
- DOE must be able to investigate events related to a DOE nuclear activity, unfettered and unencumbered
- The subject of an OE investigation is the DOE contractor
  - Potential for civil and criminal liability
- Principles governing the right to counsel are fundamental to the American system of justice

The Result

- Dynamic tension

Legal Framework

- Atomic Energy Act of 1954 (AEA)
  - Silent as to how DOE is to conduct investigations under Parts 824, 830, 851 etc.
- Administrative Procedure Act (APA), 5 U.S.C. 555(b)
  - A person compelled to appear in person before an agency or representative is entitled to be accompanied, represented, and advised by counsel
- DOE's regulations
  - "any person whose statement or testimony is taken may be accompanied, represented, and advised by his attorney." 10 CFR 820.8 (l)
  - "Person" is defined broadly in the regulations to include "any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State or political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity and any legal successor, representative, agent or agency of the foregoing." 10 C.F.R. § 820.2

Practical Efforts

- Providing early engagement and advice and counsel to the client (Consent Order considerations) and framing the enforcement strategy
- Review of the investigation report/investigation summary
  - SME review of factual accuracy
  - Legal review of regulatory analysis (severity level of violations, duplication, mitigation, exercise of discretion) and potential penalties
- Preparing the contractor's enforcement position
  - Presenting the enforcement position during the enforcement conference
  - Preparing written enforcement response
- Analysis of any PNOV received and preparation of response
- Ensuring client's right of appeal is preserved
- Engaging in formal appeals process

DOECAA 2024

Leslie Droubay Killoran

Contractor Best Practices – Enforcement Actions

1. **Mitigation**
2. **Considerations re Privilege**
3. **Customer Involvement**
4. **Proposals**
5. **Avoiding Retaliation**

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DOECAA SPRING 2024 CONFERENCE

Speaker Biographies – Enforcement Actions

Carrianne Zimmerman, Moran Lewis & Bockius

Carrianne is the Director of the Office of Security Enforcement, within the U.S. Department of Energy's Office of Enterprise Assessments. Ms. Zimmerman is responsible for the implementation of the Department's classified and unclassified controlled nuclear information (UCNI) security enforcement program. The primary goal of security enforcement is to enhance the Department's information security program, which is designed to protect against the unauthorized disclosure of classified and UCNI information, through compliance with 10 C.F.R. Part 824 and 10 C.F.R. Part 1017 regulatory requirements. In her 21 years with DOE, she also served as a security enforcement specialist and as the Department's safeguards and security survey program manager.

Maxine McReynolds, Associate General Counsel, Los Alamos National Laboratory

Maxine leads Los Alamos National Laboratory's Environment, Safety, and Health legal group, providing advice and counsel to Laboratory leadership and management organizations. With a workforce of over 15,000 employees and an annual budget of over $4.6B, the Lab executes a complex work scope that supports national security and science dating back over 80 years to the Manhattan Project.

Maxine advises on an extensive range of ESH advisory, compliance, enforcement, litigation, permitting, and related regulatory matters. Prior to joining the Laboratory, Maxine worked in public service and in private practice with an international law firm representing institutional clients in corporate, M&A, litigation, intellectual property, and
ESH matters. Maxine serves on the boards of the DOE Contractor Attorneys Association (DOECAA) and the New Mexico Board of Licensure for Professional Engineers and Professional Surveyors. She is admitted to the United States district courts for the districts of

Colorado, New Mexico, and the Southern District of Texas, and to the United States Court of Appeals for the Nineth and Tenth Circuits.

She is admitted to the United States district courts for the districts of Colorado, New Mexico, and the Southern District of Texas, and to the United States Court of Appeals for the Nineth and Tenth Circuits.

Leslie Droubay, Senior Counsel, Bechtel Global Corporation

Leslie joined Bechtel in August 2015 as a project attorney for the Waste Treatment and Immobilization Plant (WTP) project in Richland, Washington. In October 2023, Leslie began supporting Bechtel's Infrastructure Global Business Unit in the Renewables & Clean Power and US Public Infrastructure business lines. Prior to joining Bechtel, Leslie was Senior Counsel & Chief Compliance Officer for Chugach Government Services, LLC, an Alaska Native Corporation located in Anchorage, Alaska.

MANAGING THROUGH POTENTIAL GOVERNMENT SHUTDOWNS

&

DEBT CEILING THREATS

Eleanor Pelta, Morgan Lewis & Bockius

Claire Lesikar, Morgan Lewis & Bockius

Morgan Lewis 150 YEARS

MANAGING THROUGH POTENTIAL GOVERNMENT SHUTDOWNS & DEBT CEILING THREATS

Eleanor Pelta & Claire Lesikar

Presenters

Eleanor Pelta
Washington DC
eleanor.pelta@morganlewis.com

Claire Lesikar
Seattle & Silicon Valley
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EMPLOYMENT ISSUES

RIF or Furlough Legal Considerations

- Minimize the potential for litigation and litigation-related costs
- Fairness to employees
  - Fair process, fairly applied
  - Effective communications
  - Morale of remaining employees
- Perception of general public and customer relations

Top 10 RIF Mistakes

1. Too fast: improper pre-RIF planning; not considering business objectives and possible alternatives
2. Too slow: multiple rounds of reductions, business paralysis, and "the retained employees are leaving" problems
3. No process, no criteria, no control, no documentation, and (later) no witnesses who can remember anything or anybody
4. Deficient HR/Legal review of preliminary RIF selections
5. Deficient (or no) statistical analysis of RIF selections
6. Failure to address severance-pay plans and policies
7. Failure to adequately address union/contract claims
8. Deficient waivers/releases
9. Inadequate and ineffective (or worse) communications
10. Failure to comply with WARN/state-law notices

RIF Alternatives

Depending on Business Realities, Consider Alternatives

- Consider several RIF alternatives
  - Eliminate contract employees, temps, or other "contingent" workers
  - Temporary shutdowns (full-week shutdowns for exempt employees)
  - Pay reduction
  - Hours reduction for nonexempt employees (problem for exempt employees in some states)
  - Vacation accrual reduction
  - Spinoff of discrete business units
  - Reorganizations/allowing employees to move between roles/departments
  - Hiring freeze and attrition
  - Voluntary-exit incentive programs
- Ensure alternatives are administered in legally compliant manner
  - Ensure salary thresholds maintained for exempt employees (and minimum wage for nonexempt employees)
  - Deferred wages not permissible in all states

Voluntary-Exit Incentive Programs

- Structure
  - Richer benefit offered to eligible group as a *one-time* opportunity.
  - Employees volunteer by submitting application during an announced "window period."
    - Employer can reject applicants (e.g., in the case of oversubscription against business needs)
  - Benefits are not paid until severance and release agreement is signed.

- Advantages:
  - Reduces risk of EEO discrimination claims
    - Especially important where targeted workforce consists of disproportionately protected class
  - Likely less damaging to employee morale
  - Can be presented in a pro-employee positive light
  - Can be paired with subsequent involuntary RIF

Voluntary-Exit Incentive Programs

- Disadvantages:
  - Potentially more difficult to target terminations with precision
  - Often must offer greater inducement
  - Cost uncertainty (but can put caps on numbers approved)
  - Potential for oversubscription (may be alleviated through careful design and implementation of eligibility rules)
  - Greater potential for ERISA fiduciary breach claims by employees who voluntarily resign/retire prior to program
  - May take longer periods to implement

RIF Planning

RIF Planning

- Clearly and accurately articulate business goals/objectives
- Review existing severance plans (ERISA compliance)
  - Consider adopting new ERISA-compliant severance plans
- Consider contract claims (severance/notice rights)
- Review policies and past practices regarding layoffs, severance rights, notice rights
- Consider any CBA obligations
- WARN Act compliance
- Carefully review process and preliminary selection results with legal counsel to minimize discrimination claims

ERISA-Compliant Severance Plans

- Advantages of an ERISA plan:
  - Preemption of state-law claims, including reverse-discrimination claims and claims for punitive damages
  - A deferential standard of review in any litigation challenging benefit-claim determinations
  - Trial before a judge rather than a jury, and in federal rather than state court

- Disadvantages of an ERISA plan:
  - Participation, vesting, funding, fiduciary responsibility, tax qualification, reporting and disclosure requirements applicable to pension benefit plans, and the potential penalties and liabilities associated with noncompliance with such requirements

Potential Legal Challenges

Potential Claims

- Class – age, gender, race, benefits
  - Discriminatory criteria
  - Disparate impact
  - Subjectivity
- Individual – all applicable discrimination, retaliation, tort, and contract claims
  - Position elimination – position not eliminated
  - Selected based on qualifications – employee more qualified than those retained
  - Consistency in message/communication regarding reasons for RIF and selection criteria (from perspective of impacted employee – whether the employee agrees they are the "right person" for selection)
  - Failure to follow RIF policies
  - Different criteria used for different groups

Factors That Increase Risk

- Factors that increase risks:
  - Disparate impact – statistics
  - Treatment of comparators
  - Stray remarks
  - Exceptions to process
  - Length of employment
  - Identity of decisionmaker
  - Knowledge of characteristic or conduct
  - Replacement has same characteristic

Factors That Reduce Risk

- Factors that reduce risk:
  - Consistency (clear justification for exceptions)
  - Objectivity
  - Truth/accuracy
  - Clearly documented rationale
  - Objective selection criteria and process
  - Statistical review and validation
  - Communications; dignity in process
  - Fairness (in selection; severance opportunity)
  - Releases (to the extent valid and enforceable)

Burden of Proof – Disparate Treatment

- Disparate Treatment: intentional discrimination
- Burden of Proof:
  - Prima facie case:
    - Protected class
    - Qualified for job
    - Terminated
    - Evidence of discrimination
  - Legitimate Nondiscriminatory Reason
    - Justification for the RIF
    - Justification for the individual selection
  - Pretext
    - Statistics
    - Comparison to others

Burden of Proof – Disparate Impact

- Disparate Impact: policies, practices, rules, or other systems that appear to be neutral result in a *disproportionate impact* on a protected group
- Burden of Proof:
  - Prima facie case
  - Business necessity (disparate impact applies under Title VII if challenged practices were not job-related *and* consistent with business necessity)
    - Company should have clear documentation of its business purpose
    - Selection criteria should align with stated objectives

Selection Process

RIF Selection Process

- Identify decisionmakers
  - Who will be selecting employees for layoff?
  - Consider optics and ability to defend posture in litigation
  - Consider using selection committee (including management, HR, Legal, PR reps)
- Consider which types of positions or work units will no longer be necessary in light of the business realities
  - Business objective/goal should be sole driver for selection process
  - Define "scope" of reduction (decisional unit): consider whether RIF will be based on geographic considerations, functional roles, management heads, job titles, etc.
  - Determine selection criteria: consider whether selection will be based on technical skills/competencies, experience, performance, or some other legitimate business factor
- Consider which positions and skills must be retained to achieve the stated business goal (including projected postlayoff staffing needs)

Selection Method

- The development and recordation of a valid selection process is critical to the company's ability to defend against discrimination claims.
- Possible all positions being eliminated, based on role/geography/etc. (simpler to defend legally).
- Otherwise, if only a portion of employees within an affected group will be selected, then carefully consider selection methodology.
  - Ideally based on objective criteria.
  - Decisionmakers should be able to explain the basis for any subjective judgment.
  - Appropriate criteria may include knowledge, skills, abilities, seniority, or past performance.
  - If performance is a factor, consider reliability of existing performance indicators (past performance evaluations, past bonus achievements, potential disciplinary or performance-related documentation).
  - It may also include discernable qualities and competencies that can be explained and supported with examples or other identifiable observations.
  - Selection criteria should provide sufficient flexibility so that the most productive employees are retained, but generally should not use the selection process as a means of addressing individual performance issues. The key should be the employee's "suitability" to the needs of the stated business goals.

Position Elimination

- All persons in job are selected for RIF.
  - Positions do not properly align with existing or future business plans.
  - Positions are redundant or functions are unnecessary.
  - Layers of management can be eliminated without a disruption to business.
- Relative performance not considered – all within position impacted
- Once the decision to eliminate a position or group of positions within an organization or department is made, it is generally permanent.
  - Job duties will be redistributed among existing employees in other positions.
  - Replacement of such positions should generally not occur for at least six months, absent a strong business case reflecting a change in needs that was unanticipated at time of RIF.

Position Consolidation

- Number of employees within title/role/function reduced – some selected for retention, some for layoff.
  - Employees doing similar work rated together, based on relative performance and/or skill set.
- **Performance-based:**
  - Identify employees in affected business unit with same or similar job titles/functions.
  - Apply consistent/objective criteria to assess performance based on essential duties and responsibilities of position.
  - Preliminarily select lowest performers within scope.
    - Confirm decisions are consistent with most recent performance evaluation.
      - Deviations from existing performance evaluations should be clearly explained in pre-RIF documentation.
- **Skills-based:**
  - Identify primary skills expected for role in continuing business.
  - Preliminarily select employees for RIF based on skill set.
    - Consider transferable skills.
    - Confirm assessment is consistent with existing documentation (prior reviews, resume, etc.).

Performance-Based Selections

- Some RIFs may be made based solely on an employees' performance records, apart from position eliminations or function consolidations.
  - Review existing performance evaluations or other performance-related documentation (e.g., disciplinary history, bonus history, commendations/awards).
  - Review both "overall ratings" and any written narrative to evaluate whether there is support for the performance distinctions for the selection decision.
  - Consider whether performance deficiencies have been addressed with employee.

Performance-Based Criteria

- Examples of performance-based criteria may include:
  - productivity/work ethic/dependability
  - substantive knowledge base in respective area, including command of current and relevant processes and applications associated with job function
  - responsibility and initiative with respect to job functions
  - written and verbal communication skills
  - adherence to applicable policies and procedures
  - client service–oriented
  - strong leadership/management skills
- Avoid subjective reasons (e.g., attitude, energy, commitment, or "team player")

Documenting the Selection

- Develop consistently applied method of documenting the selection process.
  - Preferably a standard listing of skills, categories, and criteria that can be checked off and rated easily.
  - Individual comments are sometimes necessary for further explanation.
- Maintain clarity that no selections are considered complete until preliminary selections have been reviewed and approved by Legal.

Legal Review and Privilege

- Decisionmakers should preliminarily select employees for RIF and provide selections to HR and Legal for review
  - HR and/or Legal to ensure consistency with RIF selection process
  - HR and/or Legal to address potential sensitive issues associated with particular selections
  - Legal to ensure adverse impact review
  - **Decisionmakers should not engage in any communications that suggest decisions are final until Legal and HR have completed their review**
- Maintain strict confidentiality and attorney-client privilege throughout process
  - Maintain counsel involvement and mark communications as "Privileged and Confidential"
  - Limit selection information and RIF preliminary decisions to need-to-know group
  - Minimize email exchanges

Adverse Impact Analysis

- Allows the company to statistically analyze the impact of the RIF with respect to age, gender, and race.
  - Compares preliminary selection data against baseline employee data within decisional unit
  - This must occur before any selections are finalized
  - Depending on the outcome of this analysis, the company may want to re-check the quality of the RIF selections against stated criteria
  - Must be wary of artificial changes that can trigger "reverse-discrimination" claims
- Must be done by, or at the direction of, legal counsel
  - Critical to maintain privilege over report
  - Mark all related communications "Attorney-Client Privileged and Confidential"

Special Considerations

- Is a member of a protected class, where selections reflect adverse impact?
- Is on, or recently returned from, a leave of absence (FMLA or otherwise, including intermittent absences)
- Has a disability
- Is pregnant
- Is within six months of vesting for a significant benefit event
- Has complained of discrimination, sexual harassment, or another form of harassment
- Has complained about activity protected by a whistleblower statute
- Has pending or previous employment-related litigation, charges, or complaints against the company, including but not limited to employees who have threatened to file a charge or complaint
- Has an individual employment contract with the company or has been made any oral and/or written promises by the company
- Has any confidentiality, trade secret, noncompete, and/or nonsolicitation agreements with the company
- Has or may have a litigation support role in any ongoing or threatened litigation that might require future cooperation

Employee Notifications

WARN Act Compliance

- If triggered, this implicates required notice periods (and/or pay in lieu thereof)
  - If WARN triggers, carefully consider timing and content of employee notices
  - Generally 60 days advance notice and/or pay/benefits in lieu thereof to affected employees
  - Must also give notice to local and state governments, union officials
- Applies various triggers, primarily including:
  - Plant closure (shutdown of a single site, facility, or operating unit) that results in employment loss for 50 or more (excluding part-time employees)
  - Mass layoff (employment loss of 50 or more employees constituting at least 33% of employees at a single site (excluding part-time employees), *or* 500 employees at a single site (regardless of percentage)
  - Rolling 90-day period within which triggering events are presumed to aggregate
  - Consider statutory exceptions
  - Consider whether there may be viable alternatives that avoid WARN triggers
- Be mindful of state and local "mini-WARN" obligations

General Employee Notifications

- Communication plan
  - Treat employees fairly, consistently, and with dignity.
  - Where will termination meetings take place?
    - Allowed to return to worksite to retrieve belongings?
    - Consider privacy, safety, restrictions from company property.
    - Consider approach to multiple geographies/shifts.
  - Who will be present?
    - Town Hall approach, departmental, individual?
    - Possible to handle all in person? What about remote employees?
  - When will notification meetings happen?
    - Possible to all occur in one day to minimize general panic and disruption?
    - Consider how to notify employees on vacation/leave.
  - Be prepared for negative reaction (*Why me? Who else? Why now? Can I appeal? I am getting a lawyer.*)
- Be sure to consider communication strategy with *retained employees* too!
  - What happened; how it impacts them (or not); changes in reporting structure; value of their continued contributions

FAQs

- Advance preparation of FAQs
  - Be prepared to address selection process at a high level
  - Severance options/requirements
  - Outplacement services?
  - Benefits impact?
  - Eligible to apply for other roles?
  - Eligible for future rehire?
- Advance preparation of termination script and personal notices

Logistics

- Final Pay
  - Payout of accrued but unused vacation (if required by state law and/or policy)
  - Payout of incentives (commission, earned bonuses)
- Benefits notices
  - Benefits continuation (COBRA)
- Consider whether certain employees may be critical for short-term transition period
  - Utilize higher severance, retention agreement/milestones arrangements as appropriate
- Be prepared for the unexpected
  - 11th hour harassment complaints or disability notice; employees who refuse to leave; employees who engage in theft or damage to property; social media and blog postings
- Hiring freeze following RIF?

Protecting Information and Equipment

- Identify which employees have access to confidential information and where it is stored
- Monitor access and use of confidential information to prevent misappropriation
- Consider confidentiality clauses in releases or restrictive covenants (where permitted)
- Insert representations in agreements regarding confidential and proprietary information, trade secrets, irreparable harm, etc.
- Trust but verify: consider audits or interviews of departing employees and conduct electronic scans of laptops or portable storage devices
- Curtail computer and systems/network access to departing employees
- Limit general access to physical property or equipment that might be subject to theft or damage

Workplace Safety

- While cases of workplace violence following a RIF are rare, companies should be prepared.
- Consider retaining security and/or notifying local law enforcement of the upcoming layoff.
- Consider the time and location of employee notifications, with an eye toward potential reaction.

SEC Reporting

- If company is subject to SEC reporting requirements, and in connection with the RIF the company will incur material charges under generally accepted accounting principles (GAAP), the company is required to disclose that fact on Form 8-K.
  - Also consider layoffs of key executives and termination of material agreements.
- The filing must generally be made within four days of the triggering event.

Separation Agreements

Separation Agreements

OWBPA requirements for employees 40 and older:

- Cannot waive ADEA (e.g., federal age discrimination) rights unless waiver is "knowing and voluntary"
- Requirements for ADEA waivers to be knowing and voluntary . . .
  1. Understandability – "written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate"
  2. Mention ADEA – "refers to rights or claims arising under [the ADEA]"
  3. No Future Waiver – no waiver of rights/claims "that may arise after the date the waiver is executed"
  4. Real Consideration – "only in exchange for consideration in addition to anything of value to which the individual already is entitled"
  5. Consult a Lawyer – individual "is advised in writing to consult with an attorney prior to executing the agreement" (we favor a separate "writing")
  6. Review Period – individual "is given a period of at least 21 days within which to consider the agreement" – *45 days to review for group layoff*
  7. Revocation Period and When Effective – agreement provides for revocation period of at least "7 days following . . . execution" AND provides "the agreement shall not become effective or enforceable until the revocation period has expired"

Decisional Unit

- Scope of individuals considered for RIF (even if ultimately not selected)
  - decisional unit must be described in disclosures (i.e., the "class, unit, or group of individuals covered by [the] program")
  - defines who must get disclosures (i.e., "each person in the decisional unit who is asked to sign a waiver agreement")
  - defines scope of age/position data that must be disclosed
- If decisional unit is not accurately defined, then the ADEA release may be subject to challenge
  - Often tied to specified facility (place, location, physical plant, complex)
  - May comprise several facilities
    - If reduction is considered across multiple facilities, then the decisional unit might similarly span all considered facilities
  - Can also be a subgroup of the workforce (e.g., particular division, function, job title)
  - Might be defined by elimination (e.g., "all non-managerial employees in X facility, with the exception of ABC")

Decisional Unit Exhibits

- When waiver requested "in connection with an exit incentive or other employment termination program offered to a group or class of employees"
  - OWBPA regulations: "program" defined as when employers "offers additional consideration . . . to **two or more** employees"
- What disclosures are required?
  - Inform employees "in writing" and in a "manner calculated to be understood by the average individual eligible to participate" as to:

    (a) any class, unit, or group of individuals covered by such program;

    (b) any eligibility factors for such program;

    (c) any time limits applicable to such program;

    (d) the job titles and ages of all individuals eligible or selected for the program; and

    (e) the ages of all individuals in decisional unit who are not eligible or selected for the program.

Tracking Responses

- Track severance agreements responses
- Send employee reminders when appropriate (e.g., deadline approaching)
- Coordinate with Payroll to ensure severance payments and benefits are timely issued
- Coordinate with Legal to address any negative employee responses, PR/media/social media issues, or potential claims/demands

IMMIGRATION ISSUES

Impact on Immigration filings due to government shut-down

- Nearly 75% of all US Citizenship and Immigration Services (USCIS) workers are deemed essential and typically continue working during a shut-down. CBP officers are essential.
- Any fee-based filings may continue/business as usual
  - This encompasses virtually all visa petition filings with U.S. Citizenship and Immigration Services (USCIS,) including H-1B, L, TN, O.
  - Applications for visa issuance at U.S. consular post (operated by the Department of State) may continue as they are fee-based.
- Any filings for which an agency does not receive a fee do not continue.
  - Labor condition attestations for H-1B petitions
  - Applications for Alien Labor Certification, also known as "PERM"
  - H-2A and B with Department of Labor (DOL)

Cessation of Employment and Nonimmigrant (Temporary) Visas

- H-1B workers
  - The H-1B visa classification is arguably the most highly regulated visa classification.
  - Because a required component of the H-1B petition is a Labor Condition Application filed with and certified by DOL, there are two sets of regulations that govern cessation of work by an H-1B worker.
  - Under DOL regulations, an H-1B worker may not be involuntarily "benched" without pay.
  - H-1B workers may take voluntary leaves of absence, but an employer-mandated furlough is not considered "voluntary leave."
  - Pursuant to 8 C.F.R. 214.2(h)(11)(i)(A), an employer must immediately notify USCIS of any changes in "the terms and conditions of employment" which may affect eligibility for the H-1B.

Cessation of Employment and Nonimmigrant (Temporary) Visas

- Other nonimmigrant visa statuses (TN, L, O)
  - Regulation governing employer notification to USCIS with respect to material changes in employment applies.
  - These visa statuses are not tethered to an LCA, so there is slightly more flexibility in terms of temporary cessation of employment, timing of notification and so forth.
  - Employees in certain visa statuses receive a 60 day grace period after termination.
    - Employer may use part of grace period to cover a furlough.
    - Employer may rehire employee during grace period without having to file new petition.
    - Grace period may not be used twice in one validity period.

Foreign students (F-1)

- Foreign students may be eligible for various types of work authorization, including:
  - Optional practical training (OPT)
  - STEM OPT
- Foreign students who are unemployed for more than an aggregate of 90 days during post-completion OPT are considered to have failed to maintain status.
- Foreign students who are on STEM OPT may be unemployed for an aggregate of 150 days, including any days of unemployment during post-completion OPT.

Cessation of employment for workers with EAD's

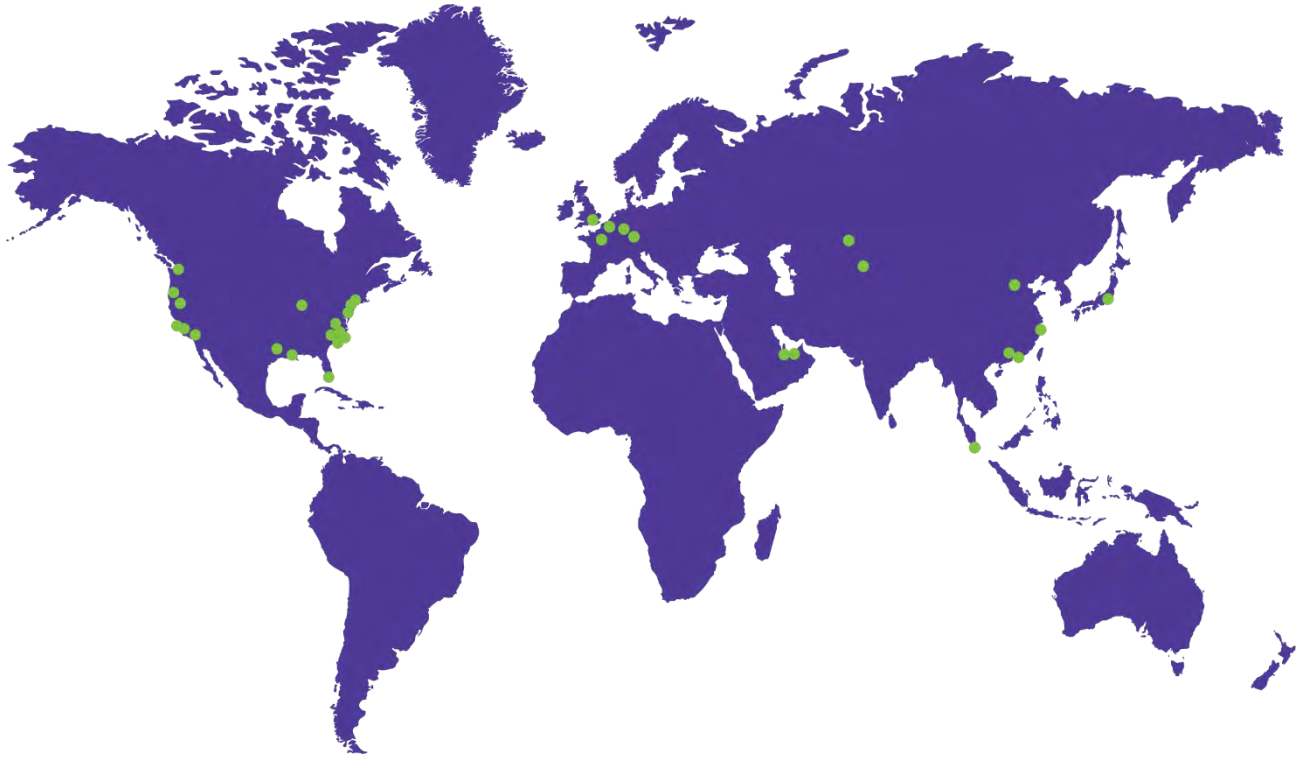
- Employment Authorization Documents ("EAD's") are granted in a variety of circumstances, including the following:
  - Asylees and refugees
  - Applicants for adjustment of status (final stage of green card process)
  - DACA recipients
  - Spouses of L-1 and E visa holders (no longer need EAD's to work but can apply for them)
  - H-4 (spouses of H-1B) holders (eligible for work authorization when H-1B worker is in certain stage of green card process.)
  - F-1 students on OPT and STEM OPT
- EAD holders may cease and recommence employment during validity period of EAD.
- Similarly, periods of unemployment have no impact upon employees with work authorization "incident to status," such as spouses of E and L holders; they may cease employment and recommence employment during the validity of their work documentation.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
Shanghai
Shenzhen
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



Morgan Lewis 150 YEARS

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DOECAA SPRING 2024 CONFERENCE

Speaker Biographies -

Managing through Potential Government Shutdowns & Debt Ceiling Threats

Eleanor Pelta, Morgan Lewis & Bockius

A recognized leader in immigration and nationality law, Eleanor Pelta counsels clients on legal and strategic issues arising from the international movement of key personnel, from the individual transfer of high-ranking executives to high-volume transfers of expert staff. Her experience includes the use of blanket visa programs and the qualification of companies as treaty investor or treaty trader entities. Additionally, Eleanor counsels businesses on the immigration implications of corporate changes, such as mergers, acquisitions, downsizings, reductions in force, and salary-level changes.

A co-leader of the firms global immigration practice, Eleanor's practice involves assisting employers of all sizes and in all industries in understanding and complying with the immigration laws relating to the hire and retention of foreign talent. This includes advising clients on, and supporting them with, temporary and permanent US immigration options for executive, business, artistic, scientific, and information technology (IT) personnel. In addition, the practice supports the global movement of client personnel. Eleanor counsels employers on the compliance aspects of US immigration laws, including employment eligibility verification and avoiding immigration-related unfair employment practices.

Claire Lesikar, Morgan Lewis & Bockius

Claire counsels businesses on employment issues including leaves of absence, disability accommodation, discrimination and harassment, disciplinary matters, layoffs, employment agreements, wage and hour compliance, and employee handbooks and policies. In addition to

her counseling practice, Claire represents companies in employment matters that include complex wage and hour class actions, representative actions brought under California's Private Attorneys General Act, workplace discrimination and retaliation, and wrongful termination. Claire also handles employment-related aspects of mergers, acquisitions, investments, and joint venture transactions. Additionally, Claire serves on the Seattle office's Hiring Committee.

TECHNOLOGY

&

RESEARCH SECURITY

MODERATOR –

Derek Maughan, PNNL Deputy GC

PANEL –

Giovanna Cinelli, Morgan Lewis & Bockius

Nelson Dong, Dorsey & Whitney *(virtual)*

Christina Lomasney, PNNL Chief Commercialization Officer

Morgan Lewis

DOECAA Spring 2024 Conference

Panel: Technology and Research Security

April 17 – 2024

Giovanna M. Cinelli
Practice Lead, International Trade & National Security
Morgan Lewis & Bockius LLP
Washington, DC

Technology & Research Security

- Technology and research are driven by scientific advancements, new applications and the need to address critical and emerging problems
- Geopolitical and geostrategic considerations play a larger role in today's world – impacting technology development and collaborative research endeavors
- Challenges in defining the not yet 'defined' – as with emerging technologies - create a reactive regulatory environment that enhances compliance risks
- This geopolitical and geostrategic framework is focused on:
  - Specific technologies – both mature and emerging
  - Countries of concern
  - Multilateral engagement
  - Policies of "delay, deny, and impede"

Technology & Research Security

- These factors affect the laws and regulations that:
  - Define what constitutes 'research security'
  - Change the paradigm of controls
  - Enhance the obligations imposed on research organizations
  - Focus on traditional tools such as intellectual property, export controls, government contracts restrictions and funding restrictions for applied research
- Over the last 10 years, Congress and the Executive branch agencies have:
  - Increased their focus on expanding export controls across tech sectors
  - Developed new reporting requirements for researchers to address conflicts of interest and overseas talent programs
  - Aggressively and expansively defined violations of export controls, economic espionage, trade restrictions (such as tariffs), and conflicts of interest

Technology & Research Security

- Within this paradigm, research organizations – whether US Government, quasi-governmental, academic, private or public institutions – have faced an overwhelming regulatory burden of new reporting, recordkeeping, licensing, and disclosure obligations that have increased the costs of compliance
- These costs have been intentionally imposed in an effort to address critical national security concerns predicated on over 40 years of technology transfer and development policies that have enhanced the capabilities of various countries of concern, specifically, the People's Republic of China (China), Russia and Iran
- Key agencies involved in establishing these obligations include: the Departments of Justice, Commerce, State, Treasury and Homeland Security

Factors that Impact Research Security and Technology Development

- Concerns related to technology leakage, economic or IP theft, export control violations and conflicts of interest are neither new nor outside the scope of national security concerns
- The COVID-19 pandemic, however, highlighted:
  - the fragility of the supply chain
  - the critical impact of over-reliance on sole or limited sources; and
  - the need for resilience and redundancy to manage the leverage that suppliers, collaborators or other parties may have on US national security interests
- COVID-19 examples of chokepoints or "leverage" include:
  - German restrictions on exports of nitrile gloves, masks and other protective wear
  - Limited sourcing of APIs from China

Current Approach

- To manage these limitations and learn from the COVID-19 situation:
  - The Trump and Biden Administrations commissioned supply chain studies to identify key areas of fragility or instability
  - The published studies identified at least the following areas of concern:
    - Semiconductors and microelectronics
    - Artificial Intelligence
    - Quantum computing, communication, encryption and sensing
    - Robotics
    - Biotechnology and biomanufacturing
    - Energy – both clean and energy resilience (such as nuclear energy)
    - Space platforms
    - UAVs and drones

Results of the Supply Chain Studies

- New executive orders to control or manage artificial intelligence, foreign direct investment in the US, outbound investment, and scientific engagements
- Created a whole-of-government approach which produced new policies, regulations, and standards
- Lead agencies:
  - Office of the Director of National Intelligence
  - NIST
  - Department of Defense
  - Department of Commerce
  - Department of State
  - Department of Justice

Results of the Supply Chain Studies and Congressional Interest

- Select Guidance documents:
  - NIST Internal Report IR 848: Safeguarding International Science: Research Security Framework (August 2023)
  - OSTP Guidelines for Federal Research Agencies regarding Foreign Talent Recruitment Programs (February 14, 2024)
  - JASON Report on Fundamental Research Security (December 2019)
  - National Security Presidential Memorandum on United States Government-Supported Research and Development National Security Policy 33 (NSPM-33) (January 2021)
  - NSPM-33 Implementation Guidance (January 2022)
  - DOE PF 2022-32 Department of Energy Current and Pending Support Disclosure Requirements for Financial Assistance (June 2022)

Key Policies and Regulations Affecting Research Security

- Department of Defense Policy on Countering Unwanted Foreign Influence in Department-Funded Research at Institutions of Higher Learning (June 29, 2023)
  - Focus on fundamental research
  - Imposes obligations regarding parties of concern and limits on collaborative engagements
  - Limits participation in foreign talent programs
  - Establishes a decisionmaking matrix for those awarding contracts, grants or other research monies – key areas:
    - Foreign Talent Recruitment Programs
    - Funding Sources
    - Patents
    - Entity Lists (sanctioned or prohibited parties)

Key Policies and Regulations Affecting Research Security

- Department of Commerce, Bureau of Industry and Security Memoranda from Assistant Secretary for Export Enforcement Matthew Axelrod
  - Further Strengthening our Administrative Enforcement Program (June 30, 2022)
  - Clarifying Our Policy regarding Voluntary Self-Disclosures and Disclosures Concerning Others (April 18, 2023):
    - "Both industry and academia must have proper compliance systems in place to identify, prevent, and mitigate export control violations"
    - Established a "confidential reporting" program for reporting third party violations
- Department of Justice and Department of Commerce lead the Disruptive Technologies Strike Force – a multilayered national/international coordinated program to pursue violations of US export laws
- Joint compliance notes: Justice, State, Treasury, FinCEN, and Homeland Security

Key Policies and Regulations Affecting Research Security

- US Export Regulations – Inconsistent definitions create compliance challenges
  - Export Administration Regulations, 15 CFR parts 730-774
    - Fundamental research, § 734.8
    - Published or public domain, § 734.7
    - Technology (encompassing technical data), § 772 (technology definition)
  - International Traffic in Arms Regulations, 22 CFR parts 120-130
    - Fundamental research, § 120.34(a)(8)
    - Public domain, §120.34
    - Technical data (includes technology), § 120.33

Key Policies and Regulations Affecting Research Security

- Department of Energy/NNSA, 10 CFR 810
  - Fundamental research, § 810.3
  - Publicly available technology, § 810.3
  - Technical data/technology, § 810.3
- Department of State Commendations and Recommendations from University Visits by the Directorate of Defense Trade Controls (April 10, 2024)
  - Enhanced focus on the "distinction between fundamental research and controlled research"
  - Increased interest in foreign person researchers and access to controlled defense services or technical data
  - IT resources for tracking access to technical data

What Keeps Me Up at Night?

- Given this background, where do issues (both expected and unexpected) arise?
  - Understanding the difference between fundamental research and controlled research
    - Which laws and regulations apply
    - What export classifications cover products, equipment, materials, software and technology/technical data
    - What licenses (or exceptions/exemptions) apply
    - What records are maintained
    - What documentation exists to allocate responsibility across the ecosystem, including with individual researchers
    - Has technical data or technology been properly released under the relevant regulations

What Keeps Me Up at Night?

- Research and researcher integrity
  - Conflicts of interest
    - Requirements from the relevant agencies – Defense, NSF, NIH, Energy
    - Information collection – is it complete, verified, and supported with documentation
    - Does the research organization understand the scope and level of disclosure required
    - Have past contracts, funding instruments, and grants been reviewed for updates (in case information was omitted)
    - Have programs, research collaborating parties, suppliers, vendors, and agencies been screened against relevant lists – whether the DOD Countering Unwanted Foreign Influence list or various sanctions lists (Commerce Entity List, Treasury Specially Designated Nationals List, etc.)

What Keeps Me Up at Night?

- Other Issues:
  - What constitutes reasonable diligence of parties involved in research projects
  - Have confidentiality agreements been updated to address changing standards of diligence and risk
  - Have foreign parties been researched and identified pursuant to the US Government's definition of those parties:
    - EAR §§ 744.21 and 744.22 (military and military-intelligence end users)
    - Civil-military fusion supporters
    - Countries of concern
    - NDAA 1260H List parties
  - How often are research projects reviewed and updated – e.g., consider ongoing obligations under EAR § 764.2(g)(2)

Concluding Thought

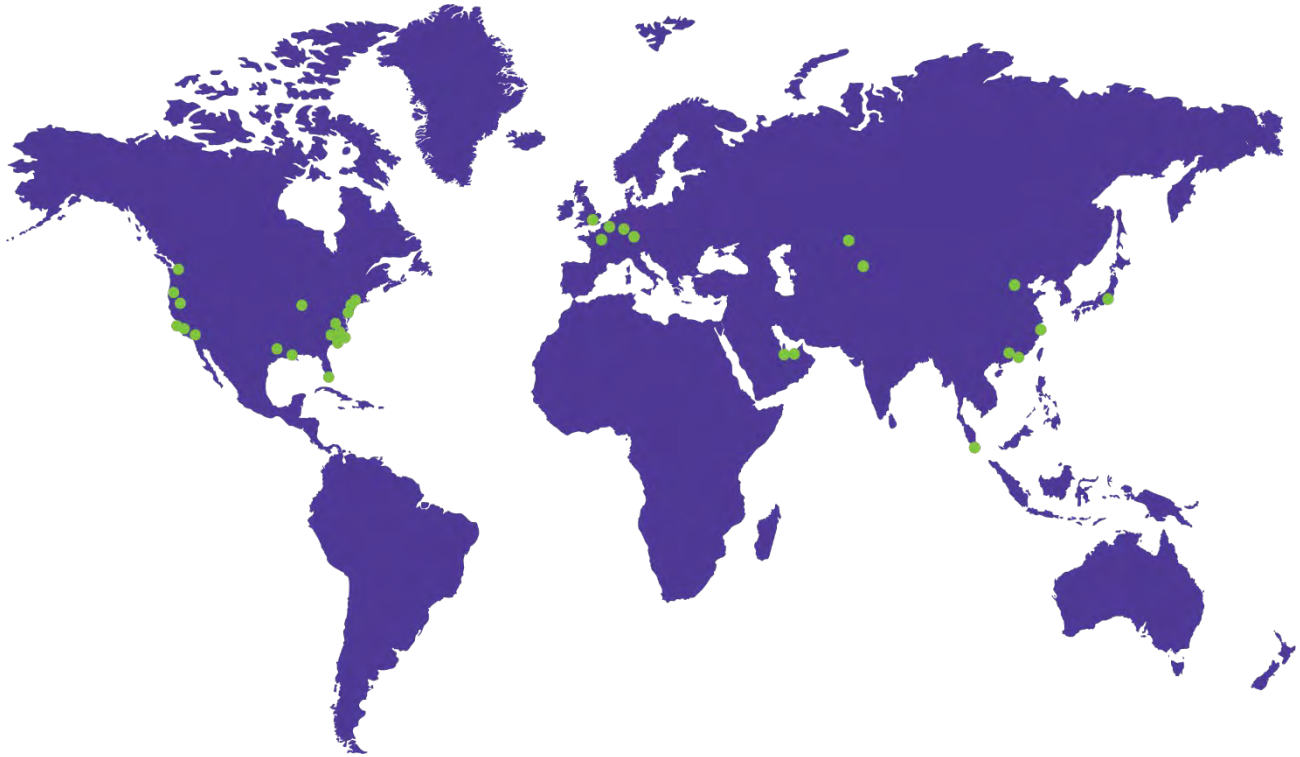
- Why does this matter?
  - "We are witnessing an erosion in the critical defense foundation [industrial machines]. Today our once self-sufficient…supply base has become vulnerable. We have become dependent on offshore suppliers for critical components of our weapons systems. Our technological superiority has declined and in some cases vanished." Statement of Secretary of Defense Frank C. Carlucci in his Annual Report to Congress (January 17, 1989)

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
Shanghai
Shenzhen
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



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TECHNOLOGY & RESEARCH SECURITY: THE GEOPOLITICAL CONTEXT

Nelson G. Dong, Of Counsel
Dorsey & Whitney LLP
Seattle, WA

DOE Contractor Attorneys Association
Spring 2024 Conference
Richland, Washington
April 17, 2024

1

PROFESSIONAL BACKGROUND

- **Of Counsel in Seattle office of 600-attorney Dorsey & Whitney international law firm with offices in Beijing, Shanghai and Hong Kong**
- **International technology lawyer with >40 years experience in international technology transactions and supply chains**
- **Co-head of Dorsey's National Security Law Group**
- **Director of Washington State China Relations Council in Seattle and National Committee on US-China Relations in New York City**
- **On U.S. Justice Department legal team to defend President Carter's 1979 historic normalization of diplomatic relations with China**
- **Former member of U.S. Commerce Department's top policy advisory committee on U.S. export control policies and procedures**
- **Member, National Assn. of College and University Attorneys**

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2

THE GEOPOLITICAL CONTEXT

- Over past two decades, US has sought many forms of "constructive engagement" with both China and Russia
- Despite such efforts, both China and Russia have moved economically, diplomatically and militarily in ways now seen as inconsistent with US national security and foreign policy interests
- Both political parties in Congress have become increasingly skeptical of further American engagement with China and Russia
- 2023 launch of House Select Committee on Chinese Communist Party
- Three successive Administrations and their National Security Strategy documents have listed China and Russia as most serious foreign threats to US
- *US research universities – including those associated with DOE -- and their activities are inevitably affected by these geopolitical trends as government laws, regulations and policies shift*

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A CAUTION FROM THE UNITED KINGDOM

- Stanford University and the Hoover Institution recently co-hosted October 2023 meeting of the security chiefs of the "5 Eyes" group – US, UK, Canada, Australia and New Zealand.
- US delegation led by FBI Director Christopher Wray
- At that public session, Ken McCallum, director of MI5, UK's domestic counter-intelligence and security agency, said publicly:

  "If you're working today at the cutting edge of technology then geopolitics is interested in you, even if you're not interested in geopolitics."
- Many key areas of technology studied by Dept. of Energy, its national laboratories and contractors are in contested domains, including AI, quantum computing, advanced materials, microelectronics, biotechnology, energy

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"WHOLE OF GOVERNMENT" RESPONSE

- Dept. of Justice: "China Initiative" (2018-2022), push to register college and university Confucius Institutes under Foreign Agent Registration Act (FARA)
- Dept. of Education: Expanded Section 117 annual reports on foreign funding
- Dept. of Commerce: expanded export controls; more enforcement focus on leading US research universities reliant on federal funding
- Dept. of Homeland Security: tougher policy on admission of PLA-affiliated foreign students or scholars, CCP members
- Dept. of State: closure of PRC consulate in Houston, TX
- Dept. of Energy: stricter disclosures of foreign affiliations, collaborations, posts
- NASA: statutory bar on collaborations with Chinese government, business entities
- NIH and NSF: push on federally funded researchers to disclose potential "foreign influence" and foreign ties such as talent programs
- OSTP: National Security Presidential Memorandum 33 (NSPM-33)

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POSSIBLE LAPSE OF 1979 US-CHINA SCIENCE & TECHNOLOGY AGREEMENT (STA)

- Historic January 1979 Science & Technology Agreement (STA) signed by President Jimmy Carter and PRC Premier Deng Xiaoping
- Short, non-specific STA has provided framework for US-PRC science and technology cooperation for 45 years with renewals every five years under both Republican and Democratic Administrations
- Last renewed in 2018 with a separate annex to address growing US concerns about intellectual property protection
- Biden Administration under increased pressure not to renew STA due to strategic concerns about PRC abuses, potential redirection of US-origin technology to drive PRC "military-civil fusion" and military end uses
- State Department only extended for six months longer to allow time for further safeguards of US interests to be negotiated – could have further extensions

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OTHER KEY GOVERNMENT AGENCIES/OFFICES

DEPARTMENT OF STATE · UNITED STATES OF AMERICA

OFAC
Office of Foreign Assets Control

U.S. DEPARTMENT OF COMMERCE · BUREAU OF INDUSTRY AND SECURITY

NSF

HOMELAND SECURITY INVESTIGATIONS

DEPARTMENT OF JUSTICE · QUI PRO DOMINA JUSTITIA SEQUITUR

DEPARTMENT OF JUSTICE · FEDERAL BUREAU OF INVESTIGATION

NATIONAL SCIENCE AND TECHNOLOGY COUNCIL

Office of Science and Technology Policy

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FOREIGN UNIVERSITIES ON BIS ENTITY LIST

- **One of harshest export control measures is to be named to Bureau of Industry and Security (BIS) Entity List**
  - **Results in stringent export licensing restrictions on any exports of US-origin items**
  - **In most stringent cases, Entity List designation may come with "policy of denial"**
- **Although Entity List measure usually aimed at companies, banks and individuals, BIS has also named several hundred universities, "academies" and "institutes" in other countries, especially in China and Russia**
  - **Generally, such an entity designation occurs because BIS and its sister agencies have intelligence that the entity is diverting controlled US technology to illicit uses, especially in support of hostile military or strategic applications**
- **Worst case scenario: PI and PI's US institution engage in research collaboration with an Entity List university – *Should they admit their potential export control violation or conceal the relationship and thus fail to make full disclosure to federal funding agency?***

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8

SECTION 1260H IN 2021 NATIONAL DEFENSE AUTHORIZATION ACT

- Congress required the President to list by April 15, 2021 and annually thereafter all "Chinese military companies" ("CMCs") operating in US that DoD has linked to China's "military-civil fusion" strategy
- To be treated as CMC, an entity must be either:
  - directly or indirectly owned, controlled, or beneficially owned by, or in an official or unofficial capacity acting as an agent of or on behalf of PLA or any other organization subordinate to Chinese Communist Party's Central Military Commission; or
  - identified as a military-civil fusion contributor to the Chinese defense industrial base and engaged in providing commercial services, manufacturing, producing, or exporting
- On June 3, 2021, DoD published its first Section 1260H list with 47 CMCs – significant overlap with other lists
  - DoD expanded its 1260H List in January 2024

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EXECUTIVE ORDER 14032 JUNE 3, 2021

- Biden Administration EO amended, largely replaced EO 13959, keeping its declaration of "national emergency" for Chinese companies linked to PLA but expanded EO to add Chinese companies whose surveillance technology is used to suppress human rights, either in China or elsewhere
  - New deadlines for US persons to end trading of entities' "publicly traded securities" by August 2, 2021 and to divest by June 3, 2022
  - Adopted 1934 Securities & Exchange Act definition for what will constitute "publicly traded securities"
  - Named in an annex 59 specific Chinese entities decoupled from DoD § 1237 List that had previously been used in EO 13959
- EO empowered OFAC to create new Non-SDN Chinese Military Industrial Complex Companies List (NS-CMIC List)
  - OFAC has already named ≈200 entities to new NS-CMIC List, mostly particular affiliates of EO 14032's 59 named companies
  - Other agencies (e.g., BIS) may now key off NS-CMIC List

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10

RANGE OF US GOVERNMENT LEVERAGE

- More US sanctions lists (e.g., BIS Entity List, OFAC Non-SDN CMIC List, DoD Section 1260H List)
- More federally-required disclosures and liability for omitted, incomplete or inaccurate disclosures
  - Potential False Claims Act civil litigation exposure
  - Potential FCA criminal exposure
  - Potential criminal exposure for wire fraud, mail fraud, services fraud
- Debarment from federal contracts or grants
- Potential criminal investigation, prosecution under multiple substantive criminal laws
  - E.g., export controls, economic sanctions, economic espionage, income tax evasion, undisclosed foreign bank account, etc.
- Adverse negative publicity, reputational damage, legal costs for both institution and individual PIs and co-PIs
- Potential Congressional investigation, hearings

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RECENT EXAMPLE UNDER FALSE CLAIMS ACT

- On October 2, 2023, Department of Justice announced a $1.9 million False Claims Act (FCA) settlement with Stanford University because it had "knowingly failed to disclose" foreign ties or funding of its faculty members seeking certain federal research grants
- Settlement covered 16 different grant proposals submitted during 2015-2020 in which Stanford did not reveal that 12 PIs or co-PIs had foreign affiliations or were receiving foreign funding
  - One case involved undisclosed employment at Fudan University in PRC and undisclosed funding by PRC National Natural Science Foundation
- US funding agencies involved: US Army, US Navy, US Air Force, NASA, NSF
- Stanford says its internal protocols and policies have changed since these cases to reflect more current and rigorous disclosure rules

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NEED FOR VIGILANT SCREENING

- DOE contractors and DOE-funded PIs should screen counter-party foreign institutions before engaging in collaborations
- Many commercial software tools on market today to provide automated sanctions and anti-money laundering screening, including:
  - Descartes Visual Compliance, ComplyAdvantage, DowJones Risk & Compliance, LexisNexis Risk Solutions, Moody's Analytics, LSEG Data & Analytics (previously Refinitiv)
  - Real time updates of multiple sanctions lists, including non-US lists (e.g., EU lists)
  - Automated record keeping with time-stamped search record to document timely due diligence
  - Dept. of Commerce also offers free (but limited) Consolidated Screening List (CSL)
- Goal is to avoid problematic, embarrassing institutional or professional ties to any such listed university, academy or institute
  - Generally speaking, applications for federal research funding should not include involvement of co-PI at a sanctioned foreign institution
  - Acute risk of eventual public exposure if goal is to publish with co-PIs at foreign institution

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KEY TAKE-AWAY MESSAGES

- Geopolitical environment is fluid and places much more urgent stresses upon Dept. of Energy and other federal research funding agencies
- Geopolitical tensions between US and China and between US and Russia affect all federal agencies because of "whole of government" approach to such national security issues
- Major government emphasis on published lists of sanctioned foreign institutions, esp. in China and Russia
- Researchers in US institutions of higher education and their legal counsel need to be on full alert for expanded and evolving federal disclosure and reporting requirements, particularly those flowing down from NSPM-33
- Close cooperation needed between legal counsel and compliance managers to assure research administrators, PIs understand their legal obligations, potential pitfalls in current push for greater research security and integrity

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14

THANK YOU!

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THESE MATERIALS AND ANY PRESENTATION BASED THEREON ARE SOLELY FOR GENERAL EDUCATIONAL PURPOSES TO PROMOTE PUBLIC DISCUSSION AND UNDERSTANDING. THEY ARE NOT INTENDED TO BE, AND SHOULD NOT BE TAKEN AS, LEGAL ADVICE. ANYONE WITH A SPECIFIC LEGAL QUESTION SHOULD RETAIN AND CONSULT QUALIFIED LEGAL COUNSEL.

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15

Pacific Northwest
NATIONAL LABORATORY

Technology Transfer Security

National Lab Perspective

Christina Lomasney
Chief Commercialization Officer

Office of Commercialization & Collaboration @PNNL

U.S. DEPARTMENT OF ENERGY BATTELLE

PNNL is operated by Battelle for the U.S. Department of Energy

FFRDC Technology Transfer Mission

From Battelle/PNNL M&O Contract (similar or same language across DOE Labs):

"The Contractor shall conduct technology transfer activities ***with a purpose of providing benefit from Federal research to U.S. industrial competitiveness****.*

"… In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Strategic Partnership Projects (SPP); providing information exchanges; and making available laboratory user facilities…

"…The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of Section 11 of the Stevenson-Wydler Technology Innovation Act of 1980…"

The "Technology Transfer Mission" is defined in the M&O contracts and in statute – it encompasses the requirements for non-federal engagements by the Lab. This includes entity vetting, industry and non-federal partner contracting, intellectual property capture and licensing.

Pacific Northwest
NATIONAL LABORATORY

Approach to Effective Entity Vetting Risk Management

Know your technology

Know your people / partners

Identify risks

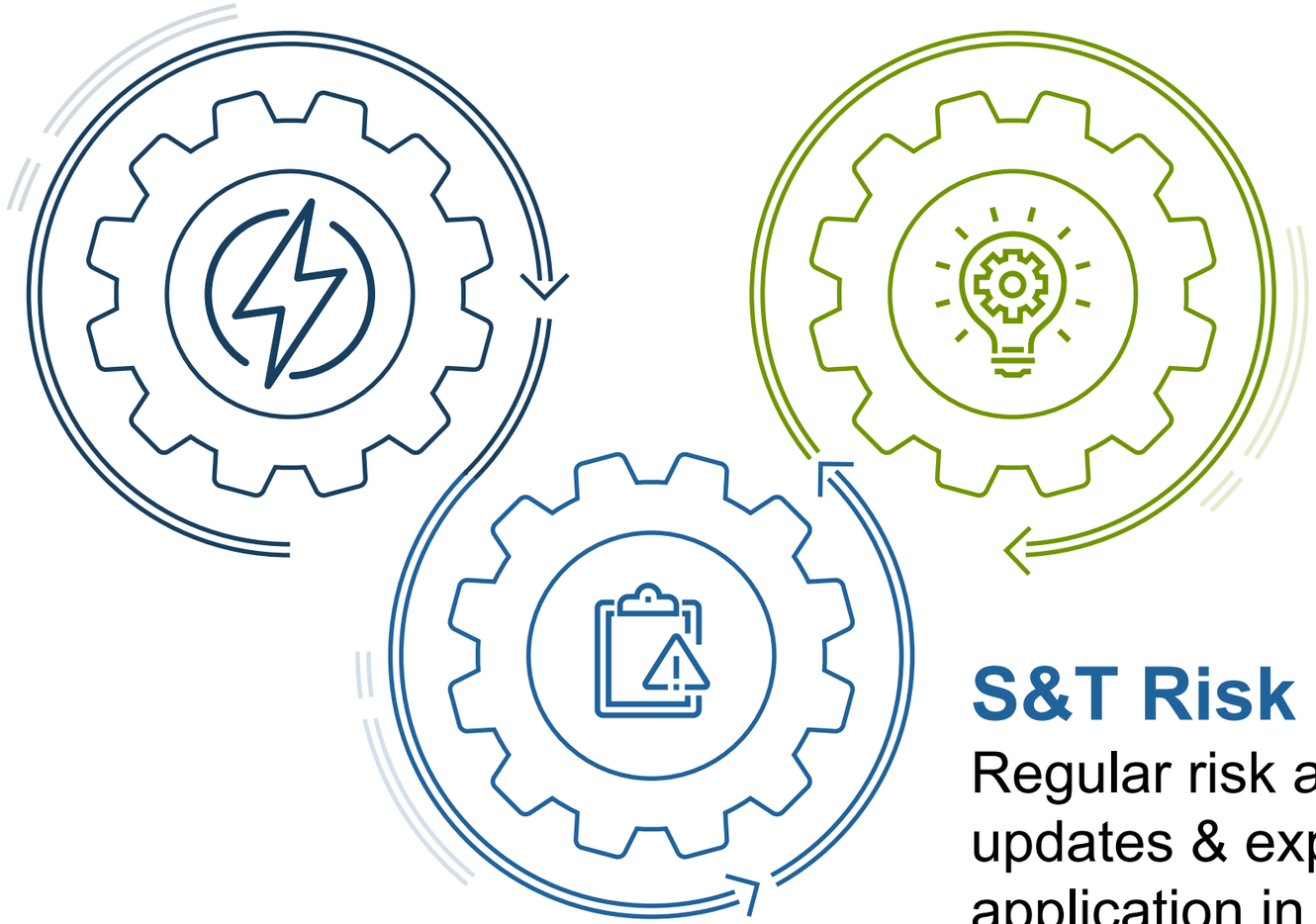
Mitigate risks

Office of Commercialization & Collaboration @PNNL

Complex Requirements in a Dynamic Landscape Complicate Compliance

DOE S&T DEC

3 new D.E.C.s in 3 years – vs. 2 new in >20 years prior



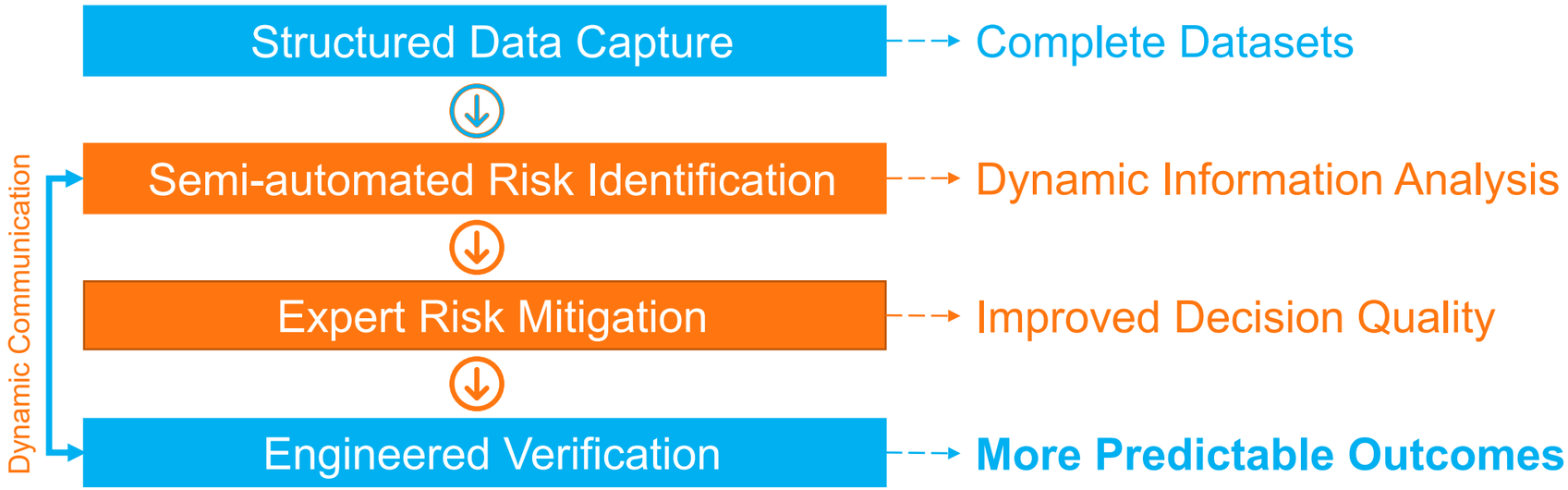
50 USC 4817

38 “Foundational and Emerging Technology” categories added in <5 years

S&T Risk Matrix

Regular risk assessment updates & expanded application in 2023

Example: Pathway to Engineered Controls



New approach enables semi-automated risk identification, reducing subjectivity and enabling dynamic verification of mitigations as requirements change.

Why is Tech Transfer Security important to DOE

Accelerating innovation is still our best tool for maintaining global economic competitiveness and regaining control of critical manufacturing supply chains

Rigorous implementation is the only way to build effective risk identification and management

Clear identification and communication of threats is a prerequisite to effective risk management

Targeted design of requirements and orders should incentivize desired behavior and penalize mis-aligned actions and actors

Key Threat Assessment References

- Protecting U.S. Technological Advantage |The National Academies Press
- China Initiative Conference | CSIS Events (200206_Wray_transcript.pdf (csis-website-prod.s3.amazonaws.com)
- Improved Export Controls Enforcement Technology Needed for U.S. National Security (csis.org)
- 2021 Final Report – NSCAI
- The Social Value of Science and Innovation Investments and Sources of Breakthroughs | NBER
- The State of U.S. Science and Engineering 2022 | NSF - National Science Foundation
- Historical Trends in Federal R&D | American Association for the Advancement of Science (AAAS)

Examples: PNNL Risk Mitigation Action & Alignment with and through Statutory Authorities

"The Department of Commerce must also **finalize its initial list of "emerging" and "foundational" technologies that must be controlled**, as mandated by ECRA more than two years ago, and work to comprehensively adapt U.S. export control lists to address modern technology-focused security challenges."

– National Security Commission on AI Report, 2021

Know Your Research

- Risk-based Tech Partnership Vetting: Part of 8-Lab, DOE-funded collaboration to conduct early technology assessments to support informed, risk-based decisions about licensing and non-Fed partnership agreements (combined with Entity Vetting)
- **Collaboration with DOC-BIS in ECRA Sec 1758 definitions**

Know Your Partner

- Entity Vetting: DOE-funded collaboration of National Labs define and implement requirements for non-federal partner vetting
- **CFIUS notification on Change of Control**

The US must "enhance its ability to **monitor investments from competitors in critical technology industries to prevent theft of IP** and ensure that the US retains control of sensitive technologies."

– National Security Commission on AI Report, 2021

Office of Commercialization & Collaboration @PNNL

DOECAA

DOECAA SPRING 2024 CONFERENCE

Speaker Biographies - Technology & Research Security (panel)

Giovanna Cinelli, Morgan Lewis & Bockius

Giovanna M. Cinelli is a partner with Morgan Lewis & Bockius LLP, where she leads the Firm's global International Trade and National Security practice. For more than 35 years, she has counseled clients across industries on national security and foreign policy matters, including export/import controls, CFIUS, due diligence, investigations, government contracts, supply chain and classified matters.

Since 1992 she has served on multiple federal advisory committees at the Departments of State, Commerce and Defense advising on key issues related to export controls, the defense industrial base, foreign direct investment and emerging technologies.

She is considered a subject matter expert by Congress as well and has testified before the House Foreign Affairs Committee Subcommittee on Oversight and Accountability, the House Financial Services Committee, and the US-China Economic and Security Review Commission on these issues. Her testimony helped inform Chairman McCaul's 90-Day Bureau of Industry and Security Export Review published in 2023.

She has been consulted by the European Union and the Government of Japan on FDI, export controls and outbound investment regimes and is frequently interviewed and/or quoted in the press by *Inside Defense*, *The American Lawyer*, Fox News Digital, Reuters, the *Wall Street Journal*, Law 360, Bloomberg, Bloomberg Law, *Foreign Investment Watch*, and *The Capital Forum* and has appeared on CNN's Burden of Proof and Hardball with Chris Mathews.

Ms. Cinelli is a Chambers-ranked recognized global leader in the field and a prolific author, with two book chapters and dozens of articles to her credit while practicing law and serving as a US Naval Reserve Intelligence Officer. She is a violinist with the Washington Opera Society and an amateur competitive pianist.

Nelson Dong, Dorsey & Whitney (*Virtual*)

Nelson Dong is an Of Counsel in the Seattle office of the Dorsey & Whitney law firm and co-heads its National Security Law Group. He advises companies, professional societies, universities and research organizations on export controls, economic sanctions, national security and international trade and investment matters. He is also an author and teacher on international technology law issues.

Nelson was a White House Fellow and U.S. Justice Department official in the Carter Administration responsible for international and national security matters and was a federal prosecutor in Boston. He has been an export control policy advisor to the U.S. Commerce Department and has been a consultant for the U.S. Department of Energy in its national laboratories. He has served for over a decade as a director of the National Committee on US-China Relations in New York City. He is also an Adjunct Senior Fellow at the East-West Center in Honolulu, a director of the Washington State China Relations Council in Seattle, a member of the Advisory Board for the Asia Society of Northern California Seattle Center and an active member of the Council on Foreign Relations and the Committee of 100. Nelson is a graduate of Stanford University and the Yale Law School and has served as a trustee of Stanford University.

Derek Maughan, PNNL Deputy GC

Derek Maughan leads an amazing group of bright, talented, and capable legal professionals in advancing the mission of PNNL to transform the world through courageous discovery and innovation. He supports PNNL management by providing counsel, insight and strategy related to legal and policy matters across the lab with particular emphasis in intellectual property and technology transfer, and in solving problems and disputes. In his 17 years at PNNL Derek has managed teams, asserted, and defended lawsuits, prosecuted patents, negotiated licenses, and acted as a strategic advisor and problem solver. He appreciates the collaborative relationships he has formed with his colleagues throughout the complex both on the contractor and government sides of the house and hosts the monthly IP counsel community of practice phone calls.

Christina Lamasney, PNNL Chief Commercialization Officer

Christina Lomasney is a veteran entrepreneur with two decades of experience in technology innovation and commercialization. She joined Pacific Northwest National Laboratory as the Chief Commercialization Officer in 2021, focusing on industrial partnerships to expand the impact of PNNL's science and technology. Prior to joining PNNL, Christina's efforts brought advanced materials and environmental remediation innovations to U.S. and global markets. She is a physicist with background in materials science and electrochemistry. Following success in industrialization of Modumetal, a novel advanced manufacturing technology, she was named one

of the World's Most Promising Women Entrepreneurs by Fortune Magazine. Christina serves by gubernatorial appointment on the board for JCDREAM, the Joint Center for Deployment and Research in Earth Abundant Materials, securing supply chains for critical materials in the State of Washington. She serves or has served as a board member of the Association of Washington Business, ASTM International, the Washington Economic Development Commission, she is a fellow with the Unreasonable Group, and a mentor on IP strategy with the Founders Institute. She also is an Entrepreneur in Residence with Washington State University - Tri-Cities.

FALSE CLAIMS

Luke Meier, Blank Rome

Robyn Burrows, Blank Rome

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False Claims Act Litigation

Department of Energy Contractor Attorneys Association (DOECAA)

Luke Meier & Robyn Burrows

April 17, 2024

Today's Speakers

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Agenda

- FY 2023 False Claims Act Statistics
- Mechanics of an FCA Suit
- Intervention & Discovery
- DOJ Dismissals
- Settlement Considerations and Damages
- Notable DOE Cases and Settlements

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False Claims Act Statistics

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FY 2023 FCA Statistics

- **$2.68B** recovered in FY 2023 ($2.3B from *qui tam* cases)
  - 70% healthcare
- Non-*qui tam* matters increase
  - FY 22: 305
  - **FY 23: 500**
- Record breaking **543 FCA settlements and judgments**
  - 50% increase from 351 in FY 2022
- **1,504** CIDs

Fiscal Year	Non-*Qui Tam*	*Qui Tam*
2023	500	712
2022	305	658
2021	212	598
2020	261	676
2019	150	637
2018	133	649
2017	176	681
2016	185	709
2015	129	639
2014	119	716
2013	117	757
2012	158	655
10-yr Avg. Non-*Qui Tam* (FY 12–21): 164		

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FY 2023 FCA Statistics

- **DOJ using data analytics to identify and initiate fraud cases**
  - Significant application in healthcare context
  - Recent point of emphasis for DOE OIG, e.g., requesting payroll-related records from contractors to run data analytics. *See* March 14, 2024 report
- **Increasing focus on cybersecurity**
  - $4 million settlement with American wireless network operator
  - $300,000 settlement with web design company
- **$377M government contracts settlement**
  - Resolved allegations of improper allocation of indirect costs associated with commercial contracts

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Mechanics of FCA Litigation

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Mechanics of FCA Litigation

- ***Qui tam*:**
  - Whistleblower complaint filed **under seal**
  - Relator must file with DOJ disclosure statement containing material evidence
  - DOJ has 60 days to investigate (in practice, far longer)
  - Complaint unsealed after **intervention** decision
- Alternatively, **DOJ may file independent FCA suit**
  - No seal procedure, no relator
- Either may be preceded by a CID

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DOJ Intervention

- **If DOJ intervenes**:
  - DOJ (in most cases) files its own Complaint-in-intervention
  - DOJ can pursue **some** or **all** of a relator's claims
  - Relator can generally pursue non-intervened claims and defendants
    - *U.S. ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, 1077 (N.D. Cal. 2020) (noting the "clear weight of authority" on this point)
    - *But see U.S. ex rel. Wride v. Stevens-Henager College, Inc.*, 359 F. Supp. 3d 1088 (D. Utah 2019) (finding relator could not pursue separate defendants and causes of action)
    - If relator proceeds, defendant(s) must respond to BOTH relator's and DOJ's complaints
  - Statistically higher likelihood of recovery

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Delayed Intervention

- ***U.S. ex rel. Aldridge v. Corporate Mgmt. Inc.*, 2023 U.S. App. LEXIS 21926 (5th Cir. Aug. 21, 2023)**
- 8-year delay in DOJ's intervention led to loss of more than half of trial damages awarded.
- Gov't claims did not relate back to original complaint, triggering SOL defense
  - DOJ's "**incessant delay in intervening**" resulted in years of unfair "**unilateral discovery**" by gov't
- Signals district courts should scrutinize new claims that gov't adds after lengthy investigations

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DOJ Declination

- **If DOJ declines to intervene:**
  - Relator proceeds and parties litigate
  - 31 U.S.C. § 3730(b)(4)(B) – relator "shall have the right to conduct the action"
  - Statistically lower likelihood of recovery
    - *But see* FY 2022 FCA stats
- Declination ≠ evidence that gov't has concluded case lacks merit
- DOJ can later move to intervene, either to join or to seek dismissal
- Gov't not subject to party discovery, but remains real party in interest (monitors litigation)

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Settlement After Declination

- ***Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994)**
  - Defendants settled with relator in non-intervened case
  - Most of settlement was allocated for wrongful termination (little recovery for gov't)
  - DOJ objected but still declined to intervene
  - Court held that DOJ cannot absolutely bar settlement:
    - "The government, although it chooses not to fully intervene in the action, retains the right, **upon a showing of good cause**, to object to a proposed settlement"
  - Court found good cause standard met (concern about parties fairly allocating total proceeds "so as to give the government its due")
- Other cases give gov't unilateral ability to block settlement

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FCA Discovery Considerations

- **Discovery post-*Escobar***
  - More focus on materiality
  - Basis to probe gov't knowledge and payment decisions
- **Touhy requests** - Obtain documents/testimony from gov't employees
  - Check agency regulations for specific requirements
  - Standard of review → FRCP 45 vs. APA "arbitrary and capricious"
    - *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994)
  - DOE Touhy regs – 10 C.F.R. § 202.21
- **Relator disclosure statements and communications with DOJ**
  - Written disclosure of all material evidence (relator's "roadmap" of the case)
  - Courts split on privilege – but can typically get *in camera* review
  - Relevant to SOL defenses

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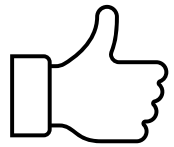
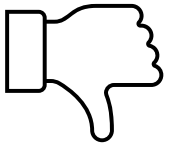
Agency Role in process

- DOJ views the agency as its **client** in FCA cases
  - Differing approaches on agency involvement with defendants
- Agency can end up in the center of the litigation
  - Procurement cases often center on agency personnel and documents
  - Agency knowledge and contract interpretation can be pivotal
- FCA cases can be high-risk, high-reward for agencies
  - Ideal case: improves performance, deters misconduct, $$$ 
  - Worst case: Diverts resources, negative publicity, -$$$ 

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DOJ Motions to Dismiss *Qui Tam* Complaints

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Section (c)(2)(A) Dismissal

- **31 U.S.C. § 3730(c)(2)(A)**
- DOJ has broad discretion to dismiss a relator's complaint at any point in litigation – even after initial declination.
- ***U.S. ex rel. Polansky v. Executive Health Resources, Inc.,*** 143 S. Ct. 1720 (2023) – DOJ moved to dismiss after nearly a decade and after relator accrued $20M in litigation costs
- Gov't afforded "substantial deference"
- FRCP 41(a) governs standard (which will be "readily satisfied")

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Motivations for Dismissal

- Granston Memo
  - 7 non-exhaustive factors
- Relator's weak case risks potentially bad precedent for gov't
  - *U.S. ex rel. Wolf Creek Fed. Servs.,* No. 1:17-cv-00558 (N.D. Ohio 2023) – Gov't moved to intervene and dismiss fraudulent inducement claims, citing concerns with relator's expert who contradicted agency testimony
- Preserving gov't expenditures against discovery, motions, trial participation, etc.

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Post-Discovery Dismissal

- ***U.S. ex rel. Vermont Nat'l Tele. Co. v. Northstar Wireless, L.L.C.* (D.D.C. Mar. 8, 2024)**
- Defendants moved to dismiss based on public disclosure bar.
- DOJ vetoed proposed MTD – Gov't wanted relator to have a chance in discovery to uncover evidence supporting its allegations.
- After case had been litigated for years, DOJ moved to intervene and dismiss after relator failed to uncover any evidence of an FCA violation/damages.

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Settlement & Damages

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Damages and Relator's Recovery

- **Treble damages** + **civil penalties** for each false claim
  - $13,946 - $27,894 (subject to inflationary adjustment)
  - Penalties typically secondary, but significant in some fact patterns
- **Relator's recovery**
  - Gov't intervention: **15-25%** of recovery
  - Non-intervention: **25-30%** of recovery
- Relator entitled to **reasonable attorneys' fees**, even where settled without admission of liability
  - Attorney's fees not required to be included in settlement agreement – may be separately litigated

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Relator's Attorneys' Fees

- What if Relator recovers on only some claims?
- Fees for pursuing unsuccessful claims ONLY IF sufficiently "**related**" to successful claims
  - Related = common core of facts; related legal theories
  - *U.S. ex rel. Savage v. Washington Closure Hanford LLC*, 2019 WL 13169887 (E.D. Wash. 2019)
- Even if related, court may still reduce fee based on overall level of success
  - *Am. Canoe Ass'n, Inc. v. City of Louisa*, 683 F. Supp. 2d 480 (E.D. Ky. 2010) (25% reduction because plaintiff only "achieved good, but not excellent, results after the prolonged litigation" and "achieved some, but not all, of its goals")

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Recovery of Defendant's Attorneys' Fees (FAR 31.205-47)

- Defendant can recover reasonable costs if FCA case fails or is withdrawn Adverse judgment or settlement typically means no recovery
  - "**Costs incurred in connection with any proceeding**" unallowable if:
    - Case results in a criminal conviction, civil liability, or suspension/debarment/termination
    - Case is settled but *could have led* to any of the above
- **Proceedings = litigation <u>and</u> investigation**
- **Exceptions:** Costs that are otherwise unallowable are allowable if:
  - DOJ and defendant agree they're allowable in terms of settlement (rare)
  - In non-intervened case, CO determines relator was unlikely to succeed on merits
- Even if allowable, costs are capped at **80%**

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Notable DOE Fraud Cases & Settlements

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DOE Fraud-Related Matters

- **DOJ abandons case alleging improper home office expenses**
  - June 2021 - DOJ files voluntary dismissal of suit alleging $5M in wrongful billing of home office expenses for “reachback” employees
  - CBCA advisory opinion found expenses allowable and reasonable
- **Settlement for undelivered goods**
  - March 2022 – $10M settlement by prime due to subcontractor allegedly failing to deliver construction materials
- **PPP fraud**
  - March 2022 – Company and owners pay $2.9M in restitution and penalties for allegedly false statements in obtaining PPP loan proceeds

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Questions?

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DOECAA

DOECAA SPRING 2024 CONFERENCE

Speaker Biographies – False Claims

Luke Meier, Blank Rome

Luke is a partner in the Government Contracts practice group of Blank Rome LLP. He has spent the last 16 years helping clients manage investigations and disputes with the federal government, primarily involving contracts with the Department of Energy. He has investigated and defended allegations of fraud at sites throughout the DOE complex and regularly speaks and writes on emerging False Claims Act issues. He also represents contractors in claims and allowability disputes and is a long-time Vice-Chair of the ABA's Bid Protest Committee.

Robyn Burrows, Blank Rome

Robyn represents clients on a wide range of government contracts matters, including assisting clients performing under Department of Energy Management and Operating ("M&O") contracts. She has handled matters involving whistleblower complaints, civil investigative demands, subcontractor disputes, cost-allowability issues, and other unique DOE requirements applying to M&O contractors. Robyn also has experience preparing and negotiating complex claims and has litigated disputes before the boards of contract appeals and state and federal courts. Robyn has a particular focus on emerging supply chain issues and has counseled numerous clients on Section 889 compliance. Robyn is also experienced in navigating clients through False Claims Act investigations and litigations and regularly assists clients in high value bid protests before the Government Accountability Office and U.S. Court of Federal Claims.

EVOLUTION OF CAUSATION IN TOXIC TORTS: FROM HANFORD TO TAIWAN BREAK

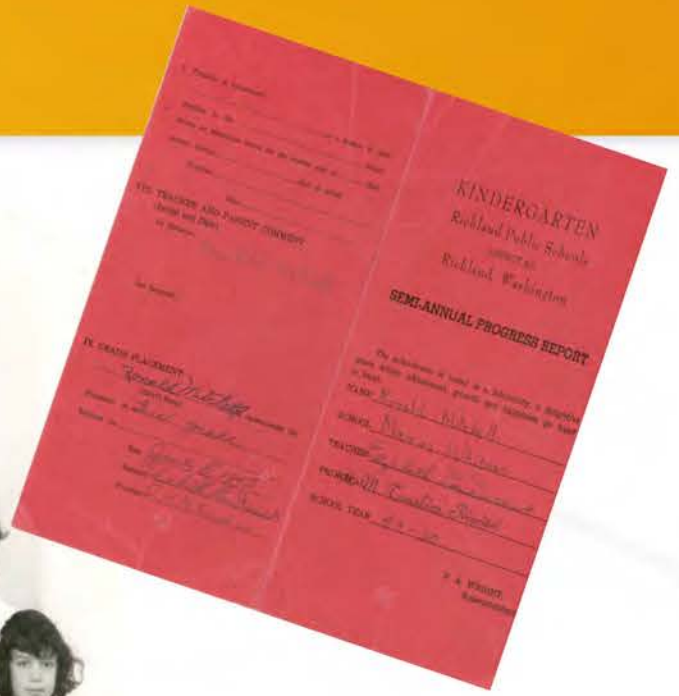
J. Chad Mitchell, Summit Law Group, PLLC

SUMMIT
LAW GROUP

J. Chad Mitchell, Attorney

DOECAA Spring Conference, April 17-18, 2024

Evolution of Causation in Toxic Torts: from Hanford to Taiwan



KINDERGARTEN
Richland Public Schools
Richland, Washington

SEMI-ANNUAL PROGRESS REPORT

IV. GRADE PLACEMENT

Rise above the usual practice

In the beginning ….

215 players in 2024

Boys & Girls Clubs of Benton and Franklin Counties

Kirby Amacker
Change Management Architect, PNNL

Daniel Sauceda
Deputy VP, Interface & Integration Services, HMIS

April Castaneda
Chief Human Resources Officer, PNNL

Louis Terminello
ALD, Physical and Computational Sciences, PNNL

John LaFemina - Retired, PNNL

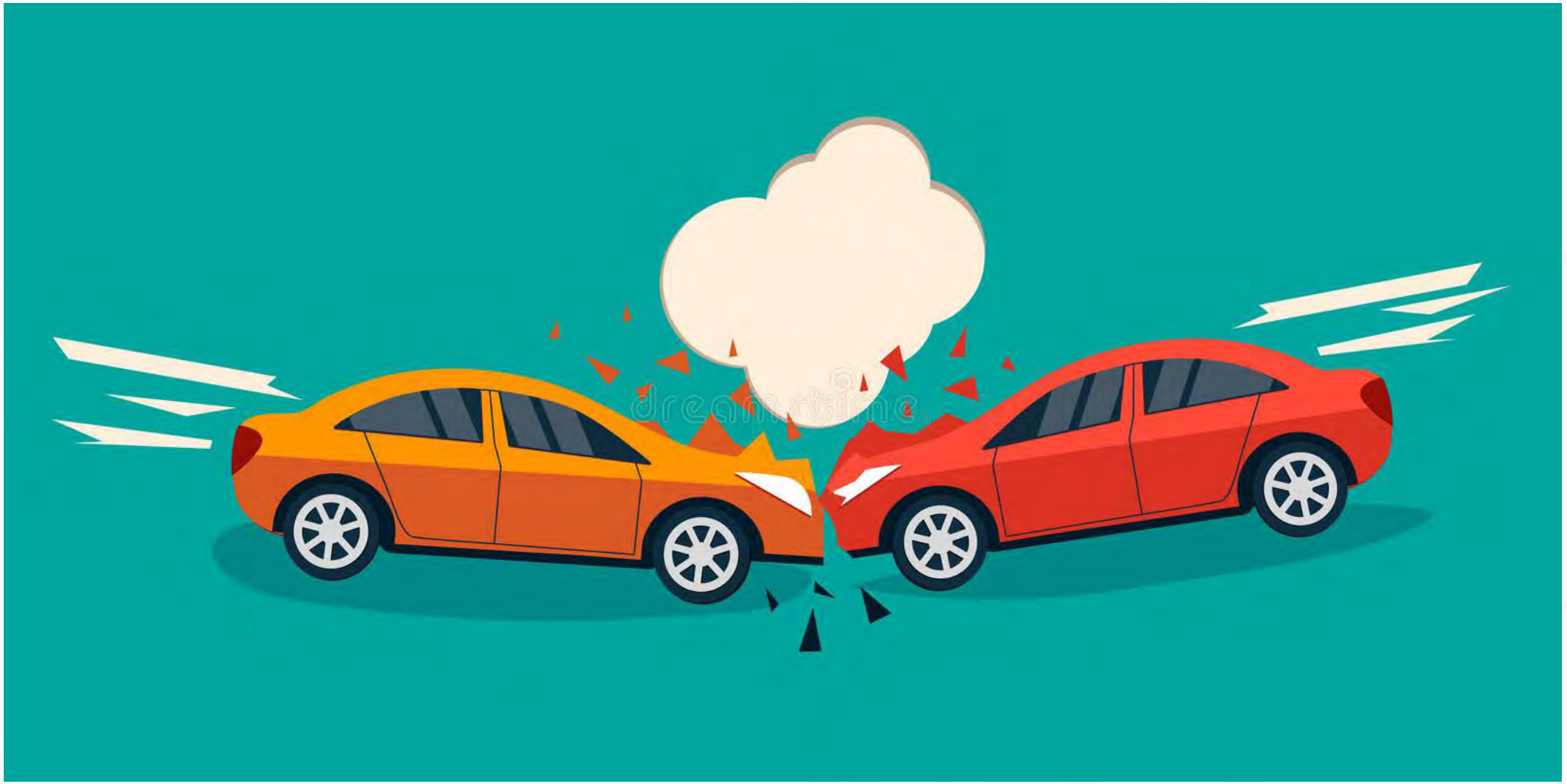
"I now know that I am a strong young adult with a great mind and a great future who can make a difference in this world."

Zaida,
Boys & Girls Clubs of Benton and Franklin Counties
Kennewick Clubhouse Youth of the Year

"Thanks to the people and activities at the Prosser Club, I had more than just an escape from my problems, I had a new home."

Aaron,
Boys & Girls Clubs of Benton and Franklin Counties
Prosser Clubhouse Youth of the Year

Acute causation



Latent causation

What caused this?

Typical U.S. causation standard re toxic torts

- *General causation* – specific substance *can* cause certain disease(s)
- *Dose/exposure* – exposure to substance at sufficient dose
- *Specific causation* – proper diagnosis + when compared with other possible causes, disease was caused by occupational exposure
- *Burden of proof* – borne by plaintiff(s)


THE TIMES THEY ARE A-CHANGIN'
BOB DYLAN
THE LONESOME DEATH OF HATTIE CARROLL
BOOTS OF SPANISH LEATHER
RESTLESS FAREWELL / WITH GOD ON OUR SIDE
THE TIMES THEY ARE A-CHANGIN'
ONLY A PAWN IN THEIR GAME
WHEN THE SHIP COMES IN / ONE TOO MANY MORNINGS
BALLAD OF HOLLIS BROWN / NORTH COUNTRY BLUES
COLUMBIA

Developments in causation in toxic torts

- Taiwan
- Japan
- Washington legislation – Camp Lejeune
- (the other) Washington legislation – Hanford

Taiwan toxic tort lawsuits by former workers

Taiwan toxic tort class action

- Plaintiff argues once it proves evidence of harmful substances used, wrongful acts by Defendants, and reasonable probability between wrongful acts and alleged injury, *burden of proof shifts to Defendants* to disprove general and specific causation.
- Defendants argue U.S. causation standard and BOP.
- 31 chemicals led to a causation finding for 1,396 (out of 1,621) claims in two class-action type lawsuits.

Japanese courts

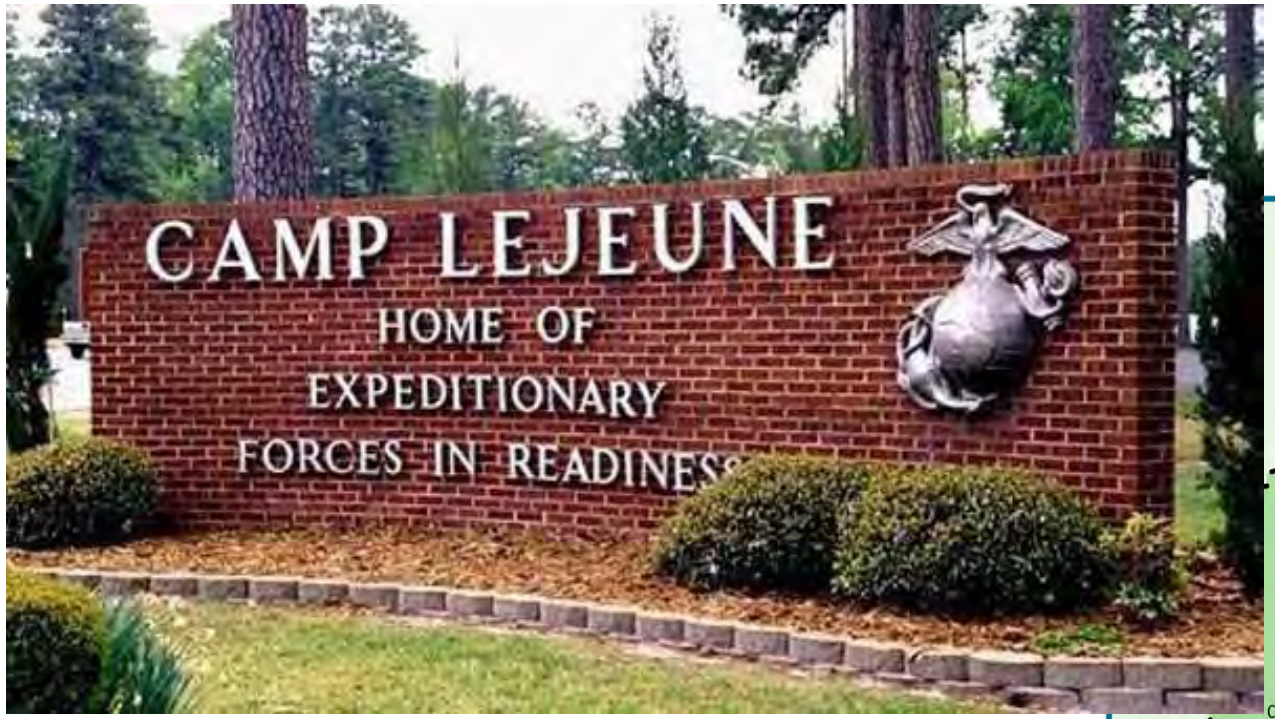
Japanese courts

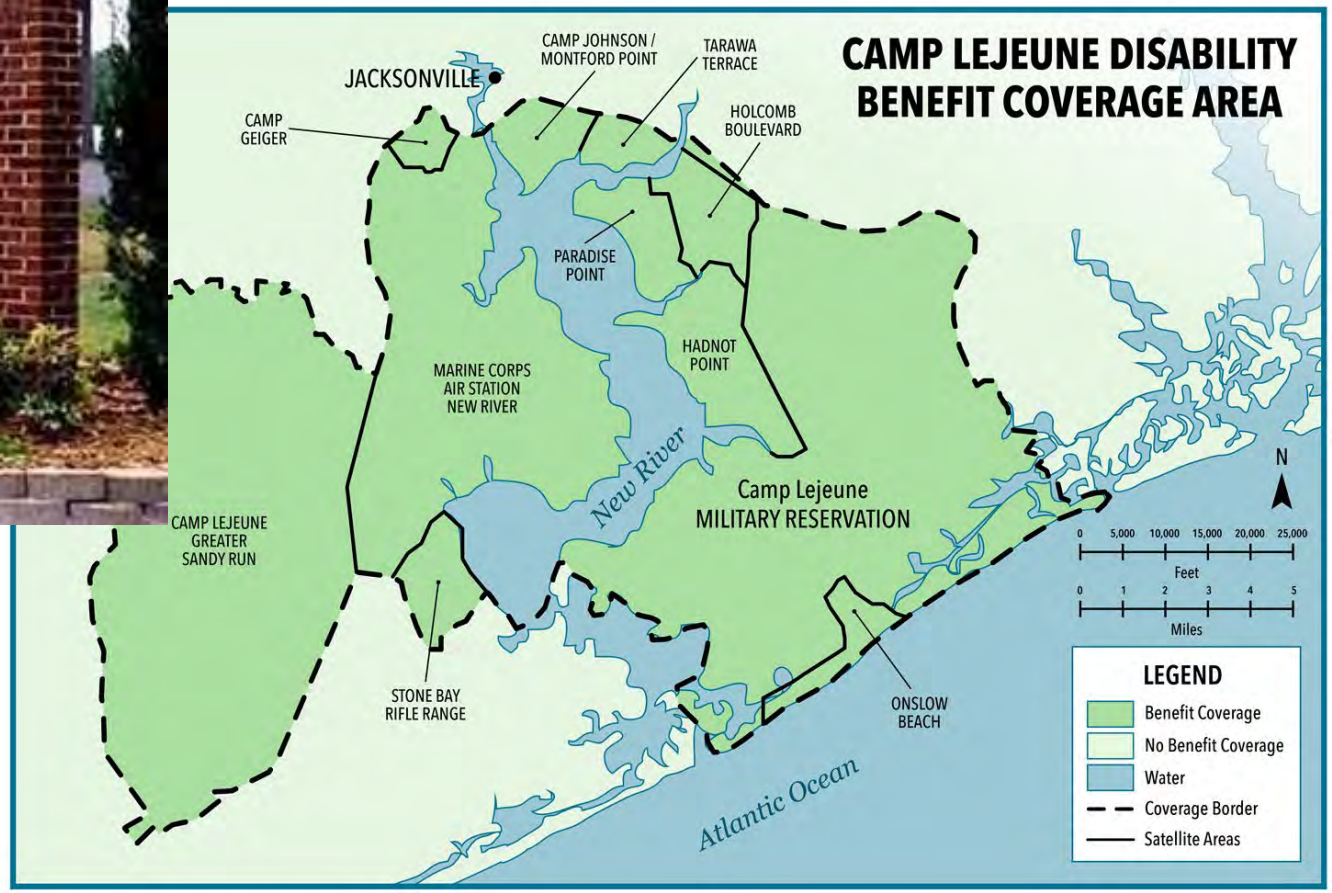
- Epidemiological causation theory – analyze causation by conducting a real-time epidemiological study on specific groups where there are no prior studies and then wrongdoers can disprove causation.

- More recently, Japanese courts are willing to consider epidemiological causation to establish general causation, but specific causation and exposure should also be examined and there should be no burden shifting.

Taoyuan County Former RCA Employees' Solicitude Association v. General Electric Intl., et al., Expert Witness Statement of Professor Yoshimasa Furuta (March 8, 2016)

Camp Lejeune Families Act of 2012





Camp Lejeune Families Act of 2012

- Act established *because* the research could not establish causation between the organic solvents used at Camp Lejeune and the diseases of the veterans or their families.

  H.R. 1627 – 112th Congress (2011-2012).

- Provides veterans or residents (30+ days) **healthcare compensation** for 8 presumed service-connected cancers and diseases (originally 15 but narrowed by VA in 2017).

  Diseases Associated With Exposure to Contaminants in the Water Supply at Camp Lejeune, 82 Fed. Reg. 4173 (January 1, 2017)

Camp Lejeune Justice Act of 2022

(c) Burdens and Standard of Proof –

(1) In general – The burden of proof shall be on the party filing the action to show one or more relationships between the water at Camp Lejeune and the harm.

(2) Standards – To meet the burden of proof described in paragraph (1), a party shall produce evidence showing that the relationship between exposure to the water at Camp Lejeune and the harm is –

(A) sufficient to conclude that a causal relationship exists; or

(B) sufficient to conclude that a causal relationship is at least as likely as not.

Fight over applicable causation standard

- Plaintiffs say that only have to prove that they were present for 30 days and have an illness that "can be caused" by Camp Lejeune water.
- Federal government argues Plaintiffs have to prove both general and specific causation.
- SJ motions on the issue currently pending in E.D. North Carolina.

Hanford workers' compensation legislation

Hanford workers' compensation legislation

- RCW 51.32.187 (2022)
  - applies to workers at "radiological hazardous waste facilities"
  - creates prima facie presumption of specific "occupational diseases"
  - DOE can overcome the presumption if it can show "clear and convincing evidence" that worker's condition did not arise from employment at Hanford
  - If DOE is successful, worker has to prove that disease arose from conditions of employment

- If applicable, DOE has to prove (1) general causation, (2) exposure/dose, and (3) specific causation.

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LAW GROUP

THANK YOU

Roundup settlement (California)

Roundup settlement (California)

- Litigation arose from allegations of non-Hodgkin's lymphoma (NHL) caused by Roundup active ingredient glysophate.
- Proposed an expert panel:
  - four-year hold on litigation while a science panel reviews the evidence linking Roundup to cancer.
  - panel's report admitted as evidence in any "future claimants" cases (exposed but not yet developed cancer).
- Court questioned "whether it would be constitutional (or otherwise lawful)" to hand the issue to a panel of scientists instead of judges and juries.

In Re Roundup Products Liability Litigation, 16-md-02741,
USDC ND Cal (San Francisco)

DOECAA

DOECAA SPRING 2024 CONFERENCE

Speaker Biography -
Evolution of Causation in Toxic Torts: From Hanford to Taiwan Break

J. Chad Mitchell, Summit Law Group, PLLC

Chad is a trial lawyer with deep experience resolving complex environmental and commercial claims in the U.S. and abroad. He has tried cases in state and federal courts and before international tribunals.

Known by his clients for the careful listening, precision, and creativity he brings to addressing complex liability issues, Chad develops dispute prevention and litigation strategies to align with each client's business objectives. A skilled negotiator, he works to secure a favorable resolution as efficiently and cost effectively as possible.

Residing in Richland, Chad frequently appears in U.S. District Court for the Eastern District of Washington, Benton and Franklin County Circuit Courts, as well as appeals to the Ninth Circuit.

Chad's clients include U.S. Department of Energy prime contractors and sub-contractors at the DOE's Hanford site, companies in Washington State and companies doing business in Taiwan.

Chad joined Summit Law after practicing with Kirkland & Ellis in Chicago for 10 years. He currently serves as the chief operating officer (COO) of Summit Law Group.

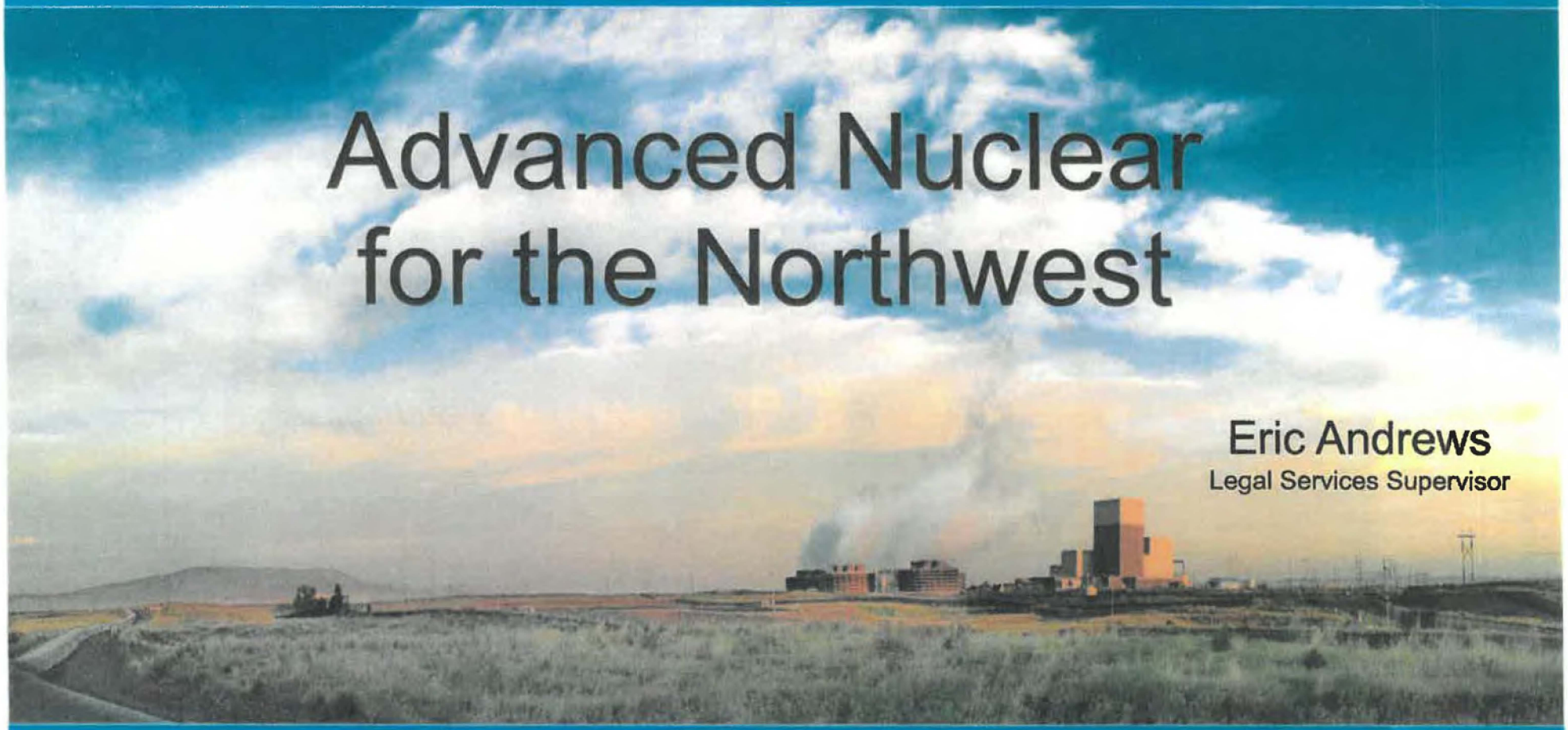
DOECAA

DOECAA SPRING 2024 CONFERENCE

Small Modular Reactors Panel

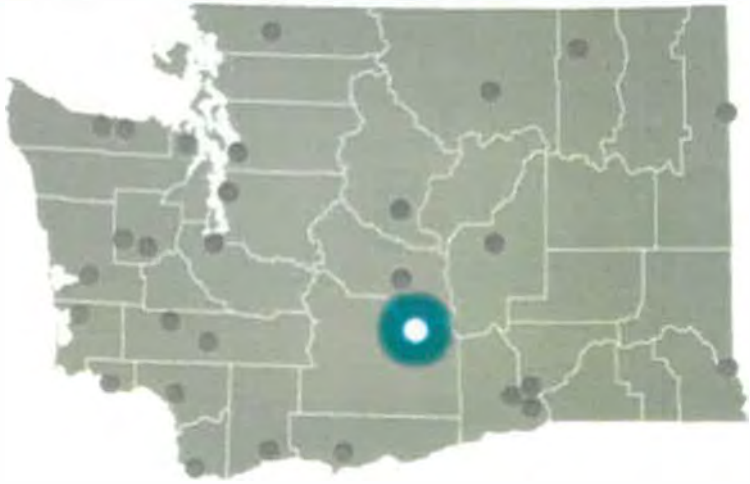
ENERGY NORTHWEST

Advanced Nuclear for the Northwest



Eric Andrews
Legal Services Supervisor

ENERGY NORTHWEST



Our Members

Asotin County PUD	Clark Public Utilities	Kittitas County PUD	Pend Oreille County PUD
Benton County PUD	Douglas County PUD	Klickitat County PUD	Seattle City Light
Chelan County PUD	Ferry County PUD	Lewis County PUD	Skamania County PUD
City of Port Angeles	Franklin County PUD	Mason County PUD 1	Snohomish County PUD
City of Richland	Grant County PUD	Mason County PUD 3	Tacoma Public Utilities
City of Centralia	Grays Harbor County PUD	Okanogan County PUD	Wahkiakum County PUD
Clallam County PUD 1	Jefferson County PUD	Pacific County PUD	Whatcom County PUD

About Energy Northwest

- Energy Northwest is a Joint Operating Agency of the state of Washington
- We operate electric generating facilities or provide energy services in states across the western U.S.
- Our 28 members are all public power utilities in Washington state
- The energy facilities we own and operate provide power to utilities in 6 states:
  - Washington
  - Oregon
  - California
  - Idaho
  - Montana
  - Wyoming

100% Clean Generating Portfolio

Packwood Lake Hydro Project (27 MW)

Nine Canyon Wind Project (96 MW)

Tieton Hydroelectric Project (15 MW)

Columbia Generating Station (1,207 MW)

Portland Hydroelectric Project (37.5 MW)

Stone Creek Hydro Project (12 MW)

White Bluffs Solar Station (38 KW)

Horn Rapids Solar, Storage & Training Project (4 MW)

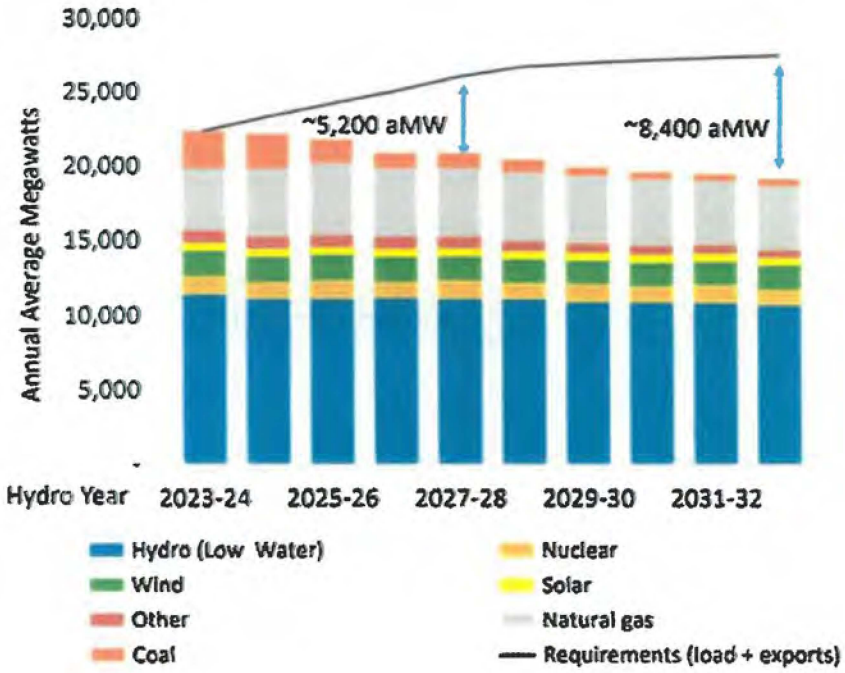
Ruby Flats Solar Project (150 MW)

Why New Nuclear?

Projected Energy Shortfalls

- Aggregation of NW utility IRPs
- Projected capacity shortfalls are higher

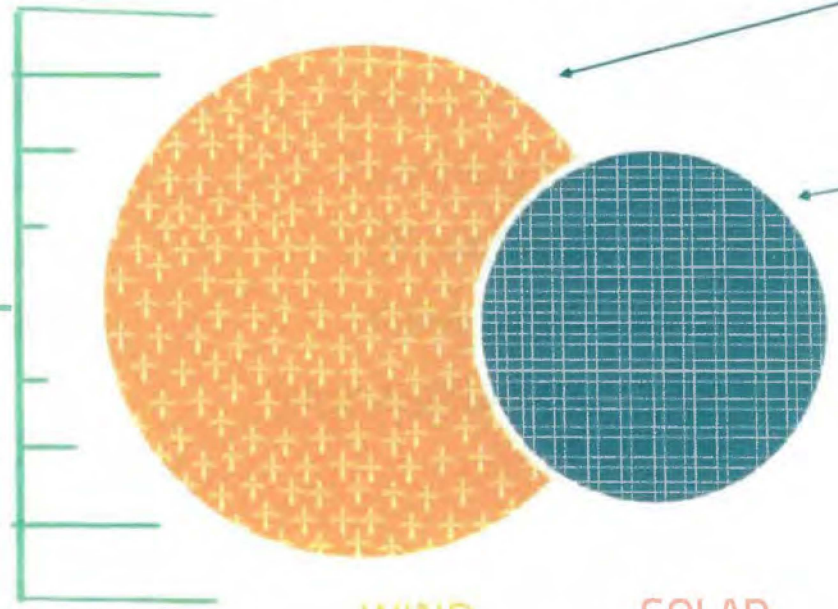
https://www.pnucc.org/system-planning/northwest-regional-forecast/



PNUCC

Land-use comparison

HOW MUCH LAND DOES IT TAKE TO POWER SIX MILLION HOMES?



But Isn't Nuclear More Expensive?

Without Nuclear

- Significant overbuild of renewables
- Significant energy storage required
- Significant transmission buildout
- Dependence on the market during peak net load times
- Hydrogen economy development

With Nuclear

- Lower system cost
- Higher capacity
- Less land impact
- Less transmission buildout
- Lower environmental impact
  - Mining
  - Waste disposal

EN Collaboration

- NuScale/UAMPS (historical)
- X-energy
- TerraPower/PacifiCorp
- Westinghouse
- Grant County Public Utility District
- Ontario Power Generation (OPG)
- Dow Chemical

Federal Support

Advanced Reactors & Federal Support

Adv. Reactor Demonstration Program (ARDP)

- January 2020 – Congress creates ARDP and appropriates $160M for two U.S. advanced reactor demonstration projects
  - *50-50 cost-share with federal government*
- November 2021 – The "Infrastructure Investment & Jobs Act" (IIJA) provides $2.5 billion to fund ARDP for 5 years
- January 2022 – DOE establishes the Office of Clean Energy Demonstrations (created by the IIJA) to manage ARDP and ensure success
- August 2022 – The "Inflation Reduction Act" is signed into law

U.S. DEPARTMENT OF ENERGY

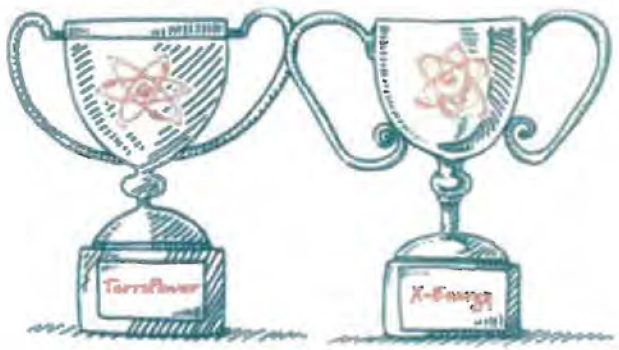


Image Courtesy of ClearPath

Inflation Reduction Act

- PTC for carbon-free generation (§45Y)
  - $30/MWh for the first 10 years of operation
  - Increases 10% for domestic content
- ITC for carbon-free generation (§48E)
  - Credit for 30% of construction expenses when plant enters service
  - Increases 10% for domestic content
- Monetized tax credits for non-tax liability entities (Sec. 6417 and 6418)
- Increased Loan Program Office (LPO) funding – both for loan and closing costs

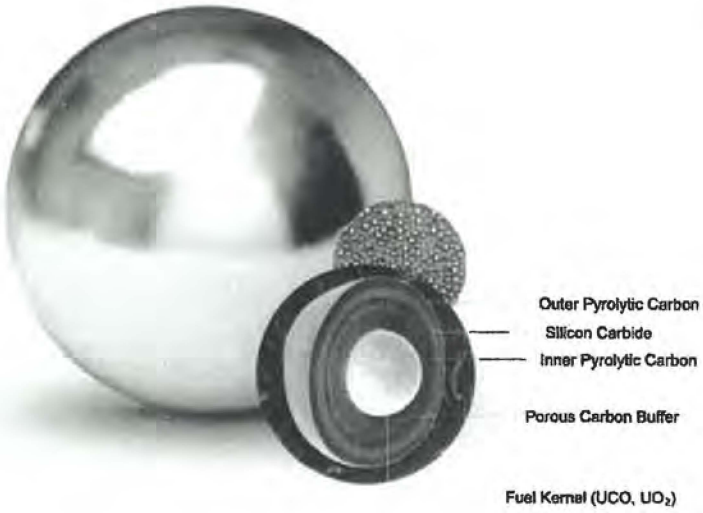
X-energy Technology

Technology Highlight – X-energy

XE-100

- High Temperature Gas Reactor (HTGR)
  - Helium cooled
  - TRISO fuel
- 4-12 Modules
- 80 MWe/module (net)
- 60-year design life; 100+ year asset
- Continuous on-line refueling
- Fuel as a variable cost
- Walk-away-safe, meltdown proof
- Modularized components built off-site, transportable via rail/road

TRISO-X Fuel

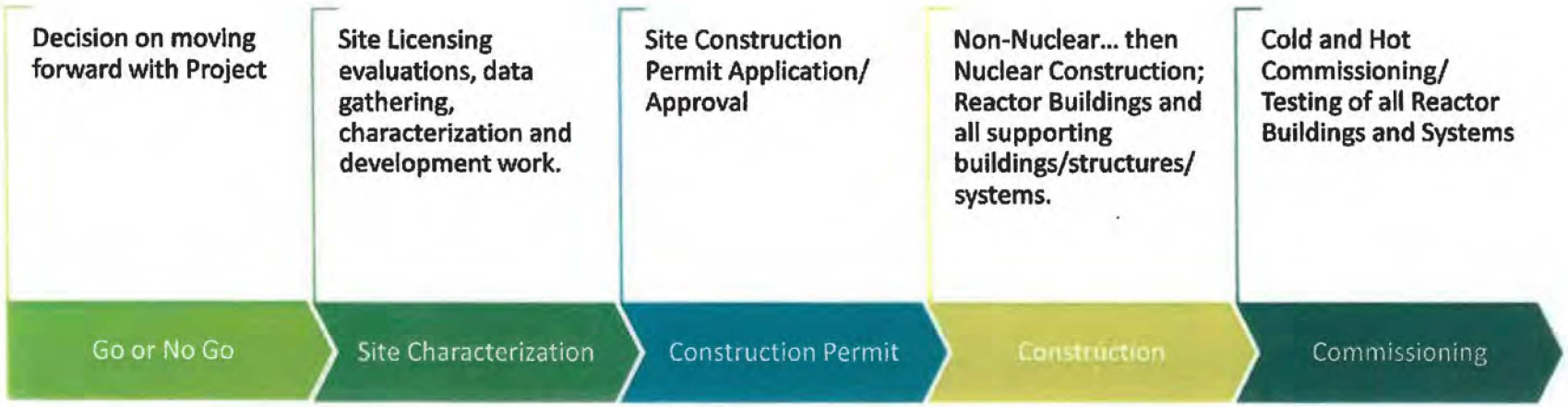


Every X-energy reactor is powered by proprietary tri-structural isotropic (TRISO) coated particle fuel, called TRISO-X, which:

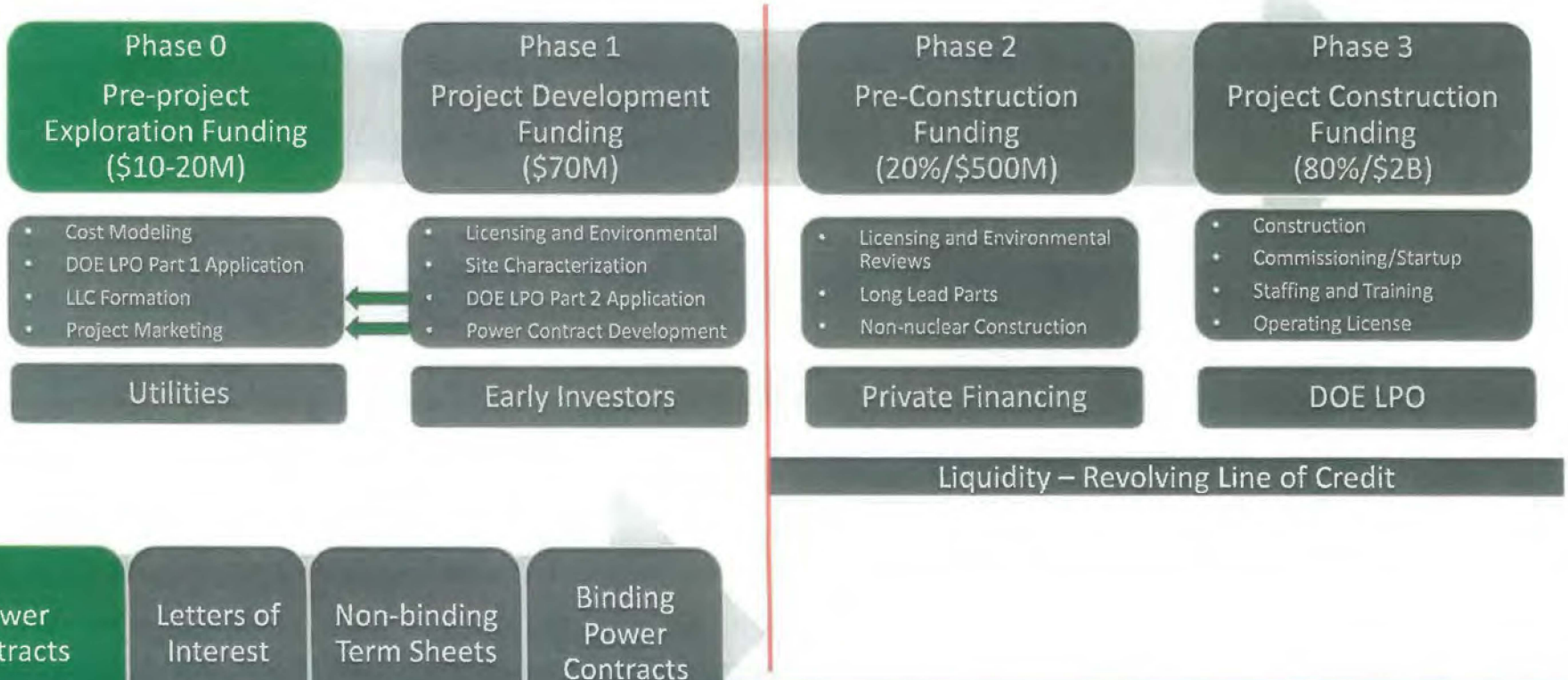
- Is made in a unique coated fuel particle manufacturing process that decreases unusable scrap and ensures quality
- Cannot melt in the Xe-100 reactor… period
- Is the reactor containment, locking in 99.999% of all fission products
- Enables the safety and economic case of the Xe-100 by simplifying the design and operations, while requiring far fewer components

Project Information

Project Pathway



Funding Framework

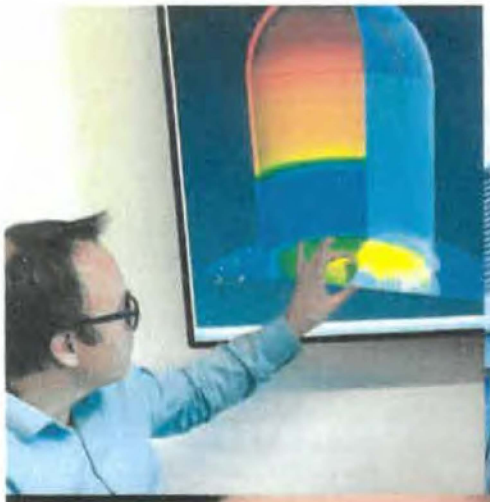


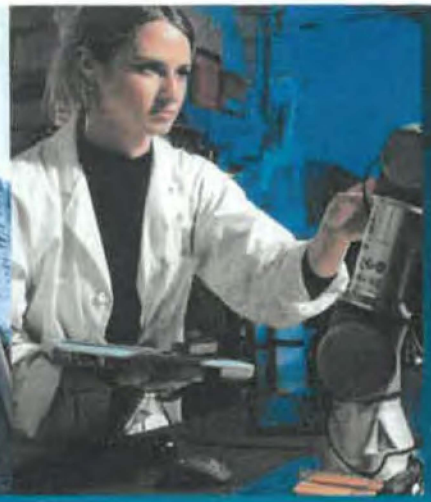
Energy Northwest Actions

- Pursuit of additional federal support
- Pursuit of WA state support
- Pursuit of other regional support including BPA
- Actively engaged with large load customers in need of new carbon free resources

Summary

- The X-energy technology provides the right resource opportunity
- Keeping the 2031 timeline requires that we get to work on the site now
- Retaining the options requires funding for the necessary work
- Energy Northwest is also ready to supply other generating resources, programs, and services





April 18, 2024

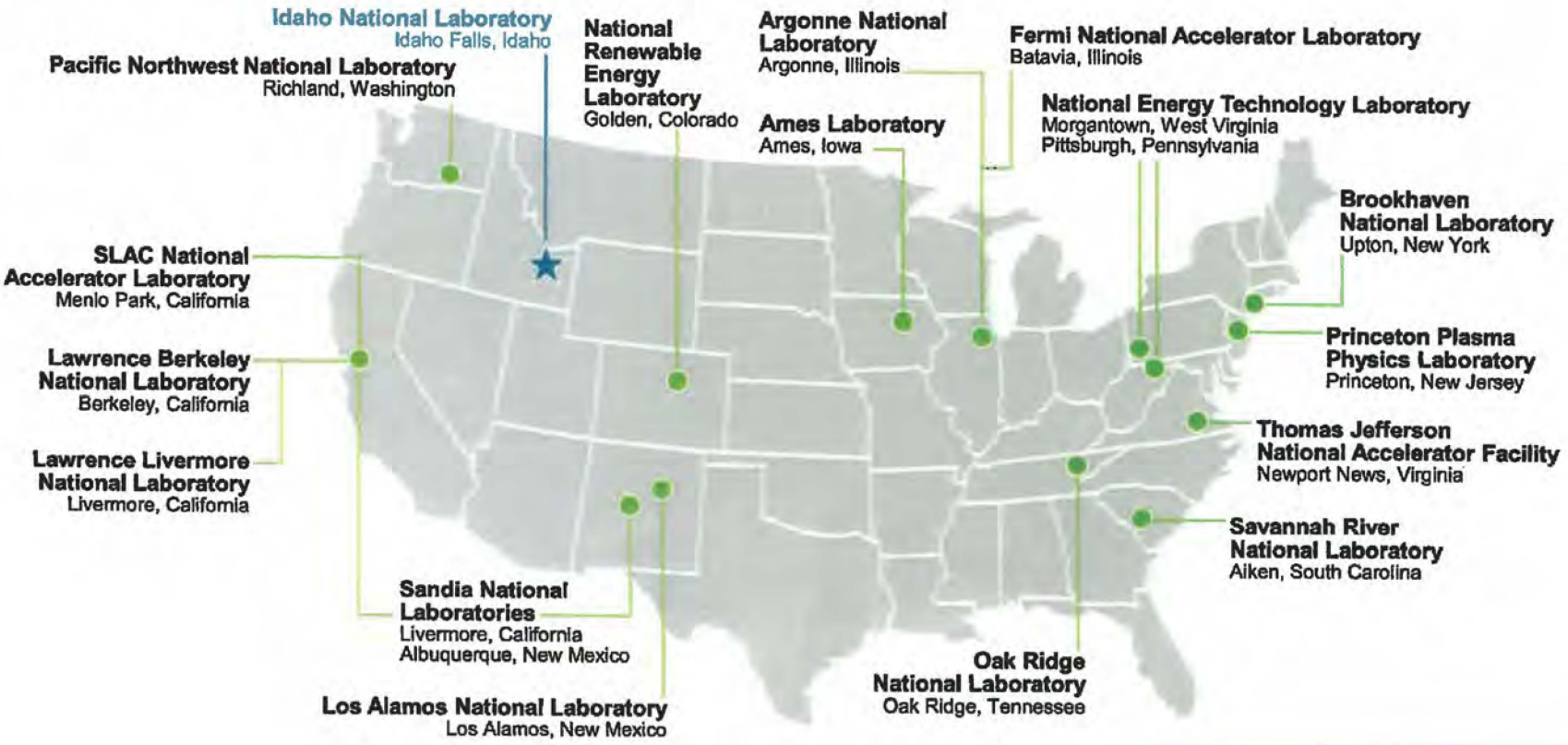
Stephen Burdick
Senior Counsel
Stephen.Burdick@inl.gov

Idaho National Laboratory – Small Modular Reactors

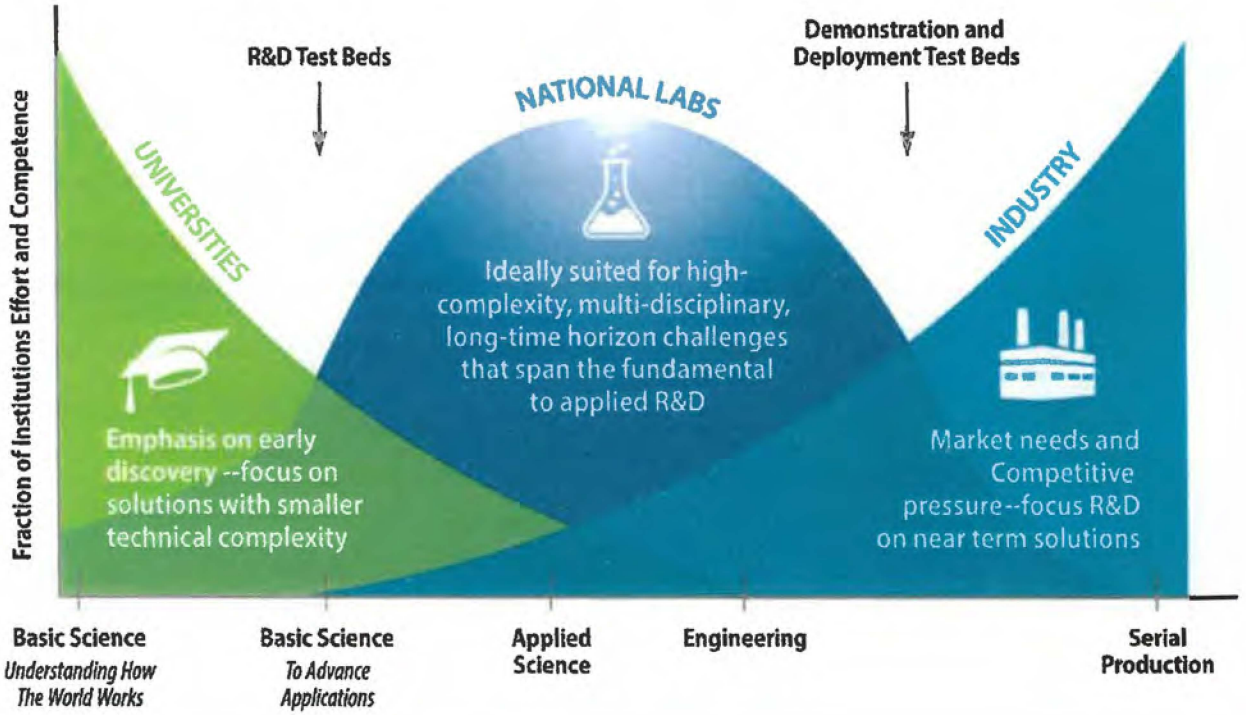
DOECAA Spring 2024 Conference

Idaho National Laboratory

DOE National Laboratories



DOE labs support the entire technology lifecycle



Our Heritage: *The National Reactor Testing Station drove nuclear innovation in the U.S. and around the world*

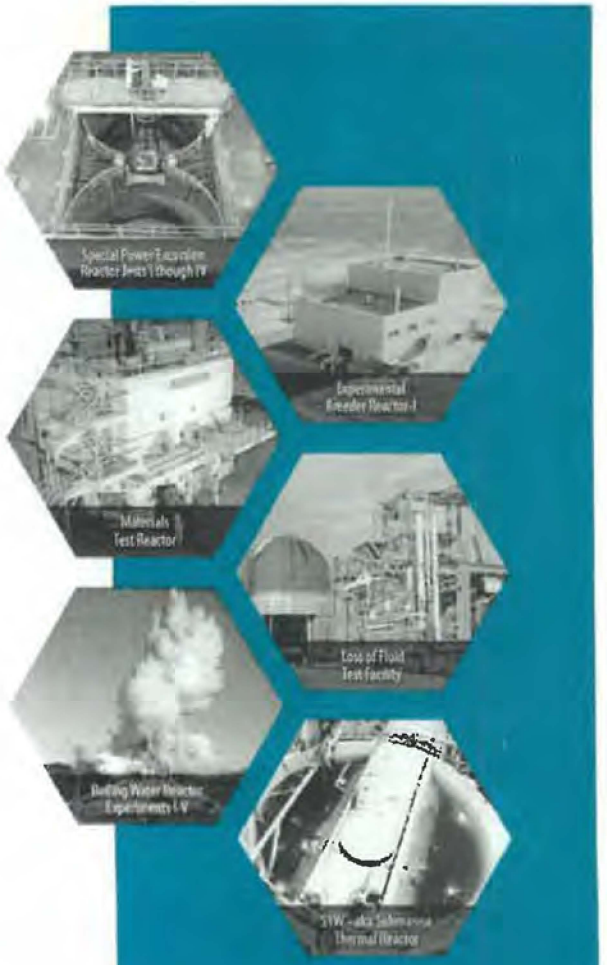
1st Nuclear power plant

U.S. city to be powered by nuclear energy

Submarine reactor tested; training of nearly 40,000 reactor operators until mid-1990s

Mobile nuclear power plant for the army

Demonstration of self-sustaining fuel cycle	Basis for LWR reactor safety	Aircraft and aerospace reactor testing	Materials testing reactors



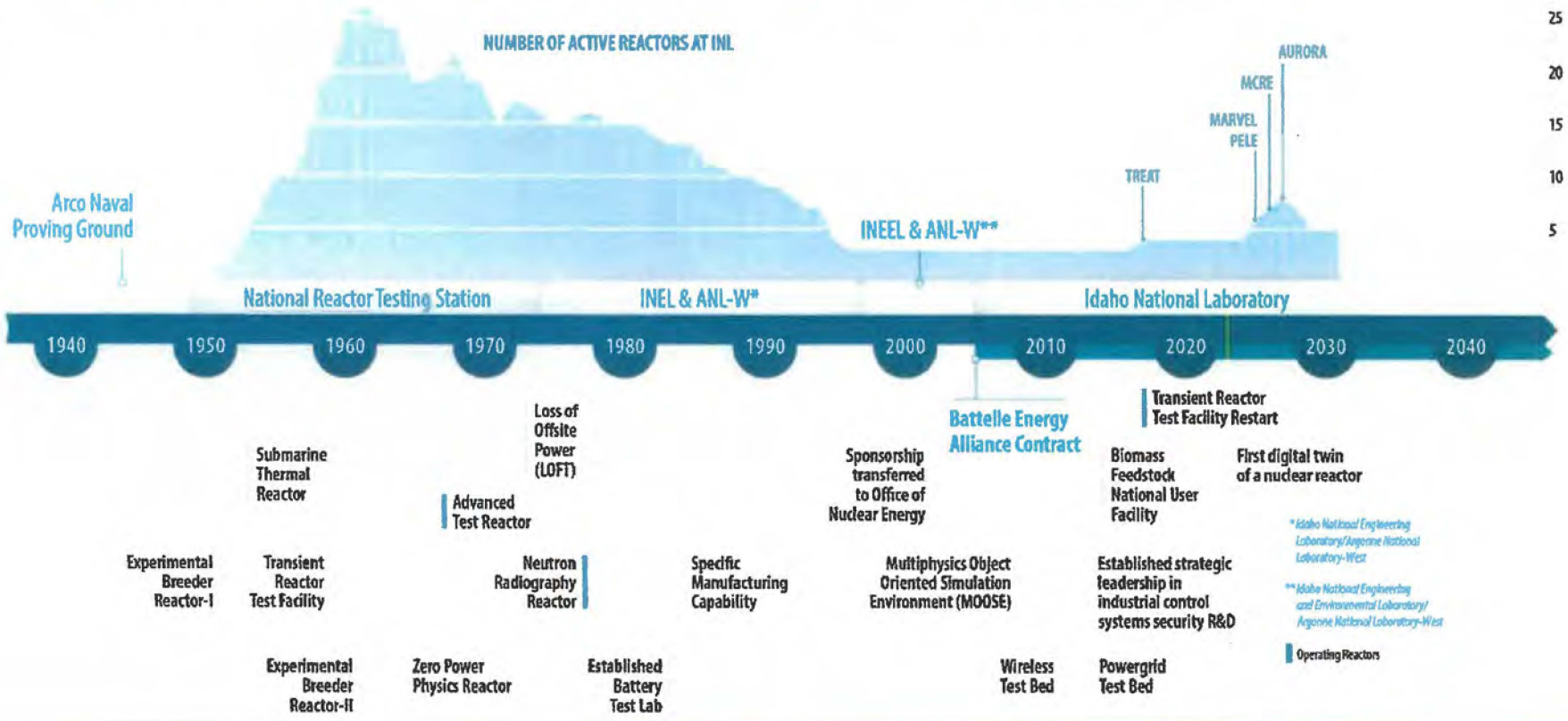
Unique INL site, infrastructure, and facilities enable energy and security RD&D at scale

$1,823 M	FY23 Total Operating Cost
6,000+	Employees
569,178	Acres
890	Square Miles

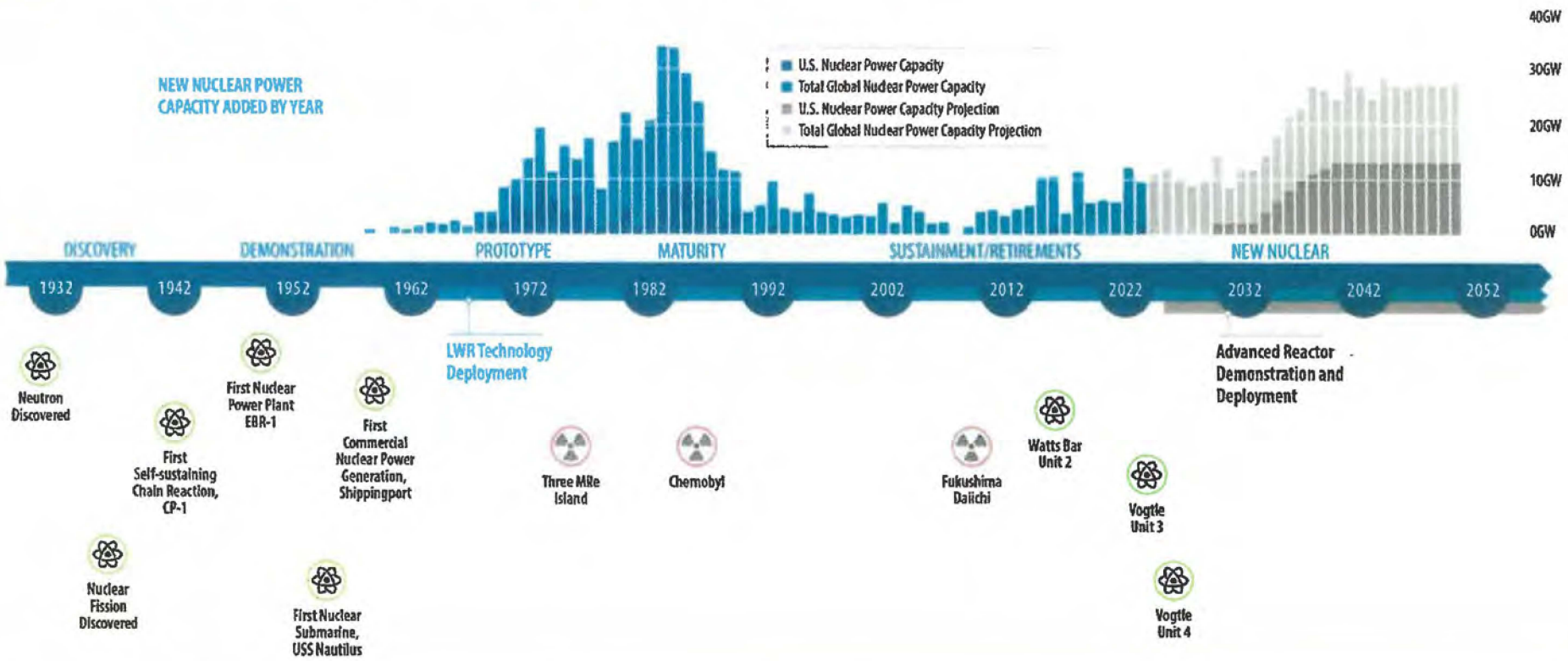
4	Operating reactors
12	Hazard Category II & III non-reactor facilities/ activities
50	Radiological facilities/activities
17.5	Miles railroad for shipping nuclear fuel
44	Miles primary roads (125 miles total)
9	Substations with interfaces to two power providers
126	Miles high-voltage transmission lines
3	Fire Stations

IDAHO NATIONAL LABORATORY

The past and future of Idaho National Laboratory



The past and future of nuclear power



10 years ago the advanced reactor ecosystem was bleak

VOYGR
UAMPS &
NuScale | SMR

2010

2014

2018

2022

2026

2030

In 2018 the advanced reactor landscape had improved but was still very uncertain

Microreactor (<10MW) demonstration by early 2020s

- Advanced reactor designs
- New markets for nuclear energy

Commercial microreactors deployed

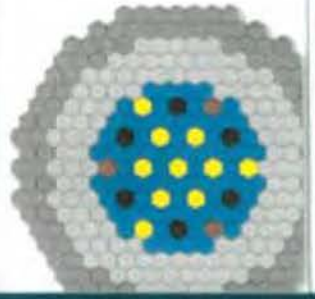
- Remote site power and process heat customers

SMR(s) operating by 2026

- SMR siting and technical support
- Joint Use Modular Plant (JUMP)

Versatile Test Reactor (VTR) operating by 2026

- Fast-spectrum testing and fuel development capability

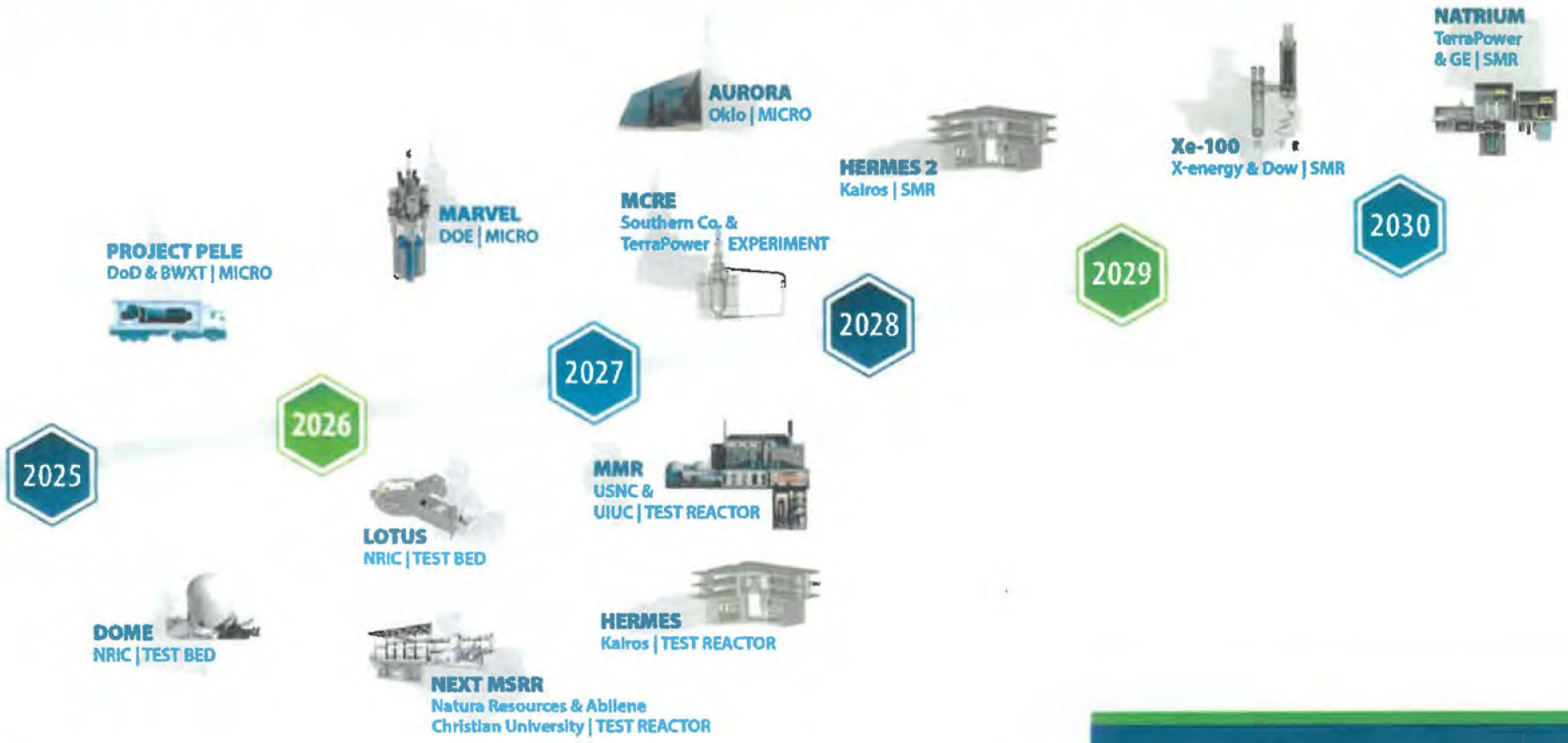


Non-LWR advanced demonstration reactors by 2030

- Replacement of U.S. baseload clean power capacity

2023 → 2030

Accelerating advanced reactor demonstration & deployment



Battelle Energy Alliance manages INL for the U.S. Department of Energy's Office of Nuclear Energy. INL is the nation's center for nuclear energy research and development, and also performs research in each of DOE's strategic goal areas: energy, national security, science and the environment.

INL Idaho National Laboratory | www.inl.gov

Natrium™

a TerraPower & GE Hitachi technology

Natrium Technology and Project Status

Michael Schmidt
TerraPower Sr. Corporate Counsel

April 18, 2024

TerraPower

Natrium

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Redefining what nuclear can be…

What is the Natrium™ Reactor and IES?

- Integral Sodium Fast Reactor
- Distributed Nuclear Facility Layout
- Advanced once-through fuel system
- GW-hr scale Thermal Energy Storage
- Decoupled Energy Island leveraged from Concentrated Solar Plant industry

Nuclear redefined

- Eliminates nuclear “sprawl”
  - ✓ Design to cost
  - ✓ Simplicity
  - ✓ Rapid construction
  - ✓ Design specific staffing
- ~41% net thermal efficiency

Integrating with renewables

- Zero emission dispatchable resource
- Price follower… w/ reactor at 100% power 24/7
- 345 MWe nominal
- Flex to 500 MWe for 5.5 hours through energy storage

TerraPower Natrium™

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Natrium Program Roadmap

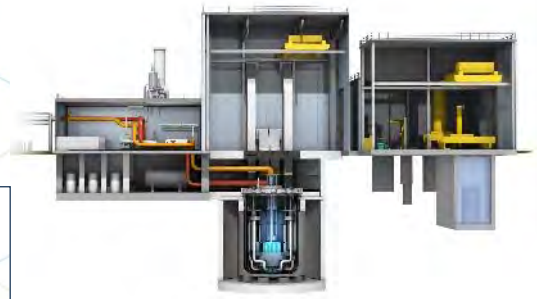
Qualification and testing of TWR technology occurs through advanced fuel and materials development using the Natrium reactor system as a platform.

Technology

TWR

Product

Natrium Reactor



Demo project start April 1st, 2021

U.S. legacy SFR experience, PRISM and TWR development

1980s-2019

Pre-Demo Phase

Natrium Demonstration Project (345 MWe → 500 MWe)

Commercial Plant Economics
+Energy Storage & Peaking Capability

2021-2030

Natrium Commercial Series I (345 MWe → 500 MWe)

3 yr. Construction
+Energy Storage & Peaking Capability

2030-2040

Commercial Series II+ (Up to GWe scale)

Commercial Series I Benefits
+DU Breed-and-Burn
+Potential UNF Recycling
+Potential Pu Disposition
+Zero-Carbon Process Heat

2040+

TerraPower

Natrium

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Team Members

Recent Accomplishments

Purchase of land in Kemmerer, WY, in August 2023, where the Natrium Reactor Demonstration Project will be built

Completed design review (DR1) of overall plant design marking the transition from conceptual design to preliminary design

Completed Class 3/4 Cost and Schedule Estimates

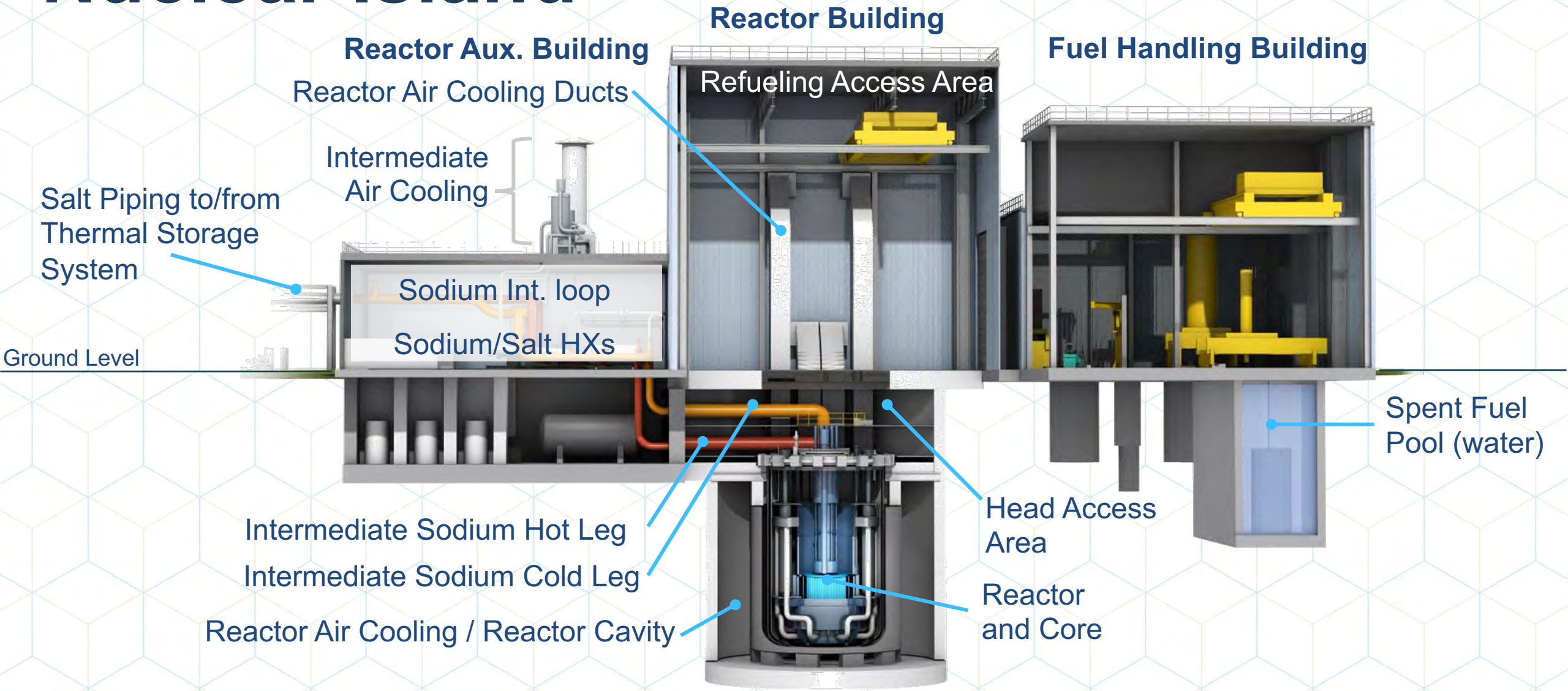
Contracts placed/supplier selection in process for key equipment/components

Submitted Construction Permit Application to the U.S. Nuclear Regulatory Commission on March 29, 2024

NATRIUM

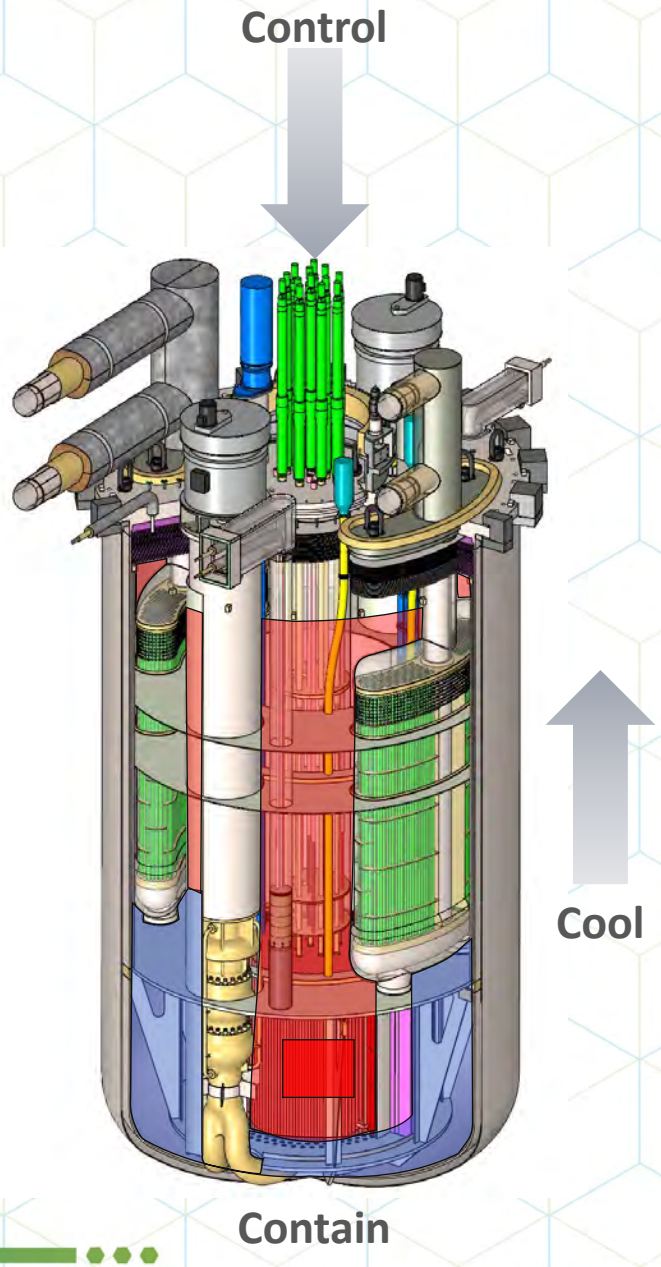
Single Unit Site

Nuclear Island



Natrium Safety Features

- Pool-type Metal Fuel SFR with Molten Salt Energy Island
  - Metallic fuel and sodium have high compatibility
  - No sodium-water reaction in steam generator
- Simplified Response to Abnormal Events
  - Reliable reactor shutdown
  - Transition to coolant natural circulation
  - Indefinite passive emergency decay heat removal
  - Low pressure functional containment
  - No reliance on Energy Island for safety functions
- Technology Based on U.S. SFR Experience
  - EBR-I, EBR-II, FFTF, TREAT
  - SFR inherent safety characteristics demonstrated through testing in EBR-II and FFTF



Control

- Motor-driven control rod runback and scram follow
- Gravity-driven control rod scram
- Inherently stable with increased power or temperature

Cool

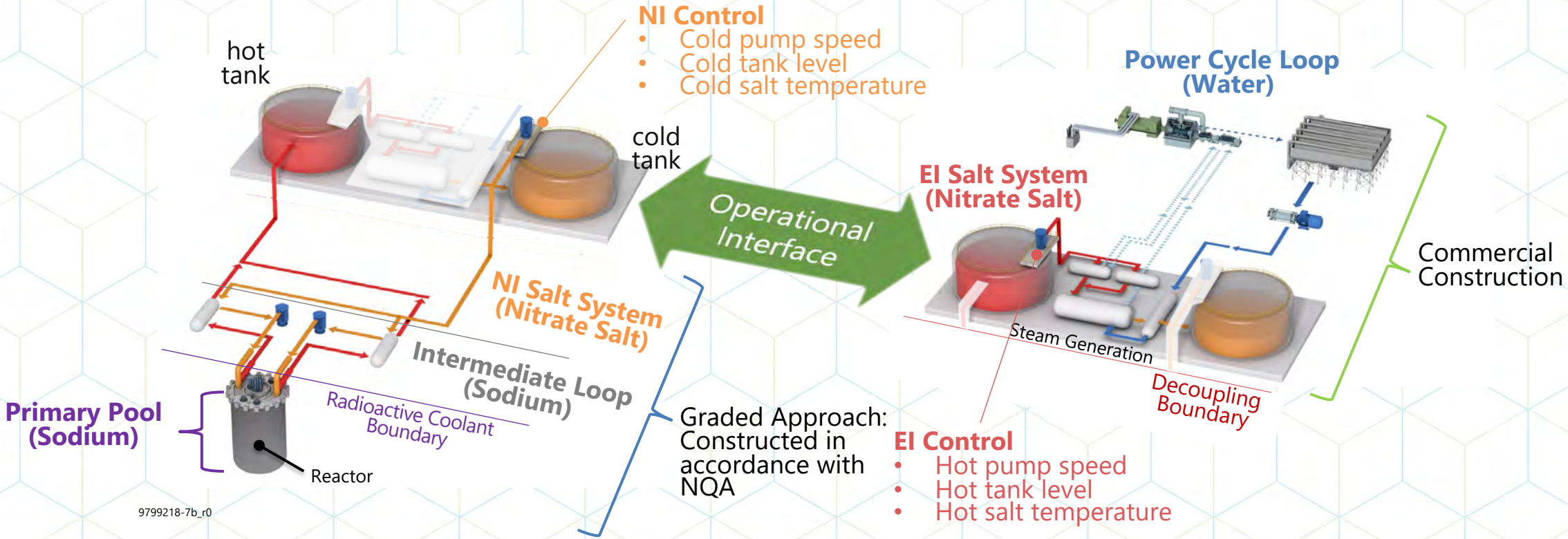
- In-vessel primary sodium heat transport (limited penetrations)
- Intermediate air cooling natural draft flow
- Reactor air cooling natural draft flow – always on

Contain

- Low primary and secondary pressure
- Sodium affinity for radionuclides
- Multiple radionuclides retention boundaries

TerraPower Natrium

Heat Transport Architecture



Importance of a Viable Supply Chain

Natrium™ Demonstration Plant involves classic supply chain needs in addition to unique processes requiring development of additional supply sources.

- **Western Service Corporation (WSC)** - engineering simulator
- **James Fisher Technologies** - injection casting furnace system
- **BWXT Canada Ltd** - intermediate heat exchanger
- **Curtiss-Wright Flow Control Service LLC** - reactor protection system (RPS)
- **GERB Vibration Control Systems Inc** - seismic isolation equipment
- **Thermal Engineering International (USA) Inc.** - sodium-salt heat exchanger.
- **Hayward Tyler, Inc**. - primary and intermediate sodium pumps.
- **Framatome U.S. Government Solutions LLC** - ex-vessel fuel handling machine and bottom loading transfer cask
- **Teledyne Brown Engineering** – In-vessel transfer machine (IVTM)

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Importance of HALEU Infrastructure

- High-Assay Low-Enriched Uranium (HALEU) is critical to the development of advanced nuclear
- DOE is engaged - – DOE's HALEU Availability Program launched 2 RFPs and a draft Environmental Impact Statement (EIS) to analyze the impacts of DOE's proposed action to acquire HALEU – comments due April 22, 2024
- Requires development of both enrichment and deconversion facilities, which require NRC licensing in the US
- TerraPower is working in parallel with suppliers to meet ARDP schedule requirements

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Conclusions

- Program to demonstrate the ability to design, license, construct, startup and operate our Natrium Advanced Reactor
- Build the supply chain for sodium fast reactors in the United States
- Lower emissions by initiating the deployment of a fleet of Natrium reactors – demo will show that we can build these plants economically and that they will be attractive for future owner/operators
- Development of new jobs and a stronger economy

SUBJECT TO DOE COOPERATIVE AGREEMENT NO. DE-NE0009054

Thank you!

To learn more, visit www.terrapower.com

DOECAA

DOECAA SPRING 2024 CONFERENCE

Panelist Speakers Biographies-

Small Modular Reactors
Panelists

Eric Andrews, Energy Northwest

Eric Andrews is currently a Senior Staff Attorney, and the Legal Services Supervisor for Energy Northwest. He advises on matters dealing with Human Resources, Procurement, Environmental, and issues stemming from various Regulatory Agencies. Before joining Energy Northwest Eric was a Civil Deputy Prosecutor for Benton County. After serving over a decade in the United States Navy on Nuclear Powered Submarines, Eric attended the Gonzaga University School of Law where he graduated with honors.

Stephen Burdick, Battelle Energy Alliance

Stephen Burdick currently is Senior Counsel in the Legal Department of Battelle Energy Alliance, the M&O contractor for the Idaho National Laboratory. He advises the Laboratory on the Environmental, Safety, Health, and Quality matters, including advanced reactor projects. Stephen began his nuclear career as a Nuclear Plant Engineer and Operator at the Knolls Atomic Laboratory in upstate New York where he helped train Navy sailors in the Naval Nuclear Propulsion Program. After graduating from the U.C. Berkey School of Law, Stephen also practiced law for almost 15 years in the Morgan Lewis nuclear practice based in Washington D.C. There he represented companies on licensing, regulatory, and litigation matters before the U.S. Nuclear Regulatory Commission and federal courts with an emphasis on new reactor projects.

Michael Schmidt, TerraPower, LLC

Mike Schmidt is currently Senior Corporate Counsel for TerraPower, LLC. He advises the company on matters involving government contracts and cooperative agreements, insurance, and commercial contracting for the Natrium project. Before joining TerraPower, Mike was a partner in the federal contracting and construction practice of a Seattle law firm. There he represented and advised both contractors and government in matters primarily involving civil infrastructure and other government projects. After graduating from the University of Wisconsin Law School, Mike began his career with a California law firm focused on commercial litigation.

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DOECAA SPRING 2024 CONFERENCE

Organization as a Client and Contract Topics

SMITHCURRIE OLES

DOECAA

2024 DOECAA Spring Conference

APRIL 18, 2024

ORGANIZATIONAL CONFLICTS OF INTEREST AND CONTRACT TOPICS

PRESENTED BY:

Howard W. Roth

- Howard is a key member of Smith Currie Oles' government contracts practice with nearly 40 years of experience advising on government contract law matters.
- He is a former Commissioner of the ASBCA, and served as: legal advisor to DOE on defense of a $41 million contract appeal to the CBCA and associated affirmative Government claims; legal counsel for a nationwide Army Enterprise IT network; advisor on contract formation for the $1.5 billion Maritime Administration NSMV ship procurement program; and advisor to construction contractors on the termination for convenience of their southern border wall contract/subcontract by the U.S. Army Corps of Engineers.
- In 2021 and 2022, Howard made new law in successfully establishing that the Court of Federal Claims had bid protest jurisdiction over Other Transaction Authority (OTA) projects in two protests at the Court.

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OVERVIEW

Organizational Conflicts of Interest

01 Financial Assistance: Interim Guidance DOE Organizational Conflict of Interest (OCI)

02 Direct Procurement FAR Overview of OCI, Three Types

03 Waiving OCI, Mitigation or Avoidance

04 Practical Considerations: Proposals and Protests

05 GAO OCI Decisions in DOE M&O type contracts

06 Takeaways and Lessons Learned

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01.

Financial Assistance: Interim Guidance DOE Organizational Conflict of Interest (OCI)

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Interim Guidance on Requirements of the Department of Energy (DOE) and OCIs

- The DOE Interim Conflict of Interest Policy for Financial Assistance ("DOE Interim COI Policy"), effective June 18, 2022; see Financial Assistance Letter 2022-02, Dec. 20, 2021.
- The DOE Interim COI Policy applies to all DOE-funded financial assistance awards (e.g., a grant, cooperative agreement, or technology investment agreement).
- Modeled on Public Health Service COI at 42 CFR part 50, Subpart F, but "Organizational Conflict of Interest" is not mentioned in the PHS COI Regulations, DOE added OCI.
- 2 CFR part 910, Department of Energy (DOE) Financial Assistance Regulations and 2 CFR part 200, e.g., 200.112, 200.318.

Organizational Conflict of Interest

- The DOE Interim COI Policy defines an OCI as a situation where, because of relationships with a parent company, affiliate, or subsidiary organization, the institution is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
- The DOE Interim COI Policy requires institutions that have a parent, affiliate, or subsidiary that is not a state, local government, or Indian tribe to disclose potential or actual OCIs to the DOE program office.
- DOE policy was meant to apply principally to commercial/business entities to prevent "self-dealing" under applicable federal procurement standards under 2 CFR 200.318. Does not apply to Phase I Small Business Innovation Research (SBIR)/Small Business Technology Transfer (STTR) applications and financial assistance awards.

02.

Direct Procurement FAR Overview of OCI, Three Types

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What are OCIs?
Federal Acquisition Regulation (FAR)

- FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest, sets forth the regulatory guidance governing OCIs
- **Organizational Conflict of Interest.** An OCI arises when, because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor's objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair competitive advantage. FAR 2.101
- Understanding both what causes OCIs and how to mitigate them are critical because unmitigated OCIs can preclude a contractor from (1) competing for future contract work, (2) performing certain tasks under existing contracts, (3) transferring personnel between company organizations, (4) hiring personnel, (5) teaming with certain vendors, and/or (6) entering into certain corporate transactions.

What Are OCIs Under FAR Subpart 9.5?

- Again, such a conflict of interest arises where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

- Contracting officials are to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505.

- The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR 9.505.

Three OCI Types Referenced in FAR and GAO Decisions

- Overview of OCI, three types

  1) —unequal access to information cases

  2) —impaired objectivity cases

  3) —biased ground rules cases, See Aetna Gov't Health Plans, Inc.; Found. Health Fed. Services., Inc., B-254397.15, B-276634.16, B276634.17, B-276634.18, B-276634.19, July 27, 1995, 95-2 CPD 129; and L-3 Services, Inc., B-400134.11; B-400134.12, Sept. 3, 2009

- References FAR 9.5, DEAR 909.5, 952.209-72, 970.0905 and 970.5204-15

- The M&O contracts generally contain at I–118 DEAR 952-209-72 Organizational Conflicts of Interest (Aug 2009) Alternate 1 (Aug 2009). This clause supplements Part 9.5.

Three OCIs

1. **Unequal Access to Information** – A firm has access to nonpublic information as part of its performance of a government contract and that information may provide the firm a competitive advantage in a later competition for a government contract. FAR 9.505-4. In these unequal access to information cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.

2. **Biased Ground Rules** – A firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these biased ground rules cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements.

Three OCIs (continued)

3. **Impaired Objectivity** – A firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or through an evaluation of proposals. FAR 9.505-3. In these impaired objectivity cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated.

- Impaired Objectivity is the most common protest ground asserted.

03.

Waiving OCI, Mitigation or Avoidance

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Waiving OCI, Mitigation or Avoidance

- FAR 9.503: "The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity." See MCR Federal LLC, B-401954.2 (Apr. 17, 2010)
- A potential OCI is resolved by imposing some type of restriction on the contractor's eligibility for future contracts, or its ability to provide particular services under an existing contract. Agencies sometimes preemptively address OCIs by requiring offerors to agree to a preclusion on future work.
- The following are specific ways in which contractors can mitigate or avoid the three OCI categories.
  - An unequal access to information OCI can be mitigated by imposing restrictions upon personnel with access to the third party proprietary or source selection sensitive information. First, a contractor should require its employees to sign non-disclosure agreements ("NDAs") to prohibit the unauthorized use and disclosure of any nonpublic information. This prevents employees from disseminating the information and also restricts access to the information to employees with a "need to know."

Waiver (continued)

- Next, a contractor should establish and document a firewall arrangement to prohibit the transfer of this information from one unit to another. This firewall can be accomplished by establishing and maintaining a log that identifies the particular types of nonpublic information to which each employee has access, physical and electronic control measures, implementation of separate reporting structures, and precluding sharing of personnel across units. It is critical to have the firewall in place before obtaining access to the nonpublic information that could create an OCI.

- A firewall is an effective method of mitigating or avoiding an unequal access to information OCI; it is, however, an inadequate mitigation strategy for biased ground rules or impaired objectivity OCIs. This is because a firewall does not eliminate the relevant financial incentives at the core of these two OCI categories. There are still a few mitigation strategies that can be employed, such as recusal from the procurement, reassignment of the potential OCI causing work to a subcontractor or the Government, divestiture of the conflicting business, or the use of an independent third-party to perform the work or to review the work impacted by the potential OCI.

04.

Practical Considerations: Proposals and Protests

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Practical Considerations – Proposals

- Solicitations
  - Government may direct submission of a mitigation plan.
  - Government may advise of restrictions on future activity.
- Proactive
  - Avoid, neutralize, or mitigate potential OCIs pre-award.
  - Pre-proposal address major questions with Government.
  - Companies should fully disclose and alert the agency to what they believe to be the potential OCIs and offer a solution that will work. Understating or hiding the effect of potential OCIs is a risky strategy for the offeror and agency.
- Address
  - Submit a mitigation plan.
  - An agency may communicate with an offeror about an actual or potential OCI without engaging in "discussions."
  - Directly in the proposal where possible.
  - Confidence on mitigation.

Practical Considerations – Protests

- When Should You Protest?
  - If you believe an offeror has an OCI, concern was raised to the agency, and the agency permits the offeror to compete, you must protest before proposals are due. If an agency excludes you because of a potential or actual OCI, you must protest before proposals are due. At GAO, see 4 C.F.R. § 21.2(a). Protests alleging OCI concerns may need to be filed at COFC before the deadline for receipt of proposals (Blue & Gold Fleet waiver rule). In Inserso Corp. v. United States, 961 F.3d 1343 (Fed. Cir. 2020), the Federal Circuit held a protester could not pursue its unequal access to information OCI allegations post-award because the protester knew or should have known the agency would disclose nonpublic information to its competitors before the deadline for receipt of proposals based on "[t]he law and facts" at hand.
- Review Standard by Contracting Officer (CO) and Protest Tribunals
  - Responsibility of identifying an OCI and whether exclusion is warranted rests with the CO. The agency is given "considerable discretion." A protester must identify hard facts indicating the existence or potential existence of an OCI, suspicion is not enough. Once it is determined that an actual or potential OCI exists, the protester is not required to demonstrate prejudice, because harm from the conflict is presumed to occur.
  - GAO and Court of Federal Claims review the reasonableness of the investigation and whether agency provided meaningful consideration to the OCI issue. GAO and COFC do not substitute their judgment for the agency's judgment unless there is clear evidence the agency's conclusion was unreasonable.

COFC and GAO Sustain Protests

- **Inadequate OCI Investigation.** COFC and GAO will sustain a protest challenging the Contracting Officer's OCI findings. Thus, for example, in Jacobs Technology, Inc. v. United States, 100 Fed. Cl. 198 (2011), COFC sustained a protest where the Contracting Officer's refusal to conduct a more detailed OCI analysis, despite being on notice of the existence of a potential OCI, was arbitrary and capricious. Similarly, in Serco, Inc., B-419617.2, B-419617.3, Dec. 6, 2021, CPD ¶ 382, GAO sustained a protest where the Contracting Officer unreasonably relied upon declarations from the contractor's personnel about their lack of access to nonpublic, competitively useful information when those assertions were inconsistent with documents provided in the record, including emails demonstrating that these employees did, in fact, have access to such information.

- **Acceptance of an inadequate mitigation plan.** See Netstar-1 Government Consulting, Inc. v. United States, 101 Fed. Cl. 511 (2011), where COFC was highly critical of the Contracting Officer's approval of an OCI mitigation plan that consisted primarily of employee declarations from only some of the personnel who had access to competitively useful, nonpublic information and undated non-disclosure agreements that appeared to have been executed months after the awardee's personnel had obtained access to such information. In C2C Solutions, Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38, GAO sustained a protest where the Contracting Officer approved a mitigation plan that lacked the necessary level of detail to reasonably assess the viability of the contractor's mitigation approach. The OCI plan in that case identified three potential approaches to mitigate an OCI, but did not explain how the strategies would work or when they would be implemented.

Unmitigable OCIs

- **Unmitigable OCIs.** Despite best efforts to establish a thorough mitigation approach, an award sometimes still cannot be made because of the presence of an OCI that, by its nature, cannot be mitigated. For example, FAR 9.505-1 prohibits a contractor that provides systems engineering and technical direction for a system from receiving the contract to supply the system or any of its major components.

- An example of an unmitigable OCI was presented in Aetna Government Health Plans, Inc., B-254397 et al., Jul. 27, 1995, 95-2 CPD ¶ 129.

05.

GAO OCI Decisions in DOE M&O Type Contracts

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GAO and OCIs in DOE M&O Type Contracts

- GAO has dealt with OCI's in Department of Energy M&O type contracts.
- For instance, in Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC, B–407948 et al., Apr. 29, 2013, 2013 CPD ¶112, GAO considered a protest concerning an OCI revolving around a subcontractor in the awardee's proposal, but found it premature.
- GAO states in that DOE protest the blackletter rule: Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a); 9.505.

GAO Consideration of OCIs (continued)

- In another GAO decision, Portage, Inc., B-410702, B-410702.4, Jan. 26, 2015, 2015 CPD ¶ 66, GAO reviewed a protest of impaired objectivity with detailed analysis of what GAO expects the Agency, in that protest NNSA, to do to determine whether an OCI can be mitigated.
  - GAO states in that protest: the responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting officer. Alliant Techsystems, Inc., B–410036, Oct. 14, 2014, 2014 CPD ¶324 at 4; The LEADS Corp., B–292465, Sept. 26, 2003, 2003 CPD ¶197 at 5. Contracting officers are to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR §9.505; Q2 Administrators, LLC, B–410028, Oct. 14, 2014, 2014 CPD ¶305 at 7. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B–405112.3, June 4, 2012, 2012 CPD ¶166 at 7; see *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Tele Communication Sys. Inc., B–404496.3, Oct. 26, 2011, 2011 CPD ¶229 at 3–4; see *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377, 1387 (Fed. Cir. 2011).
- Portage, facts of NNSA solicitation. GAO found the record showed the agency thoroughly investigated potential OCIs and, after completing its investigation and concluding that there was a limited possibility of an OCI, reasonably concluded that the OCI would be avoided by the careful assignment of work under the contract.

06.

Takeaways and Lessons Learned

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Takeaways and Lessons Learned

- Review acquisition for OCIs as early in the process as feasible, optimally at the planning stages, to permit agency and offerors to effectively address OCIs before award process. Don't hope that the OCI issue will not surface through the protest process!

- Avoid, neutralize, or mitigate significant potential conflicts before contract award. Be aware that there is a relationship between the OCI mitigation plan, technical approach, and contract performance. The potential for OCIs is an evaluation issue--whether or not it is specifically identified as a technical evaluation factor.

- There is no litmus test for ascertaining the impact of the OCI on the contract. You need to identify the significant potential OCIs and address them. Firewall within the company generally does not work to resolve "impaired objectivity" OCI. May have to hand work over to a subcontractor. Is this workable? What is the impact on the offeror's technical approach?

Takeaways and Lessons Learned

- Companies should fully disclose and alert the agency to what they believe to be the potential OCIs and offer a solution that will work. Understating or hiding the effect of potential OCIs is a risky strategy for the offeror and agency.

- In a number of impaired objectivity cases, it is clear the reason the agency wants the company to perform the work is precisely the reason that there may be an impermissible, and potentially unmitigable, OCI.

- In analyzing the acquisition for potential impaired objectivity OCIs, the agency and contractor cannot limit their analysis to acquisition conflicts. Conflicts may exist in situations where a firm will be influencing policy, or testing and evaluating products or systems, although no procurement is imminent or anticipated. GAO and COFC review the reasonableness of an agency's actions; GAO and COFC will not "second guess" or perform their own de novo review.

Questions?

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SMITHCURRIE OLES

ORGANIZATION AS A CLIENT

I. Discussion Interim Guidance on Requirements of the Department of Energy (DOE) Interim Conflict of Interest Policy with Emphasis on OCI Policy

II. OCOI portion of the DOE policy meant to apply principally to commercial/business entities to prevent "self-dealing" under applicable federal procurement standards under 2 CFR 200.318

III. Dec 20, 2021 DOE Financial Assistance Letter Subject: Department of Energy Interim Conflict of Interest Policy Requirements for Financial Assistance – Discussion of OCI

IV. References for DOE: FAR 9.5, DEAR 909.5, 952.209-72, 970.0905 and 970.5204-15

V. Overview of OCI, three types
(1) —unequal access to information cases, (2) —impaired objectivity cases (3) —biased ground rules cases
Protests of DOE contract awards at GAO concerning OCIs, See Aetna Gov't Health Plans, Inc.; Found. Health Fed. Services., Inc., B-254397.15, B-276634.16, B276634.17, B-276634.18, B-276634.19, July 27, 1995, 95-2 CPD 129; and L-3 Services, Inc., B-400134.11; B-400134.12, Sept. 3, 2009

VI. The M&O contracts generally contain at I–118 DEAR 952-209-72 Organizational Conflicts of Interest (Aug 2009) Alternate 1 (Aug 2009). This clause supplements FAR Part 9, especially Part 9.5.

VII. Why are OCIs Increasing in Relevancy

VIII. Unequal access to information – Mitigation

IX. Biased Ground Rules – Mitigation

X. Impaired Objectivity – Mitigation

XI. Waiving OCI

XII. Strategic Considerations – Proposals

XIII. Strategic Considerations - Protests

XIV. GAO has dealt with OCI's in Department of Energy M&O type contracts. For instance in Matter of: Nuclear Production Partners LLC; Integrated Nuclear Production Solutions LLC Comp.Gen. April 29, 2013B- 407948.2 GAO considered a protest concerning an OCI revolving around a subcontractor in the awardee's proposal but found it premature.

XV. GAO states in that DOE protest blackletter rule: Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§9.504(a); 9.505.

XVI. In another GAO decision, Matter of: Portage, Inc. Comp.Gen. January 26, 2015 B- 410702.4 GAO reviewed a protest of impaired objectivity with detailed analysis of what GAO expects the Agency, in that protest NNSA, to do to determine whether an OCI can be mitigated.

XVII. GAO states in that protest, the responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting officer. Alliant Techsystems, Inc., B–410036, Oct. 14, 2014, 2014 CPD ¶324 at 4; The LEADS Corp., B–292465, Sept. 26, 2003, 2003 CPD ¶197 at 5. Contracting officers are to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate

ways to resolve it. FAR §9.505; Q2 Administrators, LLC, B–410028, Oct. 14, 2014, 2014 CPD ¶305 at 7.

XVIII. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B–405112.3, June 4, 2012, 2012 CPD ¶166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., B–404496.3, Oct. 26, 2011, 2011 CPD ¶229 at 3–4; see Turner Constr. Co ., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011)

XIX. Discussion of Portage Facts of NNSA solicitation.

XX. Take Aways and Lessons learned from GAO authority on OCI.

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Speaker Biography -

ORGANIZATION AS A CLIENT AND GOVERNMENT CONTRACT TOPICS

Howard Roth, Smith Currie Oles

Howard is a key member of the Smith Currie Oles' newly combined government contracts practice. Howard has nearly 40 years experience advising on government contract law and federal grant law matters. He is a knowledgeable advisor on terminations, procurement disputes, Requests for Equitable Adjustment (REAs), claims, protests, Buy America/Buy American, rights in technical data and computer software, and International Traffic in Arms Regulations (ITARS) and export controls. He is experienced in high-visibility cases, including complex litigation and more than 100 adversarial proceedings at Government Appeal (ASBCA), Civilian Board of Contract Appeals (CBCA), and alternative dispute resolution (ADR) forums. In 2021 and 2022 Howard made new law in successfully establishing that the Court of Federal Claims had bid protest jurisdiction over Other Transaction Authority (OTA) projects in two protests at the Court of Federal Claims.

Howard is the recipient of the Army Meritorious Service Medal with oak leaf cluster for expertise and achievement in GAO protests and contract appeals, served as advisor to DOE for over four years on multi-million dollar contract appeals to the CBCA, legal counsel for a nationwide Government Enterprise IT network, advisor on contracts for the $1.5 billion MARAD NSMV ship procurement program, and advisor to construction contractors on the termination for convenience of their southern boarder wall contract/subcontract by the US Army Corps of Engineers.

He is a Lieutenant Colonel, Judge Advocate General's (JAG) Corps USA Retires.) His JAG experience includes Trial Team Chief at the Army Contract Appeals Division litigating GAO bid protests and contract appeals at the ASBCA, Commissioner at the ASBCA, and Deputy General Counsel at the Army's Support Command in Silicon Valley California.

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Common Ethical Dilemmas and Recent Advisory Opinions

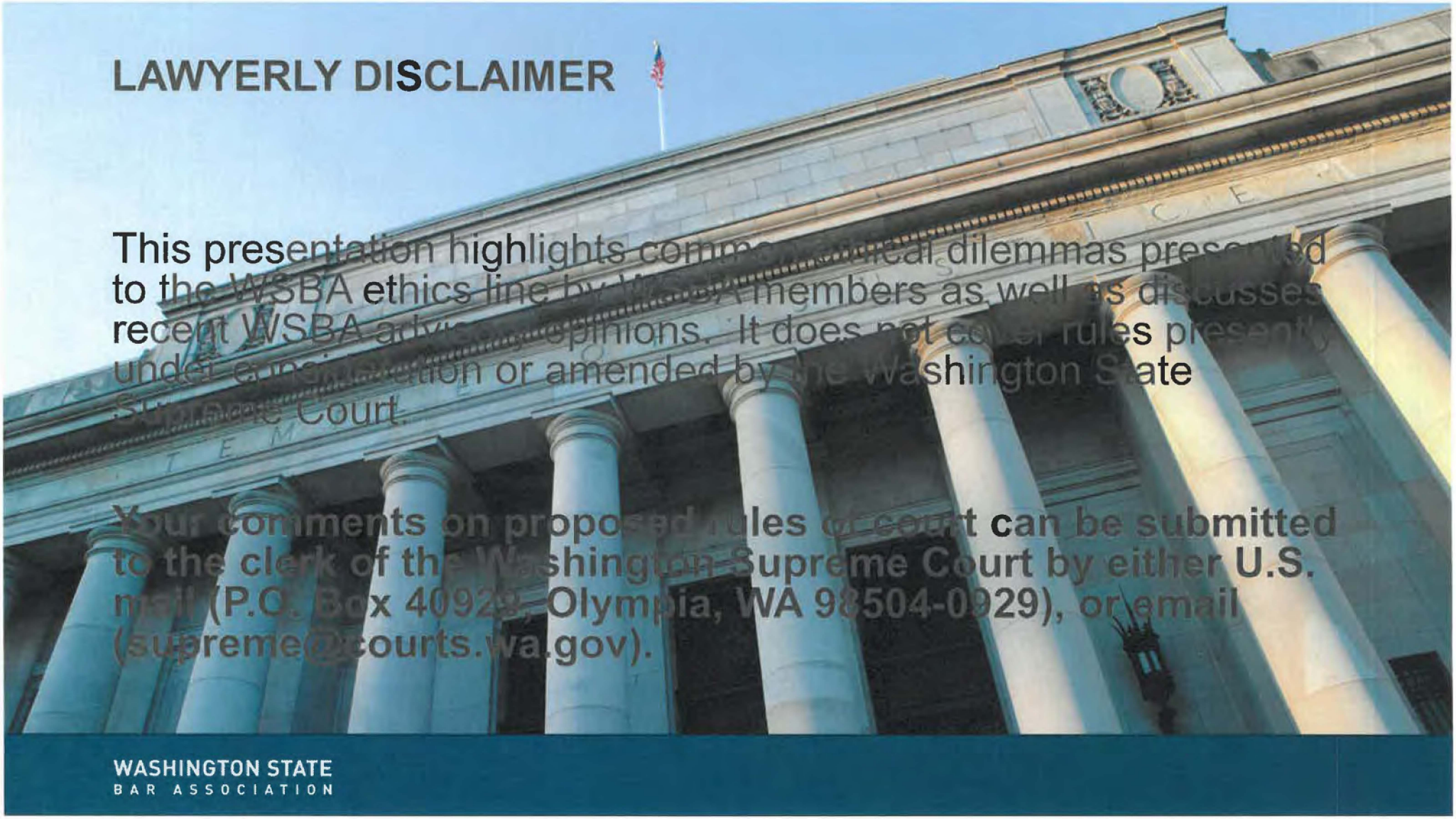
COMMON ETHICAL DILEMMAS AND RECENT ADVISORY OPINIONS

DEPARTMENT OF ENERGY CONTRACTING ATTORNEYS ASSOCIATION SPRING CONFERENCE

APRIL 18, 2024

Jeanne Marie Clavere
Senior Professional Responsibility Counsel
WSBA Advancement Department

Date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This presentation highlights common ethical dilemmas presented to the WSBA ethics line by WSBA members as well as discusses recent WSBA advisory opinions. It does not cover rules presently under consideration or amended by the Washington State Supreme Court.
Your comments on proposed rules of court can be submitted to the clerk of the Washington Supreme Court by either U.S. mail (P.O. Box 40929, Olympia, WA 98504-0929), or email (supreme@courts.wa.gov).
WASHINGTON STATE
BAR ASSOCIATION

AN OVERVIEW OF COMMON ETHICAL DILEMMAS FROM THE WSBA ETHICS LINE

Defining Boundaries and Scope
RPC 1.2; 1.16; 3.3; GR 24

Advertising
Title 7; RPC 1.6; 1.10; 5.3; 5.5

Reaching Out to Prospective Clients
Title 7; RPC 1.6; 5.4

Competence
RPC 1.1; 1.14; 1.15A

Personal Responsibility
RPC 1.4; 1.16; 5.3; 5.4; 5.5

Fee Agreements
RPC 1.5

Conflicts
RPC 1.6; 1.7; 1.9; 1.10; 1.16; 5.3

NEW WSBA ETHICS ADVISORYOPINIONS

ADVISORY OPINION 202101
CONSIDERATIONS REGARDING DISCLOSURE OF CIVIL COMMITMENT PROCEEDINGS WHILE REPRESENTING A CRIMINAL DEFENDANT

Summary: A discussion of circumstances when a criminal defense lawyer may disclose a client's involvement in civil commitment proceedings to a court or prosecutor.

Considerations for a criminal defense lawyer if the client fails to appear in court due to civil commitment in a hospital under RCW 71.05.

- Under **RPC 1.6** a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, or the consent is impliedly authorized. However, see **RPC 1.6(b)(6)** regarding disclosure to comply with a court order.
- When possible, a lawyer should get informed consent under **RPC 1.0A(e).**
- When possible, a lawyer should determine whether implied authorization was given because of the client's intent to avoid adverse consequences to their liberty.
- Compliance with a court order under **RPC 1.6 (b)(6)** should be only if necessary and only after asserting to the court that the information is protected by privilege or other applicable law.
- If a lawyer does not have informed or implied consent and is not subject to a court order, **RPC 1.14** may apply.
- If a lawyer discloses information to the court, whether pursuant to **RPC 1.6** or **RPC 1.14**, the lawyer must comply with **RPC 3.3**, governing candor toward the tribunal.

ADVISORY OPINION 202102
LAWYER ACTING AS THIRD-PARTY NEUTRAL UNDER RPC 2.4 IN DOMESTIC RELATIONS MATTERS THAT MAY INVOLVE RISK OF DOMESTIC ABUSE

Summary: Considerations when a lawyer serves as a third-party neutral in a domestic relations matter that may present a risk of domestic abuse to an unrepresented party, or to a child or other member of the household.

A lawyer acting as a third-party neutral must be sensitive to, and adequately address, that an unrepresented party may not fully understand the lawyer's neutral role. This is particularly acute in a domestic relations matter where there may be risk of domestic abuse to an unrepresented party, or to a child or other household member.

- Under **RPC 2.4(b)** a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. The potential for confusion is significant. The extent of disclosure required is a fact and circumstance analysis.
- It may be difficult to detect a risk of domestic abuse. The lawyer may develop questions or concerns regarding an unrepresented party's comprehension of the neutral's role as the mediation progresses. Training in the area of domestic abuse can assist the lawyer in interviewing techniques or identifying behavioral cues.

If the ADR process results in an agreement, the third-party neutral may draft a written confirmation of that agreement. The neutral may not draft a pleading with customized provisions on behalf of both parties nor undertake a common representation of the parties pursuant to **RPC 1.12(a).**

ADVISORY OPINION 202201
LAWYER'S EMAIL "REPLY ALL", INCLUDING ANOTHER LAWYER'S CLIENT

Summary: Considerations as to whether a lawyer may "reply all" when responding to an email in which the initiating lawyer has cc'd their own client.

If a lawyer emails a second lawyer with a copy to the first lawyer's own client, and if the second lawyer "replies all," whether the second lawyer violates the prohibition against communications to another lawyer's client without that lawyer's consent depends on the relevant facts and circumstances. Based on various factors, the second lawyer must make a good faith determination as to whether the lawyer who sent the initial communication had provided implied consent to a "reply all" responsive electronic communication.

- The purpose of **RPC 4.2** is to protect a client from overreaching by other lawyers who are participating in a matter, from interference by those lawyers with the client-lawyer relationship, and from the uncounseled disclosure of information.
- An opposing lawyer's consent to communication with her client may be implied rather than express. Whether "consent" may be "implied" in a particular situation requires an evaluation of all the facts and circumstances in the representation.
- Many factors should be considered before the second lawyer can reasonably rely on implied consent from the first lawyer. This advisory opinion suggests several factors.

Considering the intent of **RPC 4.2,** together with consideration of suggested factors and other relevant facts and circumstances, the second lawyer must make a good faith determination whether the first lawyer has provided implied consent to a "reply all" responsive electronic communication from the first lawyer. Electronic communications create a huge potential for interference with the client-lawyer relationship and the potential for inadvertent waiver by the client of the attorney-client privilege.

ADVISORY OPINION 202202
MALPRACTICE INSURANCE DISCLOSURE REQUIREMENTS

Summary: The WSSC adopted a new RPC 1.4(c) which requires disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's professional liability insurance does not meet minimum levels. This opinion answers questions and provides additional clarity.

If a lawyer does not meet minimum levels the lawyer must promptly obtain written informed consent from each client, and within 30 days obtain similar consent from each client when the lawyer's malpractice insurance policy lapses or is terminated.

- RPC **1.4(c)** does not apply retroactively to an uninsured lawyer's clients whose representation commenced prior to the effective date of RPC 14(c), i.e., September 1, 2021.
- RPC **1.4(c)**'s reference to "lawyer professional liability insurance" generally means coverage under a malpractice policy offered through the private, competitive insurance marketplace.
- Based on the Oregon State Bar Professional Liability Fund malpractice coverage pursuant to Oregon state statute as a mandatory provider of primary malpractice coverage for Oregon lawyers, coverage by the PLF meets the requirements of the Rule.

Other questions are considered including lawyers only providing non-legal services; lawyers only representing one entity and other corporate or LLC entities controlled by the single entity; and Washington licensed lawyers not representing any clients within Washington State. See the advisory opinion for these analyses and answers.

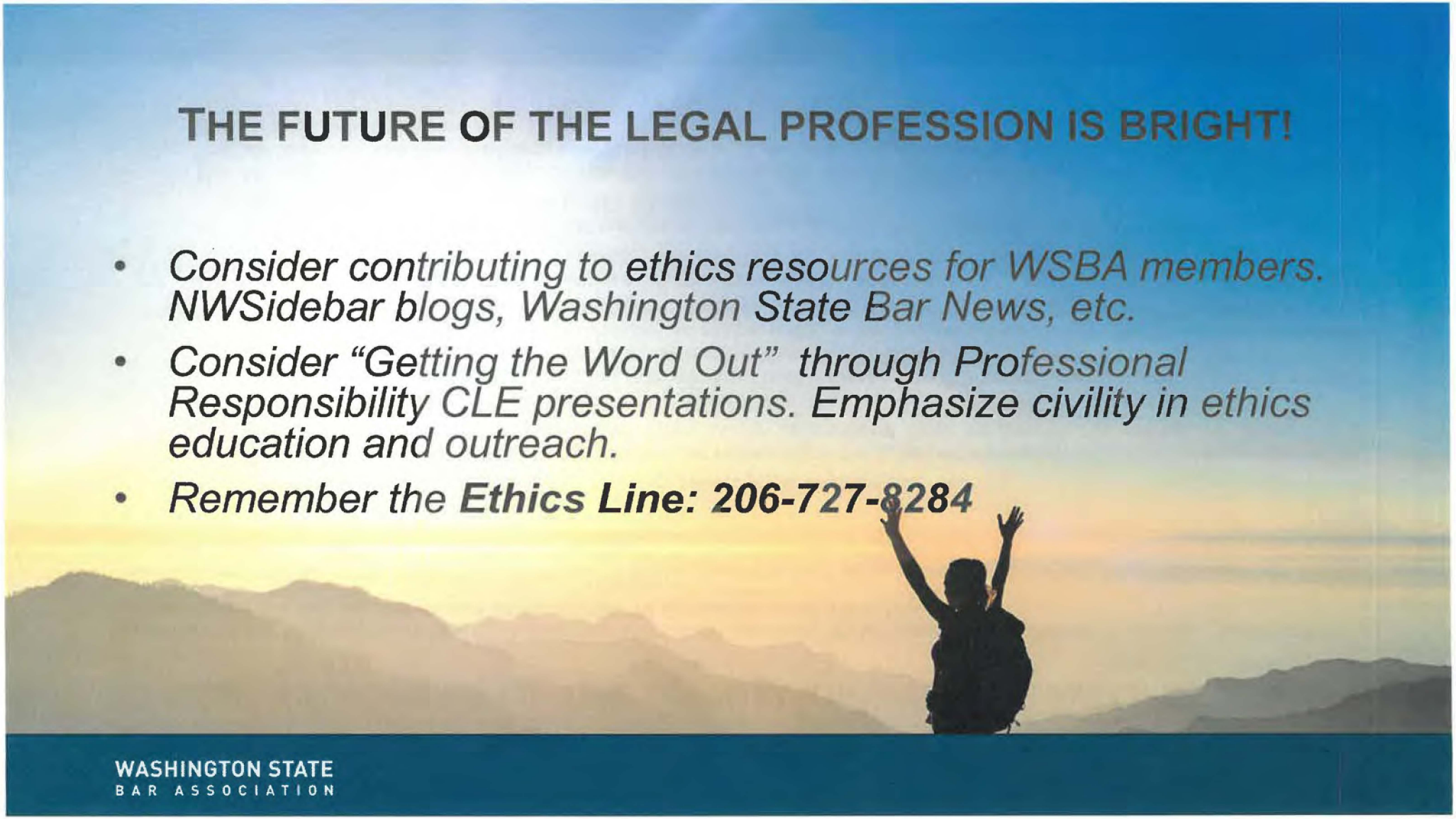
ADVISORY OPINION 201601 AND 2022 AMENDMENTS
ETHICAL PRACTICES OF THE VIRTUAL OR HYBRID LAW OFFICE

Summary: Many lawyers are choosing to do some or all work remotely, from home or other remote locations. Advances in on-line resources and service as well as the COVID-19 pandemic accelerated this trend.

This Advisory Opinion underscores that the Rules of Professional Conduct apply no differently in the virtual office context. It also highlights some areas that warrant special consideration.

- There is no requirement that WSBA members have a physical office address.
- Under **RPC 7.1** an address for a law firm may be misleading if the public would wrongly assume that the lawyer will be available in a particular location or that there are no jurisdictional limits for lawyers not licensed to practice in a jurisdiction where the office is located.
- Washington licensed lawyers practicing remotely from outside their state of licensure may do so only if this is allowed by the other jurisdiction. See **RPC 5.5.** A remote Washington licensed layer cannot either explicitly or implicitly communicate that the lawyer is authorized to practice law in an outside jurisdiction. Lawyers licensed in another jurisdiction practicing remotely in Washington should consult the RPC from their state of licensure. See **RPC 8.5**
- Special challenges for virtual offices involve the duties of supervision, confidentiality, the duty to avoid misrepresentation and conflicts of interest. See **RPC 5.1; 5.2; 5.3; 5.10; 1.1; 1.6; 1.7; 1.9; and 1.18.**
- Virtual Lawyers must comply with all applicable trust account rules and all applicable state and local business and tax regulations. See **RPC 1.15A and 1.15B; 8.5** et al.

This AO agrees with the ABA Formal Opinion 495 view that a state does not have a substantial interest in prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is authorized solely because the lawyer is practicing from a virtual office in another jurisdiction.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Which RPC?

The Rules of Professional Conduct (RPCs) are the rules that govern ethical conduct of legal practitioners. The RPCs are constantly changing. Stay on top of recent developments by visiting the Washington State Courts website at **www.courts.wa.gov.**

Helpful Links:

Lawyer RPC
www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

LPO and LLLT RPCs
www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=APR

ETHICS IN YOUR PRACTICE

The Washington Supreme Court is the highest authority for ethical guidance. Court decisions in lawyer discipline cases are instructive because they illustrate ethical misconduct. Search Opinions at **www.courts.wa.gov**.

Advisory Opinions issued by the WSBA Committee on Professional Ethics are published online and cover a wide range of ethical issues. The database is a popular resource for members in addition to the Ethics Line at **www.wsba.org/advisory-opinions**.

Ethics Articles in the WSBA's **Bar News** and **NWSidebar Blog** cover topics that are currently trending in legal ethics and professional responsibility.

Ethics FAQs are answers to common ethical questions such as file retention, unclaimed client funds, leaving a firm, or withdrawing from representation at **www.wsba.org/ethics-faqs**.

For more information, please contact:
Jeanne Marie Clavere
WSBA Senior Professional Responsibility Counsel

WASHINGTON STATE BAR ASSOCIATION

WSBA Ethics Advisory Opinions

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202101

Year Issued: 2021

RPC(s): RPC 1.6(a), RPC 1.6(b)(6), RPC 1.14(b)

Subject: Considerations regarding disclosure of civil commitment proceedings while representing a criminal defendant

Summary: This opinion discusses circumstances under which a lawyer representing a criminal defendant may be able to disclose the client's involvement in civil commitment proceedings to a court or prosecutor. The opinion addresses express informed consent and implied consent under RPC 1.6(a), the exception contained in RPC 1.6(b)(6), and authorization under RPC 1.14(b).

A lawyer representing a criminal defendant faces a dilemma if the client fails to appear in court due to civil commitment in a hospital under RCW Ch. 71.05. If the lawyer fails to disclose the commitment, the court may issue a warrant for the client's arrest or take other action detrimental to the client's interests. However, disclosure of the commitment risks violating RPC 1.6. Advisory Opinions 2099 (2005) and 2190 (2009) address a similar issue – whether or how to disclose to the court a concern about the client's competence to stand trial – but they do not address disclosure of a civil commitment proceeding. This opinion reviews ethical considerations presented by that dilemma, which is particularly acute when the lawyer does not learn of the civil commitment in advance of the hearing.

RPC 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Paragraph (b) of the rule describes eight scenarios in which a lawyer may reveal information relating to the representation without the client's informed or implied consent. Of these, subparagraph (b)(6), authorizing disclosure to comply with a court order, is relevant to this discussion.

Although it is important to discuss a client's objectives early in any engagement *n1 and to review them periodically during the engagement, it can be particularly helpful to do so if the lawyer anticipates that

mental health issues could complicate the client's defense. Should the client's condition subsequently deteriorate, it may become difficult for the client to make informed decisions about significant issues or, if the client is hospitalized, it may become difficult to communicate with the client at all.

Discussion about the relative importance of confidentiality and liberty may be not be feasible early in an engagement. However, if feasible, such discussions may in some cases lead to express, informed consent to disclose information protected by RPC 1.6 to the court and/or the prosecutor. In other cases such discussions before circumstances become exigent may provide a basis for the lawyer to conclude later in the engagement that the client gave implied consent.

"Informed consent" means the client's "agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the propose course of conduct." RPC 1.0A(e). RPC 1.6(a) does not require that informed consent be confirmed in writing. However, it may be advisable for the lawyer to provide the client a written description of the information that the client has authorized to be disclosed and the circumstances under which disclosure is authorized, together with the information that the client may revoke consent at any time. To avoid misunderstanding, the lawyer may ask the client to sign the authorization and may note that any revocation should be provided in writing. The scope of a disclosure pursuant to express, informed consent should be limited to the scope of the authorization. *n2

If early discussions do not progress to the point where the client makes a decision to give or refuse express, informed consent, the discussions may nevertheless progress to the point where the lawyer reasonably believes that the client has impliedly authorized disclosure of information in some circumstances to avoid adverse consequences to the client's liberty. When making a disclosure pursuant to implied authorization, the lawyer should disclose no more information than is reasonably necessary to accomplish the client's objective in preserving personal liberty. See RPC 1.6(b) and Comment [5].

In some cases a court may order a lawyer to reveal information relating to the representation of a client. For example, if an issue has arisen concerning the competence of the client to stand trial, the court may order the lawyer to disclose information protected by RPC 1.6 related to that issue. Subparagraph (b)(6) authorizes a lawyer to disclose otherwise confidential information pursuant to court order. However, the introductory language of paragraph (b) cautions that the lawyer's disclosure should be limited in scope to information that the lawyer reasonably believes is necessary to disclose under the circumstances. Comment [15] provides this guidance regarding court-ordered disclosure: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order." When complying with such an order, the lawyer may consider providing disclosure to the court in camera or in chambers and/or requesting that the record be sealed.

RPC 1.14 may come into play if the lawyer does not have informed or implied consent and is not subject to a

court order. This rule governs representation of a client with diminished capacity. Paragraph (b) authorizes a lawyer to take reasonably necessary protective action "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."

A client who is at risk of being arrested and jailed for failing to appear in court might conceivably face substantial physical harm in some circumstances. For example, mental health issues can sometimes cause an encounter with law enforcement to escalate quickly and unexpectedly, and confinement in jail during a pandemic can create increased risk of infection. In addition, a client who accumulates a series of arrest warrants has an increased risk of adverse rulings in court. The comments to RPC 1.14 do not discuss what types of harm might qualify as "other harm," meaning harm not considered physical or financial that could nevertheless merit protective action. Advisory Opinion 2190 observes: "Because [of] the broad language of [RPC 1.14(b)], it would not be unreasonable to assume that 'other harm' did constitute harm to a client's constitutionally protected interest [in being competent to stand trial]." The same observation applies regarding a criminal defendant's liberty interest.

Comment [6] to RPC 1.14 provides guidance for making a determination whether the client has diminished capacity. If the lawyer concludes that the other requirements of RPC 1.14(b) are also satisfied, the next question is whether disclosure to the court is "reasonably necessary protective action." Although such disclosure is not listed among the examples in Comment [5], the comment states: "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known [and] the client's best interests . . ." Discussion about the client's objectives early in the engagement may provide a basis for concluding that disclosure to the court is an appropriate protective action under RPC 1.14. Comment [8] states: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary."

If the lawyer discloses information to the court, whether pursuant to RPC 1.6(a), RPC 1.6(b)(6) or RPC 1.14, the lawyer must comply with RPC 3.3 governing candor toward the tribunal.

It is a separate question whether disclosure of the information that a client is in civil commitment may be prohibited by statute. The Committee does not opine on questions of law.

Footnotes

1. RPC 1.2(a) requires a lawyer to abide by a client's decisions concerning the objectives of the representation and notes that RPC 1.4 requires the lawyer to consult with the client as to the means by which the objectives are to be pursued.

2. If a client lacks capacity to give informed consent at the outset of an engagement, there may be an issue as to whether the client is competent to stand trial. See Advisory Opinions 2099 and 2190 for guidance regarding disclosure.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202102

Year Issued: 2021

RPC(s): RPC 2.4 and 1.12

Subject: Lawyer acting as a third-party neutral under RPC 2.4 in domestic relations matters that may involve risk of domestic abuse

SUMMARY: When a lawyer serves as a third-party neutral in a domestic relations matter that may present a risk of domestic abuse to an unrepresented party, or to a child or other member of the household, the lawyer should provide an explanation of the role of the third-party neutral that is adequate to enable the unrepresented party to make an informed decision whether to participate. This communication is particularly important when the lawyer intends to draft a written confirmation if the alternative dispute resolution (ADR) process produces a resolution.

Issue presented:

May a lawyer act as a third-party neutral under RPC 2.4 in a domestic relations matter when a party is unrepresented and the matter potentially involves risk of domestic abuse to a party, child or other household member?

Short answer:

Yes, subject to important considerations.

Rules:

RPC 2.4 and 1.12

Discussion:

A lawyer acting as a third-party neutral under Rule 2.4 must be sensitive to, and adequately address, the

possibility that an unrepresented party may not fully understand the lawyer's neutral role. Absent an adequate explanation, an unrepresented party may believe that the lawyer's assistance in resolving the matter includes assistance that is incompatible with the lawyer's role as a third-party neutral. This concern is particularly acute in a domestic relations matter where there may be risk of domestic abuse to an unrepresented party or to a child or other household member.*n1.

As a threshold matter, ADR is ordinarily not an appropriate means of resolving matters that involve domestic abuse.*n2. Domestic relations cases are particularly common settings for abusive tactics by which an abuser can reestablish power and control over a former partner long after a relationship has ended.*n3. Nevertheless, subject to the requirements of RCW 26.09.016(2), a party at risk of domestic abuse may make an informed decision to proceed with ADR, if the lawyer provides adequate information about the limitations of the role of a third-party neutral and otherwise believes ADR is appropriate.*n4.

Rule 2.4(b) provides: "A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

Comment [3] to the rule elaborates on the lawyer's duty to unrepresented parties because, "[u]nlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative." It notes that the potential for confusion is "significant" when a party is unrepresented. A statement of non-representation might suffice in some situations, such as when an unrepresented party frequently uses ADR. However, the Comment provides that "more information will be required" in other circumstances, and in those instances "the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege." Comment [3] concludes: "The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected."

In determining the extent of disclosure required before mediating a domestic relations matter, a lawyer should consider that it may be difficult to detect a risk of domestic abuse. Because an unrepresented party who has been a target of abuse might not volunteer that information, a lawyer may find it appropriate to develop questions to use in screening potential matters. In addition, such a party may have unrealistic expectations about the role of a neutral that would not be dispelled by a statement of nonrepresentation. A lawyer may wish to consider offering concrete examples, such as an explanation that the neutrality required of a mediator precludes giving any advice and precludes commenting on the reasonableness or unreasonableness of a party's proposal.*n5.

Although a lawyer typically has limited information about the sophistication of the parties at the outset, the lawyer may develop questions or concerns regarding an unrepresented party's comprehension of the neutral's role as the mediation progresses. Training in the area of domestic abuse can assist the lawyer in

interviewing techniques or identifying behavioral cues that could be of value in assessing whether undisclosed abuse may be an issue that would merit supplemental explanations or disclaimers about the neutral's role.

If the ADR process results in an agreement, the third-party neutral may draft a written confirmation of that agreement with as much or as little specificity as appears warranted under the circumstances. However, the neutral may not draft a pleading with customized provisions on behalf of both parties nor undertake a common representation of the parties pursuant to Rule 1.12(a). WSBA Advisory Opinion 201901. When drafting a confirmation of a mediated agreement, the lawyer acting as a third-party neutral should consider the risk that a court may hold that the writing meets the standards for an enforceable agreement despite the lawyer's intention not to represent either party.*n6.

Footnotes

1. "Domestic abuse," as used in this opinion, refers to patterns of behavior that fit the definition of "domestic violence" in RCW 26.50.010(3) as well as relevant conduct that may be described in other statutes, e.g., RCW Ch. 9A44, 26.44, and 26.51. In addition to harm inflicted directly by a party on a household member, the term includes indirect but very serious harm inflicted on children who witness domestic abuse and the fear of imminent harm to children. In re Marriage of Stewart, 133 Wn. App. 545, 551, 137 P3d 25 (2006) (children witnessing abuse); Rodriguez v. Zavala, 188 Wn.2d 586, 596-8, 398 P.3d 1071 (2017) (fear of imminent harm to children).

2. RCW 26.09.016(1) ("Mediation is generally inappropriate in cases involving domestic violence and child abuse").

3. RCW 26.51.010.

4. The availability of independent support, such as that provided by a domestic violence advocate, is a factor that may weigh in favor of mediating a domestic relations dispute that presents a risk of domestic abuse. RCW 26.09.016(2).

5. A lawyer may also consider offering concrete examples pertinent to the issues in dispute in the particular case. For example, if one party's retirement accounts are a significant asset and the other party has limited experience with or understanding of such financial matters, a lawyer may wish to explain that the neutral role precludes offering information or guidance regarding the accounts.

6. The main points of a settlement between parties might be held enforceable even if the parties anticipate a more definitive agreement. See Marriage of Ferree, 71 Wn. App. 35, 856 P.2d 706 (1993) (agreement of parties and counsel reached with assistance of court commissioner was enforceable though it was not reduced to writing or entered in the court record). See also Morris v. Maks, 69 Wn. App. 865 (1993) (letters between counsel established a binding settlement agreement even though the parties contemplated a more formal written agreement).

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202201

Year Issued: 2022

RPC(s): 4.2

Subject: Lawyer's Email "Reply All," Including Another Lawyer's Client

Opinion RPC 4.2
Lawyer's Email "Reply All," Including Another Lawyer's Client

Advisory Opinion 202201

Year Issued: 2022

RPC: RPC 4.2

SUMMARY: If a lawyer emails a second lawyer with a copy to the first lawyer's own client, and if the second lawyer "replies all," whether the second lawyer violates the prohibition against communications to another lawyer's client without that lawyer's consent depends on the relevant facts and circumstances. Based on various factors, the second lawyer must make a good faith determination as to whether the lawyer who sent the initial communication had provided implied consent to a "reply all" responsive electronic communication.

Facts: Lawyer A initiates communication and sends an email to Lawyer B with a copy (cc) to Lawyer A's own client. When responding, Lawyer B "replies all," and in doing so simultaneously communicates with both Lawyer A and Lawyer A's client.

Issue presented: Does Lawyer B violate RPC 4.2 when Lawyer B "replies all" and includes Lawyer A's client in the communication without obtaining express prior consent from Lawyer A?

Short answer: It is the opinion of the Committee on Professional Ethics that "Reply All" may be allowed if consent can be implied by the facts and circumstances, but express consent is the prudent approach.

Rule:

RPC 4.2

Discussion:

RPC 4.2 prohibits a lawyer in the course of representing a client, from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the person's lawyer or is authorized to do so by law or court order. Accordingly, it would be inconsistent with RPC 4.2 for a lawyer to initiate an email to another lawyer and that lawyer's client without obtaining prior consent from that second lawyer.

The purpose of RPC 4.2 is to protect a client from overreaching by other lawyers who are participating in a matter, from interference by those lawyers with the client-lawyer relationship, and from the uncounseled disclosure of information relating to a representation. RPC 4.2 Comment [1]. Consent to communicate about a matter with a represented person can be expressly granted by a client's lawyer. It also can be implied by the prior course of conduct among the lawyers in a matter, it can be inferred from a client's lawyer's participation in relevant communications, and it can be inferred from other facts and circumstances.

It would be inconsistent with RPC 4.2 for Lawyer A to initiate an email to Lawyer B and Lawyer B's client without obtaining prior consent from Lawyer B. Accordingly, the fact that Lawyer A copies her own client on an electronic communication to which Lawyer B is replying does not by itself permit Lawyer B to "reply all" without Lawyer A's consent. Rule 4.2 does not state that the consent of the other lawyer must be "expressly" given, but the best practice is to obtain express consent.

Whether consent may be "implied" in a particular situation requires an evaluation of all the facts and circumstances surrounding the representation, including how the communication was initiated and by whom; the prior course of conduct between the lawyers involved; the nature of the matter and whether it is transactional or adversarial; the formality of the communications; and the extent to which a communication from Lawyer B to Lawyer A's client might interfere with the client-lawyer relationship.

The Restatement of the Law Governing Lawyers provides that an opposing lawyer's consent to communication with her client "may be implied rather than express." Restatement (Third) of the Law Governing Lawyers § 99 comment j. Several bar ethics committees have examined this issue and concluded that while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances, it is prudent to secure express consent from opposing counsel. Opinions from other states that reflect this view include, South Carolina Bar Ethics Advisory Opinion 18-04; North Carolina State Bar 2012 Formal Ethics Opinion 7; California Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181; and Assn. of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1.

There are situations where prior consent might be implied by the totality of the facts and circumstances. One relevant fact is whether Lawyer A, initiating an electronic communication, cc'd her own client. But other

factors should be considered before Lawyer B can reasonably rely on implied consent from Lawyer A.

• One important factor is the prior course of conduct of the lawyers and their clients in the matter. If the lawyers involved have routinely cc'd their clients on communications, in most circumstances they should be able to rely on that past practice in future communications of a similar type. In particular, the responding Lawyer B should be able to rely on the past practice of Lawyer A.
• The type of communication is a related factor. Emails and texts are often used as a substitute for oral communications, and the context of an electronic communication is important. For example, if a series of emails and texts among lawyers and their clients takes the character of an active discussion among parties within a room, the "conversation" may not be different from a face-to-face conversation in which the lawyers are able to adequately protect the interests of their clients.
• A related factor is the number of persons Lawyer A cc'd on her initial communication. If Lawyer A sent an email solely to Lawyer B, with a copy to Lawyer A's client, then Lawyer B should avoid "replying all" because the only other recipient other than Lawyer A is Lawyer A's client (who should be readily identifiable in the address bar). However, if Lawyer A sends an email to multiple recipients, including her client as a "cc" among others, Lawyer B may be unaware that Lawyer A's client is on the list and it may be unreasonable to expect Lawyer B to search through all the individuals on the cc list to determine if Lawyer A's client is present. Further, if the recipients of Lawyer A's cc's are not visible to Lawyer B, the latter will not be able to know that a person on a cc list is a client of Lawyer A; in answering the email, Lawyer B should not be treated as having communicated with a client of Lawyer A without express prior consent.
• An important factor is the nature of the matter. It is common in some transactional fields of law for both lawyers and clients routinely to cc other lawyers and clients in certain communications related to a transaction, for example circulating revised documents among a transaction team comprised of multiple parties and their lawyers. Absent other circumstances, Lawyer B can rely on that past course of conduct among the lawyers and others involved in a transaction. Nevertheless, the best practice is to raise the issue early in the transaction and gain common consent among the lawyers and their clients—preferably confirmed in writing.
• Lawyers in adversarial matters should always avoid communicating with other lawyers' clients without express permission. Because of the contentious nature of adversarial proceedings, there is a greater risk that such communications could interfere with other lawyers' relationships with their clients and serve to harm those clients' interests. This is of special importance in criminal cases, and prosecutors should always seek express consent from defense counsel before knowingly cc'ing the defendant.

Considering the intent of RPC 4.2, together with the above factors and other relevant facts and circumstances, Lawyer B must make a good faith determination whether Lawyer A has provided implied consent to a "reply all" responsive electronic communication from Lawyer A.
Under no circumstances may Lawyer B respond solely to Lawyer A's client without Lawyer A's prior consent.

Because of the ease with which "reply all" electronic communications may be sent, the potential for interference with the client-lawyer relationship, and the potential for inadvertent waiver by the client of the attorney-client privilege, it is advisable for a lawyer sending an electronic communication and who wants to ensure that her client does not receive any electronic communication responses from the receiving lawyer or

parties, to forward the electronic communication separately to her client. Sending a blind copy to the client on the original electronic communication is a potential option; however, because of differences in how various email applications handle bcc commands and replies, it is prudent for a lawyer instead to separately forward an electronic communication to the client. A lawyer also may expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining under what circumstances the lawyers involved may “reply all” when a represented party is copied on an electronic communication.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202202

Year Issued: 2022

RPC(s): 1.4(c), 5.5(d), 5.7, 8.5(b)

Subject: Malpractice Insurance Disclosure Requirements

Advisory Opinion: 202202
Year Issued: 2022
RPCs: 1.4(c), 5.5(d)(1), 5.7, 8.5(b)
Subject: Malpractice Insurance Disclosure Requirements
FACTS:
The Washington State Supreme Court recently adopted a new Rule 1.4(c) of the Rules of Professional Conduct. RPC 1.4 focuses on communication from a lawyer to a client so the client can make informed decisions regarding the representation. RPC 1.4(c) requires disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's professional liability insurance ("malpractice insurance") does not meet minimum levels. A lawyer must promptly obtain written informed consent from each client, and within 30 days obtain similar consent from each client when the lawyer's malpractice insurance policy lapses or is terminated. The minimum levels are $100,000 per occurrence and $300,000 in the aggregate. Affected lawyers include lawyers with an active status in the Washington State Bar Association ("WSBA"), emeritus pro bono status lawyers, and visiting lawyers permitted to engage in limited practice under APR 3(g). The disclosure requirements do not apply to judges, arbitrators, and mediators not otherwise engaged in the practice of law; in-house counsel for a single entity; government lawyers practicing in that capacity; and employee lawyers of nonprofit legal services organizations, or volunteer lawyers, when those lawyers are provided malpractice insurance coverage at the minimum levels. RPC 1.4(c) became effective September 1, 2021.
The WSBA has received several questions regarding the meaning and applicability of RPC 1.4(c). These questions are addressed below.

QUESTIONS:
1. Does RPC 1.4(c) apply retroactively to existing clients of uninsured lawyers, or to new clients only? If an insured lawyer's insurance policy lapses or is terminated, must the lawyer disclose that fact and obtain

waivers from all existing clients, including those who had engaged the lawyer prior to the effective date of the new rule?

RPC 1.4(c) does not apply retroactively to an uninsured lawyer's clients whose representation commenced prior to the effective date of RPC 1.4(c), i.e., September 1, 2021. Indeed, RPC 1.4(c)(1) on its face requires an attorney to notify a client in writing of the absence of such insurance coverage only "before or at the time of commencing representation of a client," and thus the rule does not require notice of the absence of such insurance with respect to representation that commenced prior to September 1, 2021.

With respect to the lawyer who is insured as of September 1, 2021, whose insurance policy lapses or is terminated during the representation, the duties set forth in the second and third sentences of RPC 1.4(c)(1) will apply. There is no language in those sentences which exempts an insured lawyer from the termination-of-policy notice requirements, even if the representation had commenced prior to September 1, 2021.

2. If a lawyer or law firm is "self-insured" at or exceeding the minimum coverage levels through the accumulation of reserved amounts or retentions, or covered by a "captive insurer," is that sufficient coverage by lawyer professional liability insurance as defined in RPC 1.4(c)?

A lawyer or firm that decides to be wholly "self-insured" with personal or corporate assets and otherwise is without a malpractice policy issued by an insurance company, is "not covered by lawyer professional liability insurance" under RPC 1.4(c). Such an attorney or law firm essentially is "going bare," and therefore must comply with the notice and consent provisions of RPC 1.4(c).

RPC 1.4(c)'s reference to "lawyer professional liability insurance" generally means coverage under a malpractice policy offered through the private, competitive insurance marketplace. However, there is nothing in RPC 1.4(c) that precludes insurance coverage from a "captive insurer," "risk retention group," "insurance purchasing group," or some other insurance entity that is in good standing, chartered or licensed as an insurer in its domicile jurisdiction, has assets that exceed its liabilities, has the ability to pay claims, and complies with all applicable statutory and regulatory requirements. A lawyer or law firm insured by such an insurance entity generally does not violate RPC 1.4(c).

A liability insurance policy with a self-insured retention, reserve, or deductible, does not by itself violate RPC 1.4(c). However, as noted in Comment [9] of the rule, if the lawyer knows or has reason to know the deductible or self-insured retention cannot be paid by the lawyer or the law firm if a loss occurs, the attorney or firm's insurance coverage is insufficient to meet the minimum dollar amounts set forth in RPC 1.4(c).

3. Is coverage by a professional liability fund such as the Oregon State Bar Professional Liability Fund (PLF) "lawyer professional liability insurance" within the meaning of RPC 1.4(c)?

The PLF website describes the PLF as follows:

For over forty years, the Oregon State Bar Professional Liability Fund (PLF) has provided malpractice coverage to lawyers in private practice in the state of Oregon. The PLF is a unique organization within the United States. The Oregon State Bar Board of Governors created the PLF in 1977 pursuant to state statute (ORS 9.080) and with approval of the OSB membership. The PLF began operation on July 1, 1978, and has been the mandatory provider of primary malpractice coverage for Oregon lawyers since that date. Though a handful of other states in the U.S. require malpractice coverage for lawyers, Oregon is the only state that provides that coverage through a mandatory bar-related program.

www.osbplf.org/about/who-we-are.html 11/21/2021. Based on this description and the answer to Question 2 above, coverage by the PLF at or exceeding the minimum levels required by RPC 1.4(c) meets the

requirements of the Rule.

4. Are lawyers who only provide non-legal services, or "law-related services" as defined RPC 5.7, subject to RPC 1.4(c)'s disclosure and waiver requirements?
A Washington licensed lawyer whose work is entirely unrelated to legal services would not be subject to the disclosure provisions of RPC 1.4(c). RPC 1.4(c)(4) implicitly establishes that the disclosure requirements apply to active members of the Washington State Bar Association who are engaged in the practice of law. A lawyer who provides no legal services and provides no legal advice, but instead only works, for example, as a commercial banker, an orchardist or a bartender, is not required to comply with the RPC 1.4(c) disclosure requirements.
RPC 5.7(b) denotes "law-related services" as services that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Typical law-related services include title insurance and real estate work, legislative lobbying, accounting, financial planning, and certain human resources work. RPC 5.7 Comment [9]. RPC 5.7(a) states that when a lawyer is providing "law-related services," the lawyer will be subject to the RPCs unless those services are provided in circumstances that are clearly distinct from the lawyer's provision of legal services, or unless the lawyer makes it clear to recipients of the services that those are not legal services and that the protections of the client-lawyer relationship do not exist.
A lawyer who provides only law-related services, including but not limited to the examples in RPC 5.7 cmt. [9], is subject to the RPCs, including the disclosure requirements of RPC 1.4(c), unless that lawyer complies with the provisions of either RPC 5.7(a)(1) or RPC 5.7(a)(2), i.e., by providing the services in a manner clearly distinct from legal services, or by taking reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

5. Is a lawyer in private practice subject to RPC 1.4(c)'s disclosure and waiver requirements if the lawyer represents only one entity, or a group of corporate or LLC entities that are controlled by that single entity?
A lawyer in private practice must comply with RPC 1.4(c) whether the lawyer represents a single client or many clients.

6. If a lawyer employed by an entity as in-house counsel advises that entity and also advises other corporate or LLC entities that are controlled by the single entity, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?
RPC 1.4(c)(4)(ii) provides that the disclosure requirement of RPC 1.4(c)(1) does not apply to "in-house counsel for a single entity." It is not customary for an employee to purchase insurance to cover potential claims by the person's employer. If a lawyer's employer expects the lawyer also to represent its affiliates, such work would be considered within the scope of the lawyer's employment. In that situation, the lawyer must comply with applicable rules governing conflicts of interest, but the lawyer is not required by Rule 1.4(c) to notify the employer's affiliates of the absence of insurance meeting the requirements of this Rule. Cf. RPC 5.5(d)(1) and Comment [16] to RPC 5.5, permitting an in-house lawyer not admitted in Washington to represent the affiliates of the employer, as well as the employer, in circumstances meeting the

requirements of that rule.

7. If a Washington licensed lawyer does not represent any clients within Washington State, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?
Yes. RPC 1.4(c) defines "lawyer" as an active member of the Washington State Bar Association, without regard to the lawyer's office location and without regard as to whether the lawyer's clients are in Washington, in another state, or in another country. With regard to exercise of the disciplinary authority, Comment [10] to RPC 1.4(c) observes that whether the disclosure and notice obligations of that Rule apply to a Washington-licensed lawyer practicing in another jurisdiction is determined by the choice of law provisions of Rule 8.5(b).

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: -201601

Year Issued: 2016

RPC(s): RPC 1.1, 1.6, 1.7, 1.9, 1.15A, 1.18, 5.1, 5.2, 5.3, 5.10, 7.1, 7.2, 8.4

Subject: Ethical Practices of the Virtual Law Office

Increasing costs of doing business, including the costs associated with physical office space, have motivated lawyers to rethink how they deliver legal services. Many lawyers are choosing to do some or all of their work remotely, from home or other remote locations. Advances in the reliability and accessibility of on-line resources, cloud computing, and email services have allowed the development of the virtual law office, in which the lawyer does not maintain a physical office at all.

Although this modern business model may appear radically different from the traditional brick and mortar law office model, the underlying principles of an ethical law practice remain the same. The core duties of diligence, loyalty, and confidentiality apply whether the office is virtual or physical. For the most part, the Rules of Professional Conduct (RPC) apply no differently in the virtual office context. However, there are areas that raise special challenges in the virtual law office. Below we address whether a lawyer needs a physical address. We then summarize some of the ethical issues lawyers with virtual law practices may face.

I. Requirement for Physical Office Address

A. General Requirements

There is no requirement that WSBA members have a physical office address. Section III(B)(1)(of the Bylaws of the Washington State Bar Association (WSBA) requires that each member furnish both a “physical residence address” and a “principal office address.” The physical residential address is used to determine the member’s district for Board of Governors elections. The principal office address does not need to be a physical address. Similarly, Admission and Practice Rule (APR) 13(b) requires a lawyer to advise the WSBA of a “current mailing address” and to update that address within 10 days of any change. Nothing in that rule indicates the mailing address must be a physical address.

General Rule (GR) 30 permits courts to require service by email. If a lawyer is handling litigation in a jurisdiction that has not adopted such a requirement, the lawyer might wish to serve opposing counsel through hand delivery. The Civil Rules (CR) do not require that a lawyer provide an address for hand delivery. Rather, CR 5(b)(1) provides that if the person to be served has no office, service by delivery may be made by "leaving it at his dwelling house with a person of suitable age and discretion then residing therein." Service, of course, also may be made by mail. Particularly in jurisdictions where it is customary to serve pleadings by hand delivery, providing the opposing counsel with a physical address to do so (such as a business service center) may mean that the lawyer will get the pleadings considerably faster. If a lawyer does not want to provide opposing counsel with an address for hand delivery, we recommend that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4).

B. Address in Advertisements

RPC 7.2(c) requires that lawyer advertisements "include the name and office address of at least one lawyer or law firm responsible for its content." Some lawyers with virtual law practices practice from home and use a post office box for mail. Others contract with business service centers that receive mail and deliveries and also make conference rooms available for meetings.

The term "office address" in RPC 7.2(c) should not be so narrowly construed to mean only the place where the lawyer is physically working. Rather, the "office address" may be the address the lawyer uses to receive mail and/or deliveries. It may also be the address where a lawyer meets in person with clients, but does not have to be.

Therefore, a lawyer who works from home is not required to include her home address on advertising. As long as it is not deceptive or misleading, the lawyer may use a post office box, private mail box, or a business service center as an office address in advertisements.

An address listed in an advertisement may be misleading if a reader would wrongly assume that the lawyer will be available in a particular location. See RPC 7.1. [n.1]. For example, it may be misleading for an out-of-state lawyer to list a Seattle address in an advertisement if the lawyer will not be available to meet in Seattle. However, if the advertisement discloses that the lawyer is not available for in-person meetings in Seattle, the advertisement may not be misleading. See also Section C below.

II. Complying with the RPCs when Using a Virtual Law Office

Lawyers practicing in a virtual law office are no less bound by the ethical duties noted above than their colleagues practicing in a physical office. The standards of ethical conduct set forth in the RPC apply to all lawyers regardless of the setting: physical or virtual. However, certain duties present special challenges to lawyers practicing in the virtual law setting, including the duties of supervision, confidentiality, avoiding misleading communication, and avoiding conflicts of interest as set forth below.

A. Supervision

The duties of supervision embodied in RPC 5.1 [n.2], 5.2 [n.3], 5.3 [n.4] and 5.10 [n.5] apply in all law offices. But staff and other lawyers in a virtual law office might not share any physical proximity to their supervising lawyer, making direct supervision more difficult. Thus a lawyer operating remotely may need to take additional measures to adequately supervise staff and other lawyers in her employ.

B. Confidentiality

The use by a lawyer, whether a virtual office or traditional practitioner, of online data storage maintained by a third party vendor raises a number of ethical questions because any confidential client information included in the stored data is outside of the direct control of the lawyer. WSBA Advisory Opinion 2215 (2012) addresses the lawyer's ethical obligations under RPC 1.1 [n.6], 1.6 [n.7], and 1.15A [n.8]. A lawyer intending to use online data storage should review that opinion, and be especially mindful of several important points emphasized in the opinion:

- The lawyer as part of a general duty of competence must be able to understand the technology involved sufficiently to be able to evaluate a particular vendor's security and storage systems.

- The lawyer shall be satisfied that the vendor understands, and agrees to maintain and secure stored data in conformity with, the lawyer's duty of confidentiality.

- The lawyer shall ensure that the confidentiality of all client data will be maintained, and that client documents stored online will not be lost, e.g., through the use of secure back-up storage maintained by the vendor.

- The storage agreement should give the lawyer prompt notice of non-authorized access to the stored data or other breach of security, and a means of retrieving the data if the agreement is terminated or the vendor goes out of business.

- Because data storage technology, and related threats to the security of such technology, change rapidly, the lawyer must monitor and review regularly the adequacy of the vendor's security systems.

As the opinion concludes, "A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and the information is secure from risk of loss."

Lawyers in virtual practices may be more likely to communicate with clients by email. As discussed in WSBA Advisory Opinion 2175 (2008), lawyers may communicate with clients by email. However, if the lawyer believes there is a significant risk that a third party will access the communications, such as when the client is using an employer-provided email account, the lawyer has an obligation to advise the clients of the risks of such communication. See WSBA Adv. Op. 2217 (2012).

C. Duty to Avoid Misrepresentation

Another duty with special implications for lawyers operating virtual law offices is the duty to avoid misrepresentation. RPC 7.1, 8.4(c).[n.9]. A lawyer may not mislead others through communications that imply the existence of a physical office where none exists. Such communications may falsely imply access to the resources that a physical office provides like ready access to meeting spaces or the opportunity meet with the lawyer on a drop in basis. Unless the lawyer has arranged for such resources, she may not imply their existence. RPC 7.1.

Similarly, a lawyer may not mislead others through communications that imply the existence of a formal law firm rather than a group of individual lawyers sharing the expenses related to supporting a practice. For example, in the physical office setting, lawyers who are not associated in a firm may house their individual practices in the same building, with each practice paying its share of the overall rent and utilities for the space. These space-sharing lawyers would be prohibited from implying (e.g. via the use of letterhead or signage on the building) that they practice as single law firm. Similarly, lawyers with virtual law offices cannot state or imply on websites, social media, or elsewhere that they are part of a firm if they are not.

D. Duty to Avoid Conflicts of Interest

A robust conflicts checking system is critical to any law office, physical or virtual, in order to avoid conflicts of interest under RPC 1.7 [n.10], 1.9 [n.11], and 1.18.[n.12]. A robust conflicts checking system will include information on current and former clients, prospective clients, related parties, and adverse parties. The conflicts checking system is particularly important in a law firm where an individual firm lawyer's conflicts of interest will be imputed to the rest of the lawyers in the firm. RPC 1.10. [n.13]. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflicts checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflicts checking system is equally accessible to all members of the practice, lawyers and staff, and that such access is reliably maintained.

Endnotes

1. RPC 7.1 states, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

2. RPC 5.1 states:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure

that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

3. RPC 5.2 states:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

4. RPC 5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of thelawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

5. RPC 5.10 states:

With respect to an LLLT employed or retained by or associated with a lawyer;

(a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the LLLT's conduct is compatible with the professional obligations of the lawyer and the professional obligations applicable to the LLLT directly; and

(b) a lawyer having direct supervisory authority over the LLLT shall make reasonable efforts to ensure that the LLLT's conduct is compatible with the professional obligations of the lawyer and the professional obligations applicable to the LLLT directly; and

(c) a lawyer shall be responsible for conduct of an LLLT that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if;

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLLT is employed, or has direct supervisory authority over the LLLT, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

6. RPC 1.1 states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

7. RPC 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

8. Paragraph (c)(3) of RPC 1.15A states:

A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

9. RPC 8.4 states, “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”

10. RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

11. RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in whicha firm with which the lawyer formerly was associated had previous represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

12. RPC 1.18 states in part:

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the

prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer or LLLT is disqualified from representation under this paragraph or paragraph (c) of LLLT RPC 1.18, no lawyer in a firm with which that lawyer or LLLT is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)
...

13. RPC 1.10 states, with certain exceptions:

[W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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DOECAA

DOECAA SPRING 2024 CONFERENCE

Speaker Biography -

COMMON ETHICAL DILEMMAS AND RECENT ADVISORY OPINIONS

Jeanne Marie Clavere, Senior Professional Responsibility Counsel, Washinton State Bar Association Advancement Department is a 1987 graduate of the University of Puget Sound School of Law (now Seattle University School of Law). Prior to earning her law degree, she received a Master of Business Administration from DePaul University in Chicago. In February 2010, she joined the staff of the Washington State Bar Association as Professional Responsibility Counsel. After four years with a Seattle law firm, Jeanne Maria began her solo practice in 1992, focusing on estate planning, elder law (including complex guardianships, trusts, and guardian ad litem appointments), and contract based criminal prosecution. As Senior Professional Responsibility Counsel, Jeanne Marie serves as an advisor to members of the bar on the Rules of Professional Conduct, and the ABA Standards for Imposing Lawyer Sanctions. She has been invited to lecture on Professionalism, Civility, and Ethics at all three Washington law schools, for the American Bar Association, for the National Organization of Bar Counsel, and speaks at various local bar CLE's throughout the state. Jeanne Marie staffs the WSBA Ethics Line and wants every attendee to commit the number to memory and call her first, not after they run into an ethical dilemma.

While in private practice Jeanne Marie appeared before a wide range of courts and tribunals, ranging from Ex Parte hearings to trials on guardianship and criminal issues, and served for many years as a Settlement, Litigation, Adoption, Family Law, Incapacity and Probate Guardian ad Litem in King and Snohomish Counties. Jeanne Marie is Past President of the state Washington Women Lawyers, past Chair of the Washington State Bar Association Elder Law Section and served on the executive committee of the King County Bar Association Guardianship and Elder Law Section. She is a member of the American Bar Association and the ABA's Center for Professional Responsibility, is a Washington Fellow of the American Bar Foundation and is an Emeritus Member of the William L. Dwyer Inn of Court. Jeanne Marie also serves as the Past President of the National Conference of Women's Bar Associations and as their delegate to the American Bar Association. She is past director on the board of the International Action Network for Gender Equity and Law.

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DOECAA SPRING 2024 CONFERENCE

Investigative Claims and Document Management

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2024 DOECAA SPRING CONFERENCE

Investigative Trends and Claim Document Management

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DOE Oversight Pressure

- In the past 2 years, Congress passed the Infrastructure Investment and Jobs Act (IIJA), CHIPS and Science Act (CHIPS Act), Inflation Reduction Act (IRA), and Puerto Rico Energy Resilience Fund, which collectively provided the Department with an unprecedented $99 billion in new appropriations, $30.5 billion in new authorizations, and an enhanced loan authority of over $400 billion. https://www.energy.gov/sites/default/files/2023-11/DOE-OIG-24-05.pdf
- Focus on infrastructure and clean energy programs
- **With increased awards comes increased scrutiny from DOE OIG as evidenced in recent OIG Special Report**

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DOE Oversight Pressure

- **Report: DOE OIG Management Challenges at the Department of Energy FY 2024 – issued November 2023 - DOE-OIG-24-05**

- The Office of Inspector General ("OIG") is required by statute to annually identify what it considers to be the most significant management challenges facing the Department.

- OIG report claims DOE will face unprecedented challenges raised by the passage of the Infrastructure Investment and Jobs Act, the Inflation Reduction Act, the CHIPS and Science Act, and the Puerto Rico Energy Resilience Fund.

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FY 2024 OIG Report

- **Report Topics:**
- Technology concerns – Strengthening Cybersecurity.
- Combating the Theft of Intellectual Property.
- Research Security Modernizing Oversight and Management — Access to Data for the Purpose of Running Data Analytics.
- Cooperation with the Office of Inspector General to Advance the Use of Technology — Successes and Failures Developing and Deploying Artificial Intelligence — Artificial Intelligence and Technology Office .

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FY 2024 OIG Report

- The Report saved its most pointed criticism of DOE for the topic of data collection and analytics.
  - DOE has not "kept pace" with Federal requirements
  - DOE still in the "early stages" of their implementation
- The OIG cited several areas in particular that present challenges for the agency, including that data analytics capabilities at some reporting entities "consisted primarily of maintaining spreadsheets and manual reconciliation efforts."
- The OIG noted that improvements to data analytics would allow DOE to advance from identifying fraud after the fact to proactive, preventative measures.

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FY 2024 OIG Report

- Most notably, the Report highlighted what the OIG characterized as DOE's lack of "full" cooperation with OIG efforts to collect information that the Report claims is necessary to protect DOE against fraud, waste, and abuse.
  - Report criticized DOE for not initially complying with or supporting the OIG's expansive March 2022 request for "payroll-related data" from 10 contractors and their employees at 5 department sites.

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OIG Increased Scrutiny

- Furthermore, in revisiting these criticisms in the November 30th semi-annual report to Congress, the OIG indicated that they have begun requesting payroll information from contractors directly, rather than going through DOE.
- Though the form of these requests was not explicitly discussed in the semi-annual report, OIG is likely requesting this information through an administrative subpoena, or a threat to issue one.
- The OIG noted in this report that a review of the data they obtained through a previous, similar request "**uncovered numerous fraudulent activities, resulting in several active criminal investigations and indictments.**"
- This indicates that OIG will continue to be aggressive in this space moving forward.

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OIG Increased Scrutiny

- **OIG Focus on "Identifying" Data**: The Report offers the latest evidence of the DOE OIG's aggressive push to collect large quantities of data related to DOE and its contractors—and their employees—*in the name of detecting and preventing fraud, waste, and abuse.*

- The OIG's efforts have focused specifically on contractors:
  - Emphasis on contractor payroll records and "identifying data" related to their employees.

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OIG Increased Scrutiny

- In line with this approach, DOE's November 27th System of Records Notice ("SORN") outlines a broad range of data that the OIG may collect:
  - Including personally identifiable information, such as dates of birth, corporate-issued identifiers (e.g., frequent flyer numbers), and even Social Security numbers.
  - The SORN also exempts the OIG from standard Privacy Act requirements to share certain information with individuals whose personal data is collected, citing statutory exemptions applicable to information pertaining to criminal enforcement and investigatory activities. The agency is currently accepting public comments on the SORN, which is slated to take effect on December 27th, 2023, absent an amendment or extension.

OIG Increased Scrutiny

- **OIG Focus on "Preventative" Measures**: The collection and analysis of data is an increasingly key piece of OIG's enforcement toolkit, as evidenced by the OIG's establishment of a new Data Analytics Division discussed in a September 2022 semi-annual report.
- While data analysis *per se* is not new, the OIG's approach appears to be uniquely aggressive.
  - Using collection of personally identifiable information as a prophylactic measure rather than as a response to a specific allegation of fraud, waste, or abuse.
  - For example, in the November 27th SORN, OIG emphasized the need to collect data to "assess risk," "promote economic efficiency," and "prevent and detect fraud, waste, and abuse." In this regard, the OIG appears to be deploying a sweeping and far more aggressive data analytics operation.

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OIG Increased Scrutiny

- **OIG Continuing Focus on Exercising Enforcement Authority:** In addition to promising a Special Project Report on DOE's cooperation with respect to data analytics, the Report also foreshadowed a number of forthcoming reports that, taken together, suggest that the OIG is intent on maximizing the effect of its enforcement authority.
- Notably, the report previewed an upcoming Special Project Report on opportunities to improve the suspension and debarment process at DOE.
- Noting that DOE has not historically had a "robust" suspension and debarment program, OIG indicated that opportunities to improve this program may include suspension and debarment decisions based not just on criminal convictions or serious civil offenses, *but also evidence to indicate that a company or individual is "not presently responsible."*

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OIG Increased Scrutiny

- The Report also previewed an upcoming Special Project Report on mandatory disclosures, citing "significant lapses" in mandatory reporting of violations of Federal criminal law. This Special Report, expected in December 2023, will detail OIG's recommendations for DOE to improve its oversight efforts.

OIG Increased Scrutiny

- Given this increased scrutiny and OIG's focus on strengthening their enforcement authority:
  - DOE contractors and subcontractors must be hyper-vigilant in ensuring continued compliance with their contractual obligations.
  - In line with OIG's key areas of focus, contractors and subcontractors should pay particular attention to compliance with cybersecurity and data collection/retention provisions and should evaluate and improve internal procedures for the detection and disclosure of conflicts of interest and violations of Federal law that would be subject to mandatory disclosure requirements.

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What Does It Mean for Contractors

- Increased efforts made by DOE to respond to pressure
- DOE CO Decisions
- DOE Cognizant Audit Agency Audit Findings
- DOE OIG Investigations

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Recent Investigation Trend Examples

Trending IG investigations:

- Employee experience training representations
- Cost allowability
  - Employee productivity – and support for productivity
- Cost support
  - Time cards vs. other support for costs
  - What contract calls out vs. what DOE now expects
  - Timing of assessment
  - Auditor focus and changes

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Employee Productivity

- **Both Craft and Staff professional:**
  - Down-time
  - Delays
  - Idle time
  - Lack of Productivity

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Employee Experience/Training Representations

- **Contractor representations regarding employee**
- **Lack of consistency with SOW**
  - Education
  - Training
  - Certifications
  - Years of Experience
- **Examples of government challenges:**
  - Lack requisite education
  - Lack requisite training
  - Lack years of experience
- **Result**
  - Determination of cost unallowability and fraud

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Cost Support

- **Are your Costs Supported?**
- FAR 31.201-2 (d) — A contractor is responsible for accounting for costs appropriately and maintaining records, including supporting documentation, **adequate to demonstrate that costs claimed have been incurred, are allocable to the contract and comply with applicable cost principles in this subpart and agency supplements.**
- The contracting officer may disallow all or part of a claimed cost that is inadequately supported.
- What does this mean?
- What if there is a disagreement on support?
- What are your remedies?

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Cost Support

- Under a cost-reimbursable contract, the accounting system must be ***adequate*** and ***approved*** by the government under FAR Subpart 31 cost principles.
- Outlines how you will account and support costs.
- Failure to maintain an acceptable system, as defined by the clause, may result in.
  - Withholding of payments
  - Disapproval of the system

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Cost Support

- An acceptable accounting system complies with system criteria found in FAR Subpart 31 to provide reasonable assurances that:
- Applicable laws and regulations are complied with;
- The accounting system and cost data are reliable;
- Risk of miscalculations and mischarges are minimalized; and
- Contract allocations and charges are consistent with billing procedures.

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Cost Support

- Accounting system must be approved by the government;
- Accounting system is audited by government cognizant audit agency;
- Government has knowledge and has signed off on system;
- Arguments exist supporting your process; and
- Can be used to challenge determination of unallowability.

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Cost Support

- Example: Contractor accounting system dictates that contractor will confirm and approve subcontractor costs by review and confirmation of subcontractor daily records.
- Accounting system requires subcontractor daily records to include certain information regarding individuals and hours worked.
  - Contractor complies with specifics in accounting system –Reviews subcontractor invoices
  - Reviews subcontractor daily records
  - Based on contemporaneous review, Contractor approved invoice
- But Government then challenges allowability of subcontractor invoice because Contractor does not have subcontractor time cards.

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Cost Support

- Contractor's compliance with approved accounting system supports cost allowability
- Are costs allowable, reasonable and allocable?
- Did contractor comply with its own processes and procedures for invoice approval?
- Any contract terms that contradict process/procedure?

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Recent Investigation Examples

- **Incurred Cost Submissions**
- **Labor and Staff Augmentation**
  - Legal Costs – any unallowable legal matters
  - Certification Pay – support for overtime pay
  - Contracted Labor Time Recording
    - Time sheets submitted before work performed – timekeeping system deficiencies
    - Contractor unable to provide original timesheets supporting CLTR transactions
    - Contractor did not reconcile CLTR charges with time sheets
    - Management of CLTR subcontract agreement and modifications
  - **Contractor did not collect and retain vendor time sheets at the time recorded in CLTR system**
    - Vendors are paid automatically based on recorded time
    - Contractor systematic failure to obtain time sheets
    - Tie back to approved accounting system and requirements therein

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Recent Investigation Examples

- **Subcontractor Incurred Costs**
  - Legal services costs – matters settled/OIG investigations
  - Cases in which DOE found legal fees provisionally allowable but then contractor settled – at that point determined to be unallowable.
  - Subcontract vendor costs:
    - Lack of support
    - Lack of time cards
    - Challenging employee credentials
    - Training support
- **Unreasonable Travel costs**
- **"Idle" costs**
- **Lobbying**
- **Questions on Training**

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Recent Investigation Example

- **Parent Organization Support Costs**
- Contractor and Government entered into a performance-based cost-plus-award-fee contract.
- The underlying contract incorporated various FAR and Department of Energy Acquisition Regulation ("DEAR") clauses.
- A Section of the contract addressed parent organization support on behalf of the prime contractor during performance of the contract.
- Section also required the prime contractor to submit an annual Parent Organization Support Plan ("POSP") if Contractor or Government determined parent support was necessary.

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POSP

- Contractor submitted a POSP to Government, which included the ways in which parent organizations would support Contractor.
- The support was two-fold: 1) a "members committee" of parent organization executives to provide advice and oversight to Contractor activities; and 2) direct support from the parent organizations for "expert assistance" on an as needed basis.
- In accordance with FAR 31.201-2(d), Contractor incorporated a cost review system for parent organization invoices.
- Contractor conducted audits of parent organization costs and found that use of the POSPs was in accordance with terms of the contract.
- Following a Contractor internal audit of parent costs, Government began requesting payroll information for each person included in the POSPs.
- When Contractor did not provide payroll information, DOE subsequently found parent organization costs unallowable.
- COFD issued which was appealed to the U.S. Civilian Board of Contract Appeals.

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POSP

- At the CBCA, Contractor argued that neither the FARs nor the contract terms required that Contractor provide the information regarding parent organizations sought by Government.
- The CBCA looked to the express provisions of the contract and applied a "plain reading" to the provisions.
- The CBCA found that the contract did not require Contractor to provide Government with audit or payroll information requested by Government.
- Rather, the CBCA determined that ***Government was attempting to retroactively impose conditions onto Contractor that did not otherwise exist in the contract.***
- The CBCA agreed with Contractor, granting its motion for summary judgment and its appeal.
- POSP costs were deemed allowable.
- The take away …

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Government Action

- Disallowance of cost
- Application of Error Rate based on percentage tested
- Penalty Fees
- OIG Investigation
- Fraud based Civil and Criminal Action

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CLAIM DOCUMENTATION/
ELECTRONIC DISCOVERY CONCERNS

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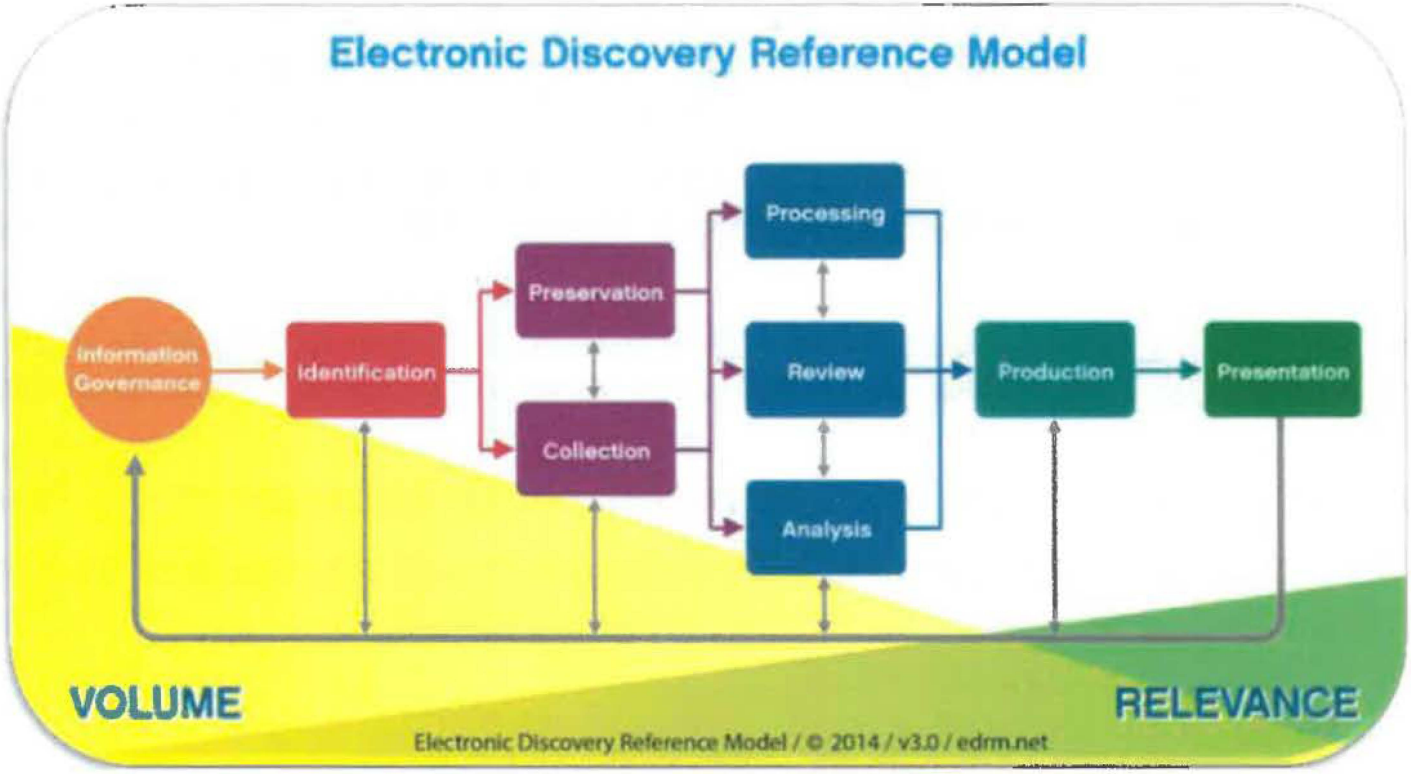
Phases of Claim Documentation



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Information Governance

- Policies, procedures, processes and controls implemented to manage information.
- Every 2 days we create as much information as we did from the beginning of time until 2003.
- Data is growing faster than ever before and by the year 2020, about 1.7 megabytes of new information will be created every second for every human being on the planet.
- By 2020, our accumulated digital universe of data will grow from 4.4 zettabytes today to around 44 zettabytes, or 44 *trillion* gigabytes.
- We perform 40,000 search queries every second (on Google alone), which makes it 3.5 billion searches per day and 1.2 trillion searches per year.
- If you burned all of the data created in just one day onto DVDs, you could stack them on top of each other and reach the moon – twice.

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Steps to Consider and Control

- Information governance
- Challenges of Electronically Stored Information ("ESI")
  - Identification
  - Preservation
    - Litigation Holds
    - Document Retention Policies
  - Collection

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Phases of Document Control

Identification

Locating potential sources of ESI and determining the scope, breadth and depth of that ESI.

Two main components in Identification include:

- Early Case Assessment: Assess case value, strategy, risk analysis, legal hold requirements, etc.
- Early Data Assessment: Interview records management personnel, potential custodians and information management personnel to determine potential locations and types of relevant ESI.

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Phases of Document Control

Preservation and Collection

- Preservation: Ensuring that ESI is protected against inappropriate alteration or destruction.
- Collection: Gathering ESI for further use in the eDiscovery process.

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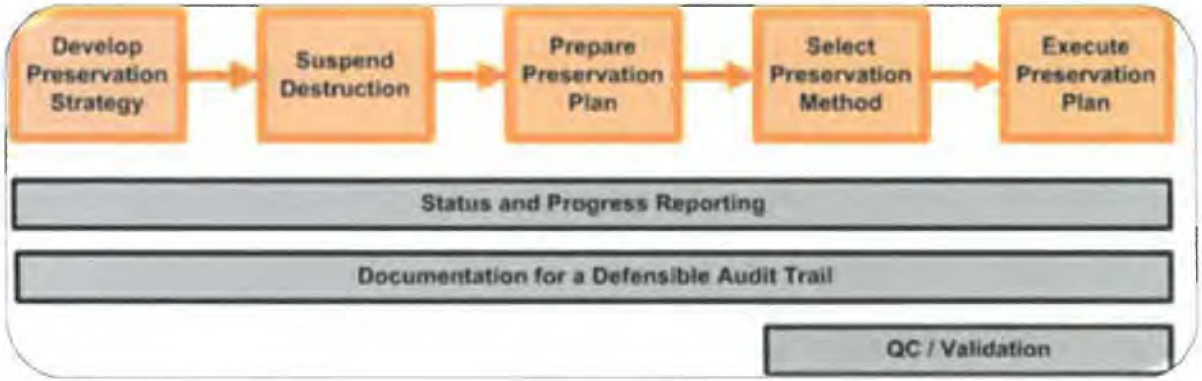
Phases of Document Control

Preservation

Aim: When duty to preserve is triggered, promptly isolate and protect potentially relevant data in ways that are: legally defensible; reasonable; proportionate; efficient; auditable; broad but tailored; mitigate risks.

Goal: Mitigate risks.



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Preserving the Relevant Data

- A Party is "under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. *Zubulake v. UBS Warburg (2003).*
- Duty arises when a party reasonably should know that litigation is likely – often arises before a complaint is filed.
  - Notice letter
  - Government agency notice charge
  - Claim disputes

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Duty to Preserve

- Does not require you to save every shred of paper, every email or e-documents and every backup tape.
- Must make reasonable steps not to destroy "unique, relevant evidence that might be useful to an adversary." *Zubulake*
- Who is to judge what is unique and relevant?
  - Courts find questions should be answered with assistance of counsel.
  - "Depending on the nature of the case, it may be unreasonable, even sanctionable, to allow a party's representatives to make the decision regarding relevance." *Pension Comm. Of Univ. of Montreal Pension Plan v. Banc of America Securities, (N.D. Ca. 2012).*
  - "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus Consulting Group, Inc. Nickie Commarata* (S.D.Tex. 2010).

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Making the Preservation Calls

- Key is balance – balance the core issues in the case, the amount at stake and the burden to collect and review it
  - Don't miss key issues to the case
  - Balance with overburdening
- Challenges for collectors
  - Knowing the hot button issues of the case at its infancy
  - Understanding client technology
  - In-house counsel pressures – viewing obligations from a business vs. legal perspective

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Making the Preservation Calls

- Good preservation practices:
  - Rely on knowledgeable people:
    - Interview people with knowledge of facts
    - Interview people with clear understanding of technology and how data is stored.
  - Depending on the case, survey of employees
    - How they store project info
    - Where they store it
    - List of all email addresses
    - List of all drives used for project
    - Use of hard drives, thumb drives, home computers
  - Bring in an outside vendor as needed

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Making the Preservation Calls

- Meta data:
  - Evidence, typically stored electronically, that describes the characteristics, origins, usage and validity of other electronic evidence.
  - There are all kinds of metadata found in various places in different forms. Some is supplied by the user, and some is created by the system. Some is crucial evidence, and some is just digital clutter. You will never face the question of whether a file has metadata—all active files do.
  - Instead, the issues are what *kinds* of metadata exist, *where* it resides and whether it's potentially *relevant* such that it must be preserved and produced.
  - Understanding the difference—knowing what metadata exists and what evidentiary significance it holds—is an essential skill for attorneys dealing with electronic discovery—Voice mail, instant messaging and other challenging ESI.

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Preservation:
What is your document retention policy?

- Hot issues with document retention policies
  - Company policies – Company wide? Department specific?
  - Accessibility of policies
  - Checks and Balances of policy compliance
  - Consistency with FRCP (and its amendments)
  - Updates based on company technology changes

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Preservation : Litigation Hold Notices

- Rise of duty of preservation – send immediate written litigation hold
- Notice of duty to preserve
- Direction on not to destroy existing documents or those that may be created in the future
  - Failure to issue a timely written litigation hold, in and of itself, may be sufficient evidence of gross negligence to support a claim for sanctions. *Chin v. Port Authority,* (2nd Cir. 2012).
- Key considerations
  - Who should receive it?
  - Do you need to collect at the time hold notice goes out?
    - Any additional steps to avoid any automatic, inadvertent or willful deletion

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Preservation : Litigation Hold Notices

- Content of Hold:
  - Don't say anything you do not want to be made public. While privileged, they may be produced to show preservation steps.
  - Describe case briefly.
  - Define what constitutes relevant information in a comprehensive way that is as simple as possible.
  - Clearly state recipients must ensure the preservation of electronic data as well has hard copy data.
  - May be necessary to give instructions on how to save documents in order to prevent automatic deletion.
  - Provide a contact/ink for confirming receipt of notice and person to whom questions should be directed.
  - Send to key custodians and necessary IT people.
  - Update as necessary.

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Preservation – Litigation Hold Notices

- *Zubulake opinions (2010): Court held* that counsel for the plaintiffs had:
- (1) contacted the plaintiffs shortly after being retained to begin preservation and collection efforts,
- (2) phoned and emailed plaintiffs and distributed memoranda instructing the plaintiffs to be over-inclusive in their collection efforts,
- (3) sent plaintiffs a monthly case status report, which included requests for additional documents, and
- (4) issued a new litigation hold following a stay in the case.

Court found these efforts fell short, however, because they did not expressly direct employees to preserve all relevant records (paper and electronic).

Moreover, the hold placed "total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from Counsel." For this and other negligent conduct, Court granted the defendant's request for an adverse inference, monetary sanctions and additional discovery.

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Collection Plan

- Harvesting
  - Collaborative Process - what that means for you:
    - How wide to cast the net?
    - Custodians/search terms/date range.
- Processing
  - To do in-house or to not do in-house?
- Review
- Analysis
- Production

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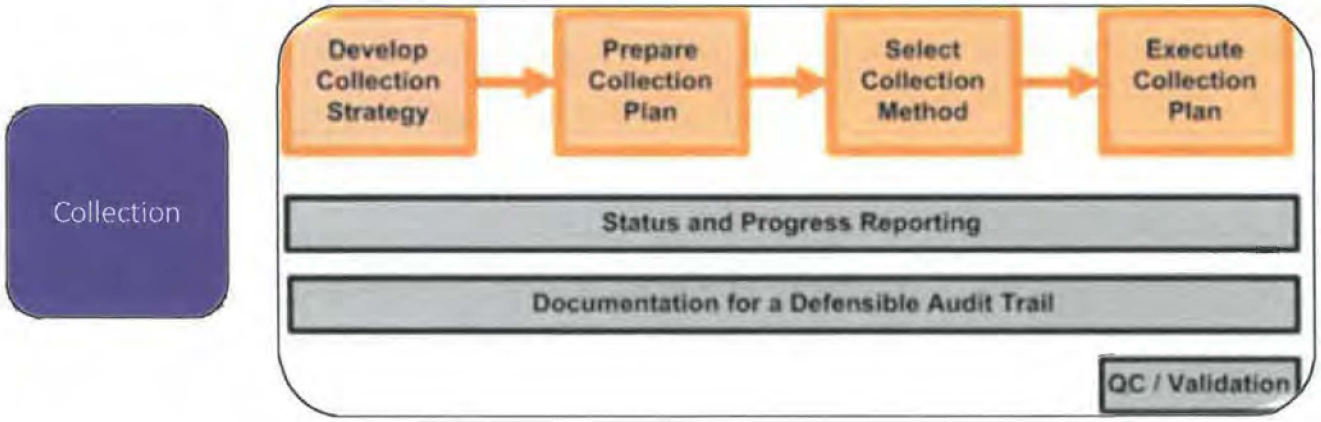
Phases of Claim Document Life Cycle

Collection

Although represented as a linear workflow, moving from left to right, this process is often iterative.



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Phases of Claim Document Life Cycle

Processing, Review, and Analysis

- **Processing:** Reducing volume of ESI and converting it to forms suitable for review & analysis.
- **Review:** Evaluating ESI for relevance & privilege.
- **Analysis:** Evaluating ESI for content & context, including key patterns, topics, people & discussion.

The stages are together in the model because they are often inter-related and occurring simultaneously.

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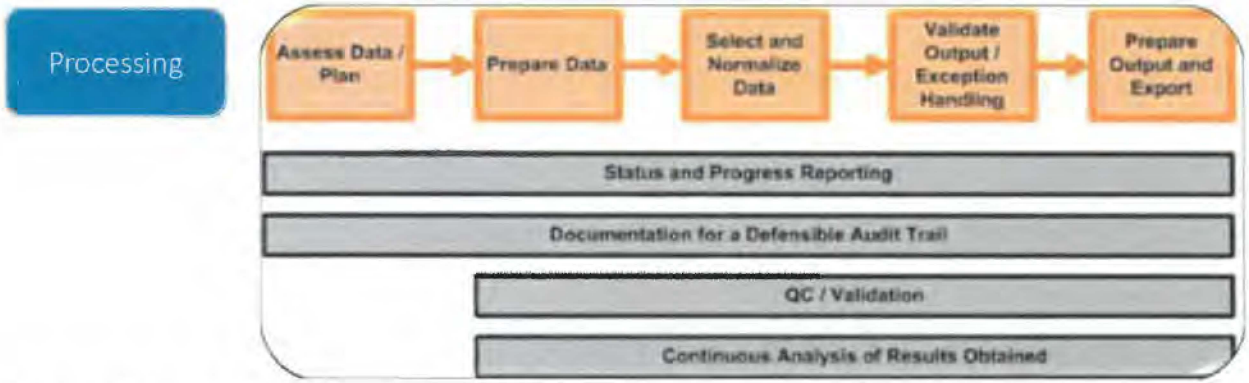
Phases of Claim Document Life Cycle

Processing

Aim: Perform actions on ESI to allow for metadata preservation, itemization, normalization of format, and data reduction via selection for review.

Goal: Identify ESI items appropriate for review and production as per project requirements.



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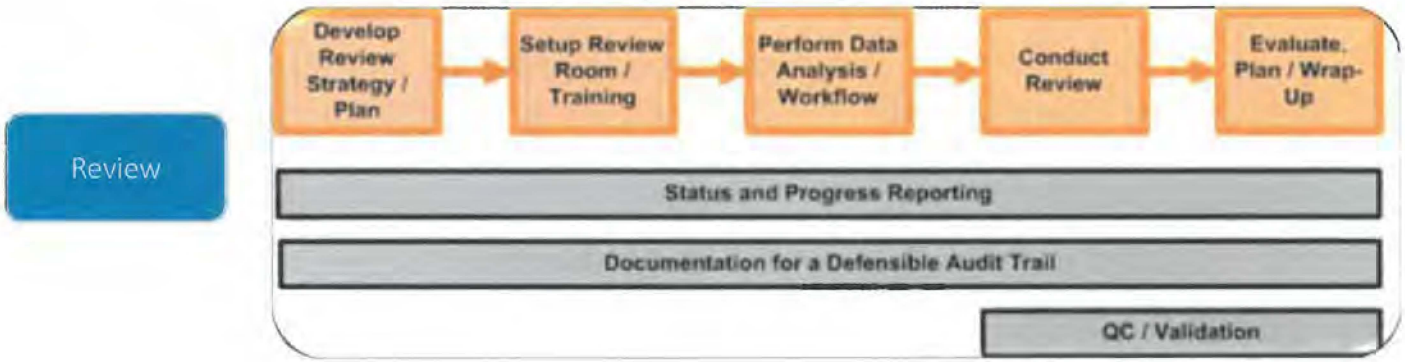
Phases of Claim Document Life Cycle

Review

Aim: To gain an understanding of document content while organizing them into logical subsets in an efficient and cost effective manner. Develop facts, reduce risk, reduce cost, leverage technology, facilitate collaboration and communication.



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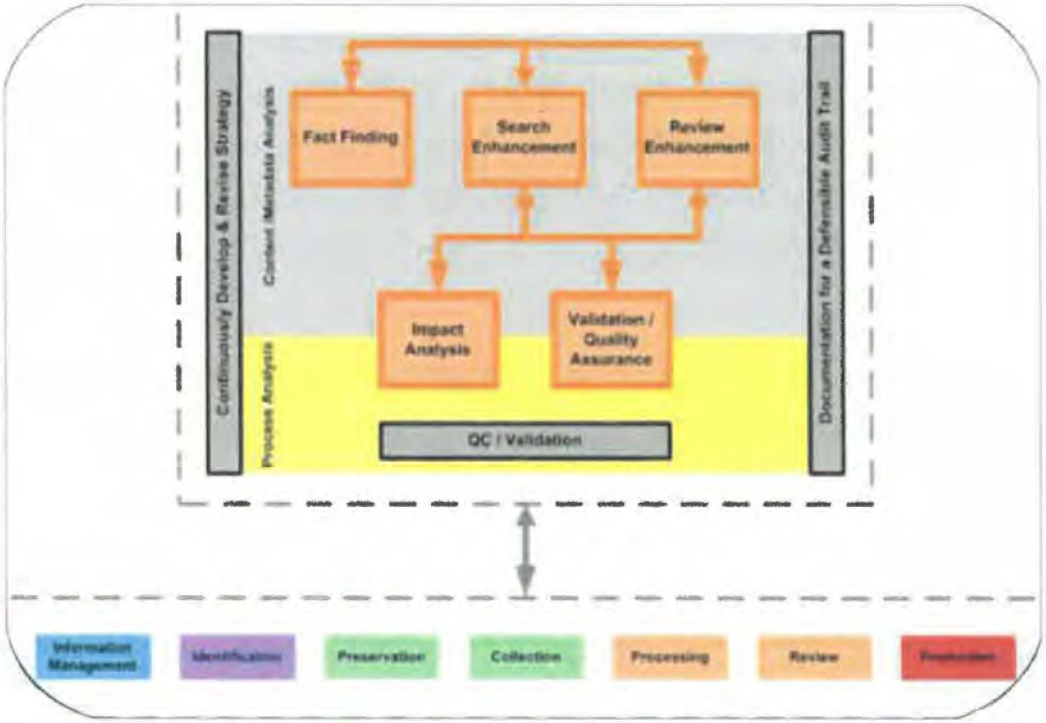
Phases of Claim Document Life Cycle

Analysis

Aim: For litigation teams to be able to make informed decisions about strategy and scope through reliable methods based on verified data.



Analysis

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Phases of Claim Document Life Cycle

Processing

Review

Analysis

Processing, Review, and Analysis

Review isn't always synonymous anymore with attorneys and other legal professionals manually reviewing all documents (after culling) and making determinations.

Technology Assisted Review (TAR): A method of culling relevant documents for production or review, using algorithms to determine the relevance of documents based on linguistic and other properties and characteristics. It relies on the coding from a human sampling of documents called a "seed set." The seed set allows the computer to identify and evaluate the remaining documents. Also known as Predictive Coding.

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Phases of Claim Document Life Cycle

Production

- **Production: Delivering ESI to others in appropriate forms & using appropriate delivery mechanisms.**
  - Subpoena
  - Litigation
  - Civil Investigative Demand

Presentation

- Presentation: Displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native & near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience.

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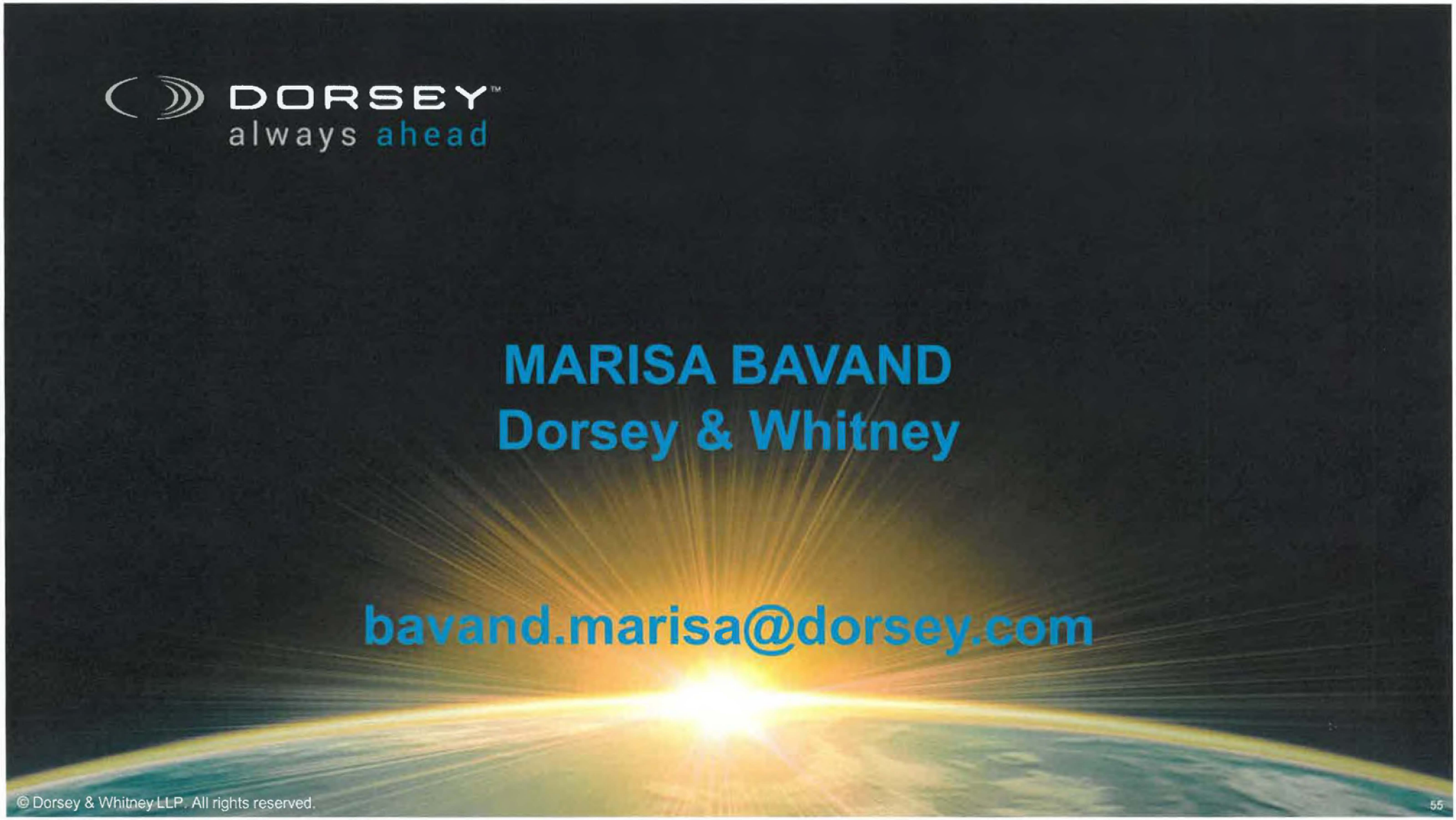

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Speaker Biography -

Investigative Claims and Document Management

Marisa Bavand, Dorsey & Whitney, LLP

Marisa provides counsel to government contractors and construction industry clients on various complex public and private projects. Her practice includes representing public and private owners, general contractors, and engineers with pre-project planning and risk assessment, contract drafting, government investigations, claim management and preservation, and litigating disputes. Marisa provides strategic advice and litigation representation on a large variety of projects including heavy civil, light rail, waterway remediation, naval shipyard remediation, highway, bored tunnels, universities, production facilities, fire stations, mixed use commercial projects, and various vertical construction projects. Marisa has worked on government contract matters involving various Federal and State agencies including, but not limited to the U.S. Department of Energy, the U.S. Navy, the U.S. Army Corps of Engineers, the California Department of Transportation, the State of Washington, the Washington State Department of Transportation and Washington State Sound Transit Authority. She regularly advises clients in navigating various Federal statutes/regulations and has represented clients extensively related claims asserted under the Federal False Claims Act. Marisa is licensed to practice in the states of Washington and California.