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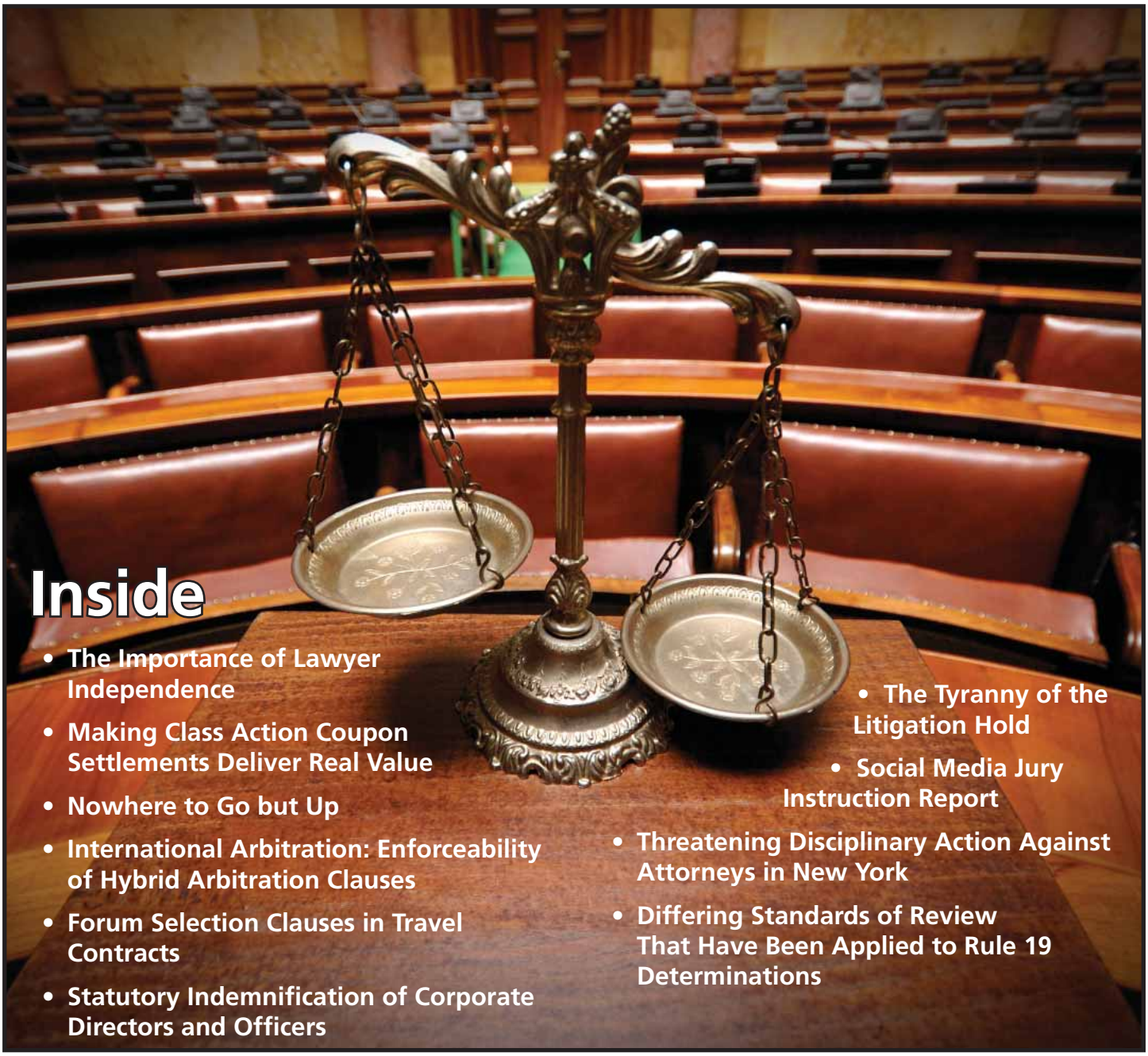

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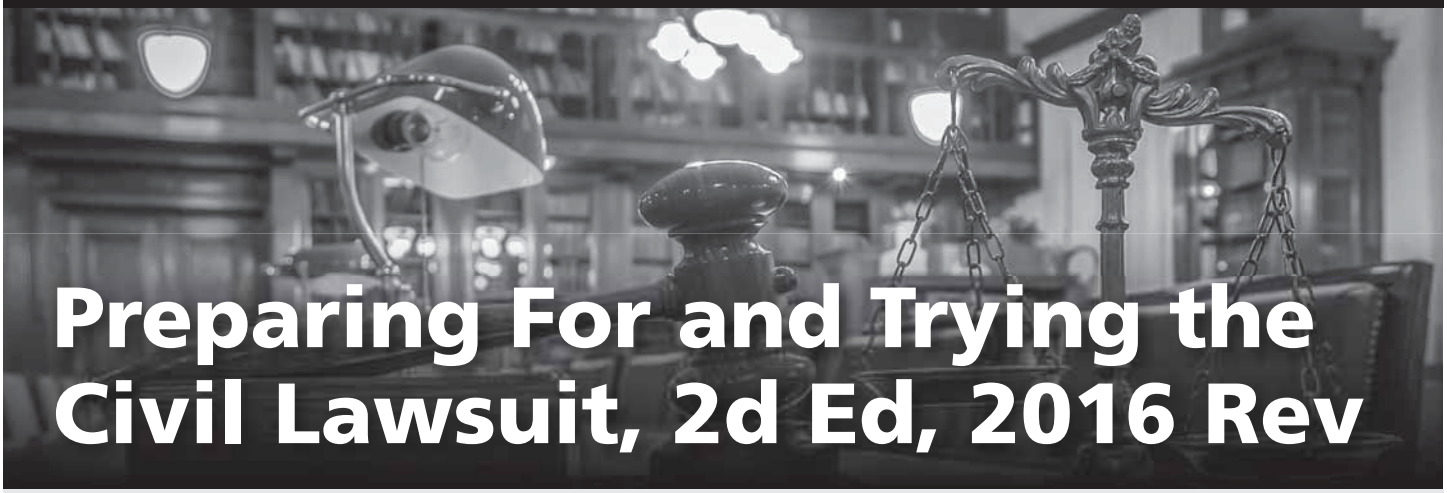
Table of Contents

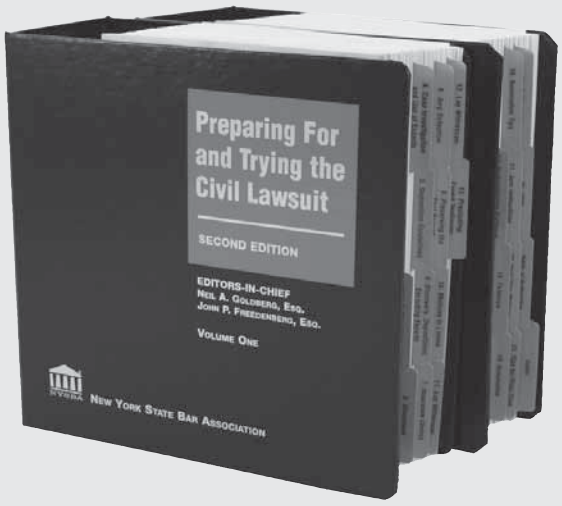
Spring 2016 • Vol. 21, No. 1

Page

From the NYSBA Book Store



Preparing For and Trying the Civil Lawsuit, 2d Ed, 2016 Rev



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A Message from the Chair
The Importance of Lawyer Independence

Perhaps the most important rule of professional conduct is 2.1, which is quietly titled, "Advisor." That rule is also known as the "lawyer independence" rule. The rule states, in simple and concise terms, that lawyers must give honest, candid advice to their clients. It provides, *"In representing a client, a lawyer shall exercise professional judgment and render candid advice."* That pronouncement seems clear and easily understood. It is the backbone of our legal system; the integrity of the rule of law rests on strict loyal adherence to that rule.

"Lawyer independence" does not mean "freedom from regulation." Indeed, to the contrary, lawyers become guardians of the integrity of our system. We are a so-called "self-regulating" profession because of this rule. Any erosion of this rule erodes our system. We must guard it zealously.

60 Minutes ran a segment earlier this year highlighting the importance of lawyer independence. It was troubling to say the least. The piece, entitled "Anonymous Inc." explored money laundering in the U.S. (which apparently has become the most favored nation among foreigners with dirty money). Acting undercover, a nonprofit group called Global Witness secretly recorded client interviews with 16 New York lawyers. Excerpts of the interviews were aired. The lawyers' advice and responses to the clients varied wildly. The segment was difficult to watch. The many blogs about lawyers that followed that week were both disconcerting and embarrassing to the profession.

TV shows don't help. The main character portrayed in *Better Call Saul* is the very antithesis of that ever-important rule. The show remains hugely successful.

This concern is not new. Abraham Lincoln, in a memorandum for law lecture in 1850, aptly observed:

> There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

We must strongly guard "lawyer independence" to preserve the integrity of our system. This means rendering candid, albeit unpleasant or difficult advice to our clients. Without that, the system fails. Even more importantly, it means we must teach and mentor younger lawyers the critical importance of this rule and how we are entrusted to uphold that obligation. Each step we take without adherence to that rule, no matter how small it may seem, has a destructive effect on our rule of law and system as a whole.

James M. Wicks

Making Class Action Coupon Settlements Deliver Real Value to Class Members

By Hon. Thomas A. Dickerson

Once started, how are consumer class actions resolved? Typically, but not always, after a class action is certified, the parties will begin serious negotiations to reach a settlement. Any proposed settlement must be examined and conditionally approved by the court before the class is notified and given an opportunity to raise objections. Ultimately, the court conducts a hearing and may or may not approve the settlement, in whole or in part. In addition, the court may pass on class counsel's fees and costs application. In this article, we will discuss the viability of class action settlements featuring non-cash compensation, such as vouchers or coupons, which provide a discount towards the purchase of defendant's goods or services. In addition, we shall examine the recent decision of the 7th Circuit, in *In re Southwest Airlines Voucher Litigation*, approving a "coupon settlement" consisting of "replacement drink vouchers."[1]

Non-Cash Coupon Settlements

Although subject to criticism, there are occasions when a non-cash settlement of coupons for the purchase of goods or services from the defendant may be appropriate. The reasons for allowing coupon settlements include (1) recovery of de minimis damages (which makes the cost of distribution of each individual's cash award higher than that individual's claims), (2) the inability to identify class members, (3) the defendant's inability to pay cash to the class, or (4) because it makes good business sense from the standpoint of both the consumer and defendant. Since coupon settlements are generally worth less to consumers than cash, they must be carefully examined for adequacy. Yet coupon settlements are justified because they solve manageability problems, may reflect the defendant's financial instability, and require a defendant to disgorge improperly obtained monies. The primary concern for the court is to ensure a proposed coupon settlement is nearly as good as a cash settlement.

Transferability and Cash Convertibility

Coupons, typically, require the purchase of specific goods and services, which the class member may not want. The coupons should be convertible into cash either by redemption or by being transferable to persons or entities, such as coupon brokers, who are willing to pay cash for them. Cash convertibility, even at a discount, would be acceptable. Coupon settlements that limit transferability to family members and provide no cash convertibility, no cash sales, and no redemption through travel agents[2] may be problematic at best.

Redemption Rates and Tracking

In evaluating the merits of a coupon settlement, an appropriate means of measuring true value is to estimate the actual redemption rate of the offered coupon. Coupon settlement is particularly attractive for defendants because the average redemption rates on food and beverage coupons have consistently been between 2 percent and 6 percent.[3] A coupon settlement should require post-settlement tracking of the redemption rate of the coupons. Better yet, there should be a 100% redemption of the offered coupons or credits. The 100% redemption means that the coupons must be transferable, cash convertible, and the defendant must continue to issue coupons until the agreed-upon cash face value of the settlement is reached. For example, in *Feldman v. Quick Quality Restaurants, Inc.*, the settlement provided for the issuance of food coupons with a minimum value of $0.50. The defendants were required to continue issuing and distributing to consumers until the agreed upon face value of the settlement was reached.[4]

Time Limits and Redemption Methods

Equally important in measuring the actual value of a coupon settlement is the time during which redemption must take place and the manner in which the coupons must be redeemed. As for duration of coupon redemption, the longer the time period, the better. Redemption periods of three years, two years, and one year have been found to be acceptable.[5] As for the method of redemption, the consumer should not be required to reveal his or her intention to use the coupon or credit until the parties agree on the price. For example, if the retailer is aware that the consumer intends to use a coupon or credit, the retailer may increase the sale price to compensate for the reduced payment.

Problem of Attorney Fees

Coupon settlements also raise issues on evaluating class counsel's request for an award of legal fees and costs. Typically, when there is a monetary settlement, the Court may use either the percentage method or the lodestar method[6] in determining the appropriate fee. However, in coupon settlements, a fee award may not be appropriate when it is based on a percentage of an estimated settlement value, which itself is based upon an estimated redemption rate. To avoid this problem, the court may wish to base a fee award on claims actually made or require class counsel to accept a portion of their fees in the same non-cash consideration in the settlement. For example, in *Aburine v. Northwest Airlines Inc.*, class counsel accepted

cash and $200,000 in non-transferable credit for travel.[7] The rationale for requiring class counsel to share with class members is that it ensures value for the non-cash component, on the theory that class counsel would not accept a fee that is relatively worthless. In the alternative, counsel fees should be based upon the actual recovery to the class. This alternative requires cash convertibility, transferability, extended redemption periods, post-settlement tracking, and continued coupon issuance, until the amount redeemed equals the promised cash value of the settlement.

The Southwest Vouchers Settlement

In In re Southwest Airlines Voucher Litigation, decided August 20, 2015, the court noted "[t]hese appeals present several issues concerning class action litigation and settlements. The most general is whether the 'coupon settlement' provisions of the Class Action Fairness Act…allowed the district court to award class counsel an attorney fee based on the lodestar method rather than the value of the redeemed coupons. Our answer to that question is yes."[8]

The Drink Vouchers

"For several years passengers who bought 'Business Select' tickets on Southwest Airlines received vouchers good for a free in-flight alcoholic drink. The vouchers did not contain expiration dates. Some customers saved them for future use, and Southwest honored them, at least for a while. In August 2010, however, Southwest stopped honoring these older vouchers, announcing that each voucher was good only on the flight covered by the accompanying ticket."[9]

The Lawsuit

Plaintiffs "Levitt and Malone filed suit against Southwest on behalf of a purported class of plaintiffs holding unredeemed Business Select drink vouchers that were suddenly worthless. The class alleged claims for breach of contract, unjust enrichment and violations of state consumer fraud laws. The district court quickly dismissed the unjust enrichment and statutory claims as preempted by the federal Airline De-Regulation Act. The breach of contract claim remained."[10]

The Settlement

"The parties agreed to settle the breach of contract claim. The settlement provides for class certification and includes three types of relief. First, it requires Southwest to issue replacement coupons to each class member who files a claim form. The coupons are transferable and good for one year on any Southwest flight. Second, the settlement provides injunctive relief to prevent similar controversies over expiration dates if Southwest issues new coupons in the future. Third, the settlement provides for incentive awards to the two lead plaintiffs of $15,000 each."[11]

Class Member Objections

Two class members objected to the proposed settlement because "the fee settlement included 'clear-sailing' and 'kicker' clauses designed to shield the fee award from challenge."[12] "In a typical 'clear-sailing' clause the defendant agrees not to oppose a fee award up to a certain amount. A 'kicker' clause provides that if a court reduces the attorney fee sought in a class action, the reduction benefits the defendant rather than the class."[13] In addition, objectors asserted that "the attorney fee in this 'coupon settlement' had to be based on the value of coupons actually redeemed by class members, under a provision of the Class Acton Fairness Act."[14]

Settlement Approved

"The district court approved the class settlement as fair and reasonable, focusing primarily on the fact that the settlement provided essentially complete relief to the class. The district court determined that [Section] 1712 applied to the settlement because the vouchers were 'coupons' within the meaning of that provision, though the usual concerns about coupon settlements are minimal here because the class's claim itself is for the value of coupons that already required class members to buy plane tickets to use."[15] The court further determined that section 1712 "permits the use of the lodestar method to determine attorney fees based on coupon relief" and, therefore, approved an award of $1,649,118.[16]

Fee Awards In Coupon Settlements

"When Congress enacted the Class Action Fairness Act, one of its targets was abusive 'coupon settlements,' where defendants and class counsel agree to provide coupons of dubious value to class members but to pay class counsel with cash."[17] "The potential for abuse is greatest when the coupons have value only if a class member is willing to do business again with the defendant who has injured her in some way, when the coupons have modest value compared to the new purchase for which they must be used, and when the coupons expire soon, are not transferable, and/or cannot be aggregated."[18]

Attorneys Fees and Lodestar Method

"We hold first that [Section] 1712 applies to this settlement."[19] "The replacement vouchers for free drinks on Southwest flights are indeed 'coupons' and hence this settlement is subject to [Section] 1712."[20] In the 7th Circuit's holding, it recognized the more difficult issue to be "whether [Section] 1712 allowed the district court to use the lodestar method to calculate the fee award for class counsel."[21] Objectors argued that section 1712 prohibited use of the lodestar method, and, the only permissible

basis for a fee award here would be the value of the new coupons actually redeemed by class members. Under this view, use of the lodestar method in a coupon settlement is not permissible.[22] This view was adopted in *In re H.P. Inkjet*.[23] However, in analyzing section 1712, the court noted the text, structure, legislative history, and the legislative purpose of the statute that "allows a district court discretion to use the lodestar method to calculate attorney fees even when those fees are intended to compensate class counsel for the coupon relief he or she obtained for the class."[24]

Fairness of the Settlement

"No party disputes the adequacy of the class relief. This is not a case where coupons of dubious value will be provided to compensate for a loss of cash. The class lost the value of drink coupons. The settlement provides replacement drink coupons, on a one-for-one basis. The claims process is easy, and the replacement coupons will remain valid for one year. There is also a happy alignment of interests between class members and Southwest. Southwest has no incentive to insist on a stringent claims process. Every replacement coupon can be used only by a customer who buys a plane ticket."[25] The court recognized that "Southwest should benefit from every one that is actually used. The benefits for a defendant under a coupon settlement are usually a reason for caution if not skepticism. This case is different though, Southwest would have received the same benefits from the old coupons. Serendipitous or not, such essentially complete relief for the class is the model of an adequate settlement."[26] The court further noted that "[t]he class members will receive everything they reasonably could have hoped for. While some replacement coupons might never be used, the same could be said of the original coupons."[27]

Endnotes

1. *In re: Southwest Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015).
2. *See In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 421 (N.D. Ga. 1992) (holding objectors to proposed settlement granted limited discovery).
3. *See* Weinstein, *The Love/Hate Dynamics: Coupons Issued by Manufacturers*, 71 Progressive Grocer 117 (May 1992).
4. *Feldman v. Quick Quality Restaurants, Inc.*, N.Y.L.J. July 22, 1983, p. 12, col. 4 (N.Y. Supp.).
5. *See In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. at 425 (allowing discovery for redemption of two to three years); *see also In re North Atlantic Air Travel Antitrust Litig.*, Index No. 84-1013, at *4 (D.C. Cir. 1986) (recognizing five years for redemption).
6. Lodestar Method is the value of time spent in prosecuting the class action.
7. *See Aburine v. Northwest Airlines, Inc.*, No. 3-89-402, at *4 (D. Minn. Aug. 16, 1991).
8. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 701 (7th Cir. 2015).
9. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 704.
10. *Id.* at 704-705.
11. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 705.
12. *Id.*
13. *Id.*
14. *Id.*
15. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 705.
16. *Id.* After an evidentiary hearing on counsel's Rule 59(e) motion, the fee award was increased. *Id.*
17. *Id.* at 705-06.
18. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 706 (citing *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177-79 (9th Cir. 2013) (discussing some of these common concerns about coupon settlements)).
19. *Id.*
20. *Id.*
21. *Id.*
22. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 706 (noting exceptions for compensation to counsel for obtaining injunctive relief).
23. *See In re H.P. Laserjet Printer Litig.*, 716 F.3d at 1183-85.
24. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 707.
25. *In re Southwest Airlines Voucher Litig.*, 799 F.3d at 711.
26. *Id.*
27. *Id.*

Hon. Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is also the author of Travel Law 1 (ALM Media Properties, LLC, 2015); *see* Appellate Division Second Judicial Department, http://www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml (last visited Oct. 13, 2015); *see also* Class Actions: The Law of 50 States 1 (ALM Media Properties, LLC, 2015); Weinstein et al., New York Civil Practice: CPLR, Article 9 (David L. Ferstendig, 3rd ed. 2015), *available at* http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?prodId=10532#sthash.UpfknUjZ.dpuf; *see also* Commercial Litigation In New York State Courts Chapter 111 (Robert L. Haig, 4th ed. 2015); co-author of Litigating International Torts in U.S. Courts 1 (Thomson Reuters, 2015).

Nowhere to Go but Up

By Eve Kerzhner and Amit Shertzer

After the dust of the 2008 financial market crash settled, New Yorkers started to do what we do best in the wake of tragedy: re-build. In terms of real estate development, this is to be taken literally. For the past several years, it seems everywhere one looks there is a new designer tower, surrounded by cranes and countless crew embers, waiting to assert its place in this world-famous skyline. However, behind the glass, steel and foreign wealth vying for a premium slice of the big apple there is a lesser known reality: litigation. Some New Yorkers don't like what they see (or don't see, rather). Petitions to save prized views or halt construction by major developers have even reached the New York court system.

The Pierhouse is a luxury condominium and hotel complex currently under way in Brooklyn Bridge Park. It promises owners front-row seats to the vista of the East River, Brooklyn Bridge and Manhattan skyscrapers. However, from the earliest stages of this project, there has been pushback from the residents of Brooklyn Heights who contend that this development blocks prized views of the Brooklyn Bridge and Manhattan, once openly seen from the Brooklyn Heights Promenade and the historical brownstones behind it.[1]

In March 2015, Save the View Now ("STVN" or the "Plaintiff") commenced an action against the Pierhouse Developers in Kings County Supreme Court, arguing that the structure violates the building height limitations set forth in the Modified General Project Plan ("MGPP") presented to the community in 2006, and sought a temporary restraining order and preliminary injunction halting construction.[2] There was a disagreement between the two parties about the proper points of measurement for the building height limitations. Brooklyn Bridge Park Corporation, New York State Urban Development Corporation, Brooklyn Bridge Park Development Corporation, the City of New York, Toll Brothers Real Estate Inc., and Starwood Mortgage Capital LLC (jointly "Defendants") argued that the height measurements were calculated consistent with industry standards and zoning codes. The Plaintiff, however, believed that the measurements should be read to include the bulkheads and parapets moved to the roof after superstorm Sandy because such was the only "common sense" way to measure.

In June 2015, the court found that the buildings being built were "in conformity with the MGPP" because rooftop mechanical equipment is a permitted obstruction excluded from height limitations of the New York City Zoning Resolution and Building Code ("Zoning Resolutions"). The court also found that "the time within which to challenge the construction has expired" based on the four-month statute of limitations governing Article 78 proceedings; in this instance, the challenged government conduct was the approval of Brooklyn Bridge Park. Ultimately, the court felt that even though STVN framed this case as a declaratory judgement, it was really an Article 78 proceeding.

In July 2015, STVN moved to amend its complaint and renew its motion for a preliminary injunction based on what it argued was newly discovered evidence (*e.g.*, copies of leases and building plans that STVN claimed were never released by the Defendants). STVN argued that "the Defendants offer no evidence of a final government action by…[any] governmental agency, that permitted or allowed the construction of buildings on Parcel A and Parcel B in violation of applicable legal requirements." As such, the Plaintiff claimed that the dispute could not be challenged in an Article 78 proceeding. The Defendants responded by asserting that the materials cited by the Plaintiff as "new" were all public records available at the time of STVN's initial motion for an injunction and, thus, could not be a proper reason for a motion to renew under CPLR 2221(e).

The Plaintiff also argued that the newly discovered building plans showed that the rooftop structures and bulkheads did not contain only mechanical equipment, but rather other amenities and additional structures (*i.e.*, awnings, event spaces, kitchens, outdoor showers, etc.). STVN reasoned that these kinds of additional structures were not permitted obstructions under the Zoning Resolutions and should not be excluded from the height limitations set out therein. The Defendants responded by arguing that the Zoning Resolutions provided only general guidance.

On September 21, 2015, Judge Knipel denied STVN's request for a preliminary injunction yet again, standing by his previous decision granting the Defendants' motion to dismiss on statute of limitations grounds. The Court explained that the point about the additional rooftop structures and zoning issues had been rendered moot by the statute of limitations, but even if it had not been, the structures were "outside the bulkheads and are only illustrative of potential rooftop activity. Such activity does not impact the structure or fixtures of the building itself." On October 2, 2015, STVN filed a notice of appeal, showing that the fight to keep this prized view will be hard-fought.

Real estate litigation is not confined to disputes over air space in new residential projects. As the New York City real estate market continues its hot streak, high-stakes litigation has been commenced over some of the City's most valuable commercial property as well. There may be no better example than the litigation currently taking

place over a massive new planned development in the so-called "Vanderbilt Corridor," a row of five sites near Grand Central Terminal along Vanderbilt Avenue between 42nd Street and 47th Street.

The litigation concerns the type of property known as transferrable development rights ("TDRs"), which are also commonly referred to as "air rights." Under the City's zoning laws, an owner of under-developed property may, under certain circumstances, sell or transfer excess development rights (*i.e.*, TDRs) to a buyer who owns adjoining property. By purchasing the TDRs, the buyer obtains additional floor area that it can use for its property and that it otherwise would not have had under the zoning laws.

The litigation involves Midtown TDR Ventures LLC and Midtown GCT Ventures LLC (jointly, "Midtown"), which own Grand Central Terminal. Since the Terminal is a designated landmark, Midtown is effectively prohibited from building on top of it. As such, in Midtown's view, the true value of this property is not the Terminal itself but the 1.2 million square feet of unused TDRs that are part and parcel of the property.

On September 28, 2015, Midtown filed a complaint in the U.S. District Court for the Southern District of New York. The complaint seeks around $1.1 billion in damages against the City of New York and $475 million of damages against the City's largest office landlord, SL Green Realty Corporation and its affiliates ("SL Green").[3]

The subject of the litigation is whether Midtown was wrongfully deprived of the value of its Grand Central Terminal TDRs when SL Green received a special permit under a City zoning amendment that granted it approximately 536,000 square feet of additional development rights in the Vanderbilt Corridor. Without this special permit, Midtown contends, SL Green would have had to purchase the TDRs from Midtown for fair market value. According to the complaint, the special permit amounted to "a classic violation of the Public Use clause of the Fifth Amendment to the Constitution—taking the property of a private citizen for the benefit of another private citizen without any public purpose."

In the City and SL Green's view, the special permit was granted following nearly a year of review by multiple City agencies and ultimate approval by the City Council. Furthermore, SL Green's planned use of the development rights to build a 1,400-foot tall, 65-story office tower (to be known as "One Vanderbilt") is conditioned upon SL Green's construction of $220 million worth of improvements in the surrounding area.

As was aptly noted by the *Times*, this litigation "involves complex questions of zoning, constitutional law, politics and potential conflicts of interest."[4] On the legal front, both the City and SL Green have filed letters with the court in which they signal their intent to file a motion to dismiss Midtown's complaint on the ground that it is legally deficient. For its part, Midtown has indicated that it would fight such a motion.

The letters filed with the court also point to a fight over the "bigger picture"—that over the narrative that will play out in the public sphere. Is Midtown a mere opportunistic speculator trying to exploit its "dirt cheap" purchase of Grand Central Terminal to turn it into a windfall, or is Midtown the victim of closed-door politicking aimed at depriving it of its valuable TDRs? Is SL Green the bona fide recipient of development rights in return for which it will contribute $220 million worth of improvements to public infrastructure, or did SL Green improperly cajole its way into influencing the City's public officials into shaping the zoning laws to fit its personal needs? Did City officials approve the special permit to promote the public good, or did they do it to award one of the City's most powerful and well-connected companies an incredible bargain?

What can be said for sure is that, at least when it comes to real estate litigation in New York City, the fight is between Goliaths; David could not afford the legal fees.

Endnotes

1. http://savetheviewnow.org (last visited Jan. 4, 2016).
2. *Save the View Now v. Brooklyn Bridge Park Corp.*, Index No. 504785/2015 (Hon. Lawrence Kniple).
3. *Midtown TDR Ventures LLC v. City of New York*, No. 15-cv-07647 (Hon. Paul G. Gardephe).
4. Charles V. Bagli, *Owner of Grand Central Sues Developer and City for $1.1 Billion Over Air Rights*, N.Y. Times, Sept. 28, 2015, at A22.

Eve Kerzhner and Amit Shertzer are associates in the New York office of Fox Horan & Camerini, LLP.

International Arbitration: Enforceability of Hybrid Arbitration Clauses

By Clara Flebus

1. Introduction

Preeminent courts in Singapore, New York, and Sweden have recently grappled with the issue of whether an arbitration clause may validly provide for one arbitral institution to administer the proceedings under the rules of a competing arbitral institution. Clauses providing for such "hybrid" arbitrations have been challenged as invalid or inoperable, on the ground that the rules of one institution are typically tailored to that institution's unique structure and organization, and thus it would be difficult for another institution to apply them. The counter argument is premised on the principle of party autonomy, which is a cornerstone of arbitration. Since arbitration is a creature of contract, parties to an arbitration clause are free to devise a hybrid arbitral process, incorporating the rules of a certain institution and the administering structure of another. Courts confronted with this issue have adopted a case-by-case approach aimed at preserving the intent of the parties to arbitrate, but contingent upon the feasibility of a workable hybrid arbitration arrangement.

It should be noted that arbitral institutions are generally protective of their own arbitration rules, which are developed with great effort to promote efficient conduct of the proceedings and provide fair and reliable outcomes. In 2012, the International Chamber of Commerce ("ICC") amended its rules (the "ICC Rules") by inserting language intended to prevent the use of hybrid arbitration clauses calling for the application of the ICC Rules by other institutions. Article 1(2) provides that "[t]he [ICC] Court is the only body authorized to administer arbitrations under the [ICC] Rules."[1] Article 6(2) states that "[b]y agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the [ICC] Court."[2] However, the decisions discussed below call into question the effectiveness of these types of provisions.

2. Singapore

a. *Insigma Technology*

In *Insigma Technology Co. Ltd v. Alstom Technology Ltd*,[3] a leading case on this topic worldwide, the Singapore Court of Appeal upheld a hybrid arbitration clause providing that:

> Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English…[4]

The parties entered into a 2004 license agreement granting Insigma a limited license to use Alstom's wet flue gas desulfurization technology in China.[5] The agreement contained the aforementioned arbitration clause. Subsequently, a dispute arose over the proper basis of calculating the annual royalties payable by Insigma to Alstom. Initially, Alstom commenced an arbitration with the ICC. Insigma objected to the ICC's jurisdiction, arguing that the parties had agreed to have the Singapore International Arbitration Centre ("SIAC") administer the arbitration, also because of its lower administration costs. This prompted Alstom to inquire with SIAC whether it would administer such a hybrid arbitration. After SIAC agreed to apply its own SIAC rules with the ICC rules used "as a guide to the essential features the parties would like to see in the conduct of the arbitration," the ICC arbitration was withdrawn on consent of the parties. [6] Alstom then commenced an arbitration proceeding at SIAC.

Once the arbitral tribunal was constituted, SIAC further indicated it was prepared to administer the arbitration under the ICC Rules to the exclusion of the SIAC Rules. More specifically, SIAC stated that some of its bodies would perform the functions assigned by the ICC Rules to bodies within the ICC, to wit, the SIAC Secretariat would function as the ICC Secretariat, the SIAC Registrar as the ICC Secretary-General, and the SIAC Board of Directors as the ICC Court. Despite this arrangement, Insigma challenged the enforceability of the arbitration clause before the arbitral tribunal, arguing that the reference to both SIAC, as the administering institution, and the ICC Rules rendered the clause "invalid and void for uncertainty."[7] The tribunal, however, found that the arbitration agreement was valid. It further noted that the agreement was not inoperable because SIAC was capable of administering an arbitration proceeding under the ICC Rules by having its own institutions perform *mutatis mutandis* the functions of the ICC institutional bodies.[8]

Subsequently, Insigma made an application to the Singapore High Court to set aside the decision of the arbitral tribunal that it had jurisdiction to hear the dispute, on the ground that the arbitration agreement was "inoperative for uncertainty."[9] The High Court dismissed the application. Significantly, the court found that: (a) it was clear and undisputed that the parties intended to resolve their

disputes by arbitration; (b) the parties had not bargained for an ICC institutional arbitration, but for a hybrid *ad hoc* arbitration administered by SIAC and applying the ICC Rules; and (c) all reasonable efforts should be made to give effect to the parties' intent, as party autonomy should trump institutional self-interest.[10]

Insigma appealed that decision to the Singapore Court of Appeal. Acknowledging this was an issue of first impression, the Court of Appeal started off by observing that where the parties have evinced a clear intent to settle any dispute by arbitration, courts should give effect to that intent, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars, so long as (a) the arbitration can be carried out without prejudice to the rights of either party, and (b) giving effect to such intent does not result in an arbitration that is not within the contemplation of either party.

The court provided detailed guidance on how to approach the interpretation of hybrid arbitration clauses. First, where a clause can be interpreted in two different ways, the interpretation that enables the clause to be effective should be adopted in preference to that which prevents the clause from being effective. Second, as far as possible, a commercially logical and sensible construction should be preferred over another that is commercially illogical. Third, an arbitration clause containing a defect is not necessarily unenforceable, since the defect often may be cured with the assistance of national courts, arbitral institutions, and arbitrators, who can salvage the arbitration clause by restoring the true intent of the parties. Fourth, absent contrary public policy considerations, courts should ordinarily respect the principle of party autonomy and enforce workable arbitration arrangements in international arbitration.

Thus, the court dismissed the appeal finding that Insigma had offered no convincing reason why the arbitration clause was too uncertain to be enforced or unworkable, since the clause "was rendered certain and workable in the present case by [ ] SIAC agreeing to administer the arbitration in accordance with the ICC Rules,"[11] which is what the parties had bargained for in the first place.

Insigma Technology made clear that hybrid arbitration clauses should be enforced if a solution can be found that reflects the intent of the parties to arbitrate under rules mutually agreed upon. If no such solution can be found, the clause will likely be declared inoperable.

b. *HKL Group*

After *Insigma Technology*, the ICC enacted the 2012 amendments essentially to prevent other organizations from administering arbitrations using the ICC Rules. In 2013, however, the Assistant Registrar in the Singapore High Court rendered two decisions in *HKL Group Co. Ltd v. Rizq International Holdings Pte Ltd*,[12] upholding a hybrid arbitration clause that provided for disputes to be settled by arbitration in Singapore by a non-existent institution, *viz.*, the "Arbitration Committee," under the ICC Rules. The clause stated:

> Any dispute shall be settled by amicable negotiation between [the] two Parties. In case both Parties fail to reach [an] amicable agreement, all dispute out of in [*sic*] connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding [on] both parties.[13]

In 2011, the parties entered into an agreement for the sale of sand that was to be shipped from Cambodia to Singapore. After a dispute arose over certain invoices issued by HKL that Rizq had failed to pay, HKL commenced an action in the Singapore courts to recover the amounts allegedly owed. In response, Rizq made an application for a stay of the judicial proceedings in favor of arbitration. HKL opposed the application, arguing that the arbitration clause was so defective as to be "inoperable," because there was no entity in Singapore named the "Arbitration Committee."[14] However, Rizq argued that, although the arbitration clause was defective, it was clear that the parties' intent was to arbitrate and the court could give effect to the clause by, for instance, referring the matter to SIAC for arbitration under the ICC Rules.

Initially, the court observed that in the majority of cases, when an arbitration clause meets the contractual requirements for validity and the meaning of that clause may be discerned by applying general principles of contract interpretation, the clause will be found to be operable so long as the conditions stipulated therein have been satisfied. By contrast, if a court is unable to discern the meaning of the clause, either in part or entirely, the clause will be deemed pathological.[15]

The court went on to note that generally "an incorrect reference to the arbitral institution has not prevented courts from referring the matter to arbitration."[16] In this case, the court found the clause to be operable because: (a) it clearly showed the intent of the parties to resolve their disputes by arbitration; (b) it mandated that a matter be referred to arbitration if a dispute arose; (c) it provided for the place of arbitration, *i.e.*, Singapore; and (d) it provided that the arbitration was to be governed by a particular set of rules, *i.e.*, the ICC Rules.[17]

The court emphasized that it would "give primacy to the decision of the parties to arbitrate," and thus would "seek to resolve the various pathologies [of the arbitration clause] with the aid of the principle of effective interpretation."[18] Accordingly, the court stayed the proceedings in

favor of arbitration, on condition that the parties reach an agreement with SIAC, or any other arbitral institution in Singapore, to conduct a hybrid arbitration applying the ICC Rules.[19]

An important point made in *HKL Group* is that a determination on the enforceability of a hybrid arbitration clause is to be made on a case-by-case basis, taking into account the nature of the "pathology" and whether a "cure" can be found to render the clause workable.

c. *HKL Group (II)*

In a subsequent court application, HKL raised Article 1(2) of the ICC Rules and argued against the condition imposed by the court on the ground that, pursuant to the amended ICC Rules, only the International Court of Arbitration of the ICC may administer an ICC arbitration.[20] The court refused to enforce the relevant provisions of the amended ICC Rules and confirmed that the clause was enforceable. Notably, the court held:

> Although Art 1(2) of the ICC Rules claims for the International Court of Arbitration the sole authority to administer ICC arbitrations, *the power of the rules to bind emanates from the consent of the parties*. Art 1(2) cannot curtail the freedom of parties to agree to be bound by the result of an arbitration administered by a different arbitral institution applying the ICC Rules, neither can it curtail the power of the court to give an interpretation to a pathological arbitration clause, where that clause uses language which admits the possibility of different arbitral institutions, which provides a wider range of solutions to the parties.[21]

The holding in *HKL Group* (II) implies that by agreeing to a hybrid arbitration clause, the parties may expressly, or implicitly (by choosing a different administering institution), opt out of Articles 1(2) and 6(2) of the ICC Rules, which provide, respectively, that the ICC Rules can only be used in an arbitration administered by the ICC and that the parties consent to ICC arbitration if they choose to use the ICC Rules. Indeed, the ICC Rules are of a contractual nature and can only bind the parties to the extent that the parties agree to be bound by them. Moreover, the ICC cannot mandate that parties incorporating its Rules in the arbitration clause must arbitrate at the ICC because there is no privity of contract.

In *HKL Group* (II), the court further noted that "[i]n the ordinary course of things, hybrid arbitrations should be avoided."[22] However, when the issue comes before a court because the "parties are faced with the difficulty of overcoming a pathological arbitration clause," it is appropriate to provide the parties with "the solution of a hybrid arbitration, inelegant as it may be."[23]

3. New York

In 2014, the International Arbitration Part of New York Supreme Court examined a hybrid arbitration clause in *Exxon Neftegas Limited v. WorleyParsons Limited*,[24] which involved a dispute over the performance of engineering services in connection with the building of a drilling platform offshore Sakhalin Island.[25] The governing dispute resolution clause provided for a hybrid arbitration administered by the American Arbitration Association ("AAA") and applying the ICC Rules:

> The parties agree to resolve all differences arising out of or relating to this Agreement or any Order through binding arbitration before three arbitrators pursuant to the Arbitration Rules of the International Chamber of Commerce (ICC Rules). The place of arbitration shall be Houston, Texas, and the language of the arbitration shall be English. The American Arbitration Association shall administer the arbitration, and also act as the appointing authority when the ICC Arbitration Rules call for an appointing authority to act.

Exxon Neftegas sued WorleyParsons in New York Supreme Court. WorleyParsons interposed a motion to compel arbitration pursuant to the arbitration clause, after having filed a request for arbitration with the ICC in New York. Exxon Neftegas opposed the motion, noting, *inter alia*, that the clause called for arbitration before the AAA, and not the ICC. At oral argument, Exxon Neftegas also observed that the ICC Rules contained referrals to bodies within the ICC that have no analog in the AAA. The ICC filing was subsequently withdrawn.[26]

The court granted the motion to compel arbitration and directed the parties "to have any arbitration administered by the American Arbitration Association pursuant to the ICC Rules, with the parties to seek the Court's assistance if they are unable to agree on any modifications to the ICC Rules required for AAA administration."[27] In an effort to preserve the parties' intent to arbitrate, and their concrete ability to do so, the court held that if the AAA was unwilling or unable for any reason to administer the arbitration under the ICC Rules, "the reference to the ICC Rules in the arbitration clause in the [agreement] is severed and the parties shall arbitrate pursuant to arbitration rules designated by the AAA in accordance with its procedures."[28]

Mindful of the strong policy in favor of arbitration enshrined in the Federal Arbitration Act, the court adopted a practical approach aimed at salvaging a potentially pathological arbitration clause by providing that the reference to the ICC Rules could be severed. Thus, the court focused on ensuring that the parties could avail them-

selves of arbitration, which was the dispute resolution method they had contracted for.

4. Sweden

Recently, the Svea Court of Appeal upheld a final award resulting from a hybrid arbitration in *The Government of the Russian Federation v. I.M. Badprim S.R.L.*[29] The parties entered into a 2007 agreement for the construction of a border crossing post on the border between Russia and Poland. The agreement provided for disputes to be settled by arbitration in Sweden, to be administered by the Stockholm Chamber of Commerce ("SCC") and governed by the ICC Rules.[30] A dispute arose in 2010 over Badprim's compensation for work allegedly performed. Badprim commenced an arbitration pursuant to the arbitration clause. The SCC accepted to administer the arbitration, provided, however, that the parties agreed to authorize the SCC to adapt the ICC Rules to the SCC organization. Upon a jurisdictional challenge, the arbitral tribunal rejected the Government's position that the clause was unenforceable. After the conclusion of the proceedings, the tribunal rendered a final award directing the Government to pay damages in excess of EUR 1.8 million to Badprim.

Subsequently, the Government challenged the enforceability of the arbitration clause in an application to set aside the award before the Svea Court of Appeal. The Government argued that the SCC "lack[ed] both the required organizational structure as well as experience to carry out the most vital tasks under the arbitration rules of the ICC," including: (a) the appointment of arbitrators based on the ICC's national committees; (b) the confirmation of arbitrators based on the experience of their performance in other ICC arbitrations; (c) the confirmation of "Terms of Reference;" and (d) the scrutiny of arbitral awards. [31] The Government contended that the manner in which the SCC had carried out some of those functions was not satisfying, and also that it had never agreed that the SCC could adapt the ICC Rules.

In response, Badprim stated that it "always had the intention of avoiding the risk of having to litigate against the Government before Russian courts," and the parties had "clearly agreed that disputes should be resolved by arbitration before the SCC."[32]

The Svea Court of Appeal refused to set aside the award. The court relied on the general principle that an arbitration clause should be interpreted in line with the parties' basic intent that their disputes should be settled by arbitration. Consequently, the court reasoned it may disregard self-contradicting or otherwise ambiguous procedure that is not "practicably doable," if it is clear that "the remainder of the arbitration agreement otherwise represents the parties' actual intentions."[33] Applying these principles to the matter at hand, the court found that the parties had clearly agreed to arbitration as a method of resolving their disputes, and "the purpose [of the agreement] was that the arbitration should take place in Stockholm before the SCC."[34] Since it was undisputed that the SCC had already accepted and administered the arbitration, the court held that the arbitration clause was valid and enforceable. In so doing, the court rejected the Government's argument that adapting the ICC Rules to the SCC organization violated the intent of the parties.

Undoubtedly, determinative factors in the court's decision were the will of the arbitral institution to use the rules of another institution, and the fact that the arbitration had already taken place. However, the arguments raised by the Government show that awards resulting from hybrid arbitration clauses may still be subject to strategic challenges.

5. Conclusion

When examining this type of clauses, courts have presumed that the parties have considered and accepted the risks involved in hybrid arbitration. The general approach has been to enforce the clause, if deemed to be workable. However, at the drafting stage, parties should carefully evaluate whether the perceived advantages of agreeing to hybrid arbitration (*e.g.*, lower administration costs, as stated in *Insigma Technology*) outweigh the potential disadvantages. The decisions discussed show that parties may be required to face additional proceedings before the arbitral tribunal and the courts to determine enforceability of the clause, and thus incur more costs in lengthy litigation. After the arbitration is concluded, the losing party could still challenge the hybrid clause at the award enforcement stage, which may require even further litigation, expense, and delay.

Endnotes

1. ICC Rules of Arbitration 2012, Art. 1(2).
2. ICC Rules of Arbitration 2012, Art. 6(2).
3. Insigma Technology Co Ltd v. Alstom Technology Ltd [2009] 3 S.L.R.(R.) 936; [2009] S.G.C.A. 24.
4. *Id.* at ¶4.
5. *Id.* at ¶3.
6. *Id.* at ¶9.
7. *Id.* at ¶20.
8. *Id.* at ¶21.
9. *Id.* at ¶2.
10. *Id.* at ¶26.
11. *Id.* at ¶40.
12. HKL Group Co Ltd v. Rizq International Holdings Pte Ltd [2013] S.G.H.C.R. 5.
13. *Id.* at ¶1.
14. *Id.* at ¶11.
15. *Id.* at ¶12.
16. *Id.* at ¶21.
17. *Id.* at ¶27.

18. *Id.* at ¶24.
19. The parties had permission to go back to court if they failed to find any institution willing to administer a hybrid arbitration (see id. at ¶37).
20. HKL Group Co Ltd v. Rizq International Holdings Pte Ltd [2013] S.G.H.C.R. 8.
21. *Id.* at ¶10.
22. *Id.* at ¶11.
23. *Id.*
24. Exxon Neftegas Limited v. WorleyParsons Limited, No. 654405 (N.Y. Sup. Ct. July 16, 2014) (counter order [Ramos, J.]).
25. By Administrative Order dated September 16, 2013, the Chief Administrative Judge of the Courts of New York State designated Justice Charles E. Ramos to hear all international arbitration cases before the Commercial Division in New York County, including all proceedings brought under CPLR Article 75 or the Federal Arbitration Act. The Rules of the specialized International Arbitration Part are available at: http://www.nycourts.gov/courts/comdiv.
26. *See* Sabater, Stadnyc, *New York's International Arbitration Judge, One Year Later*, N.Y.L.J., Nov. 17, 2014, at S6-S7.
27. *Id.*
28. *Id.*
29. The Government of the Russian Federation v. I.M. Badprim S.R.L., Svea Court of Appeal Case No. T 2454-14 [2015].
30. *Id.* at *2.
31. *Id.* at *4.
32. *Id.* at *9.
33. *Id.* at *2.
34. *Id.* at *14.

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Forum Selection Clauses in Travel Contracts: Should Adequate Notice Be Required?

By Hon. Thomas A. Dickerson

I. Introduction

Generally, in state and federal courts in the United States, the defendants in a lawsuit may seek to have the case dismissed or transferred on the grounds that there is another forum which is more convenient. This doctrine, known as forum non conveniens, is a standard procedural defense [such as a lack of personal jurisdiction] which recognizes that the situs of the accident, the location of witnesses and evidence, the existence of an adequate alternative forum, and other factors may require that the lawsuit be adjudicated in a forum different from the one chosen by the plaintiff.[1]

II. Importance of a Forum Selection Clause

Forum selection clauses (FSCs) are important to defendants since forcing injured travelers to pursue their claims in distant and foreign forums, with legal systems (e.g., no contingency fees) and laws not necessarily as accommodating as those in the United States, may chill the enthusiasm of injured travelers to pursue their claims. A particularly important factor in a forum non conveniens analysis is whether the plaintiff has "consented" to a change of forum based upon the existence of a FSC in the travel contract, which states, in essence, that any and all claims against the purveyor of the travel service must be brought before a court in a specific forum; typically, where the accident took place or where the travel purveyor is headquartered.[2]

III. Cruise Passenger Contracts

FSCs got their start in the cruise industry and are still used in passenger contracts, requiring that all cruise passenger lawsuits be brought in locales in which a cruise company may be headquartered, such as Broward County, Florida, or New York, New York, or Seattle, Washington. Generally, such clauses are enforceable under appropriate circumstances, such as adequate notice and fairness.[3]

IV. FSCs Gain Popularity

Recently, other purveyors of travel services, such as hotels,[4] ski resorts,[5] tour operators,[6] Internet travel sellers,[7] helicopter manufacturers,[8] railroads,[9] resort time share facilities,[10] para-gliding companies,[11] and scuba diving companies,[12] have used FSCs in their travel contracts.

V. Florida's Case Law

In several cases involving accidents at the Atlantis Paradise Island Resort (Atlantis) in the Bahamas, the federal courts in Florida have advanced the salutary concept that a consumer of travel services should be given sufficient advance notice of a FSC to be able to reject the travel contract in which it appears. As noted by the Court in *Cleveland v. Kerzner International Resorts, Inc.*,

> The Eleventh Circuit[13] has adopted a two-part "reasonable communicativeness" test for this analysis. The Court looks first to the clause's physical characteristics [visibility based on print size and location in travel contract] to determine whether the (FSC) was hidden or ambiguous, and second to "whether the plaintiffs had the ability to become meaningly informed of the clause and to reject its terms."

VI. The Sun Trust Case

The first case addressing this issue was *Sun Trust Bank v. Sun International Hotels, Limited*,[14] in which an infant tourist was killed while snorkeling at a resort in the Bahamas. The Sun Trust Court rejected the application of a Bahamas' FSC in the hotel guest registration document.

> The extrinsic circumstances indicating the plaintiff's ability to become meaningfully informed and to reject the contractual terms at stake are equally important in determining enforceability…. A forum selection clause is not fundamentally fair if it is shown that the resisting party was not free to reject it with impunity….[15]

Here, while Atlantis guests may have been afforded sufficient opportunity to read the forum selection clause (upon arrival), they had no objectively reasonable opportunity to consider and reject it. It is undisputed that (the consumer) was not told when she made her reservations that she would be required to sign the clause. This rule has been followed in subsequent Florida cases.[16]

VII. Prior Visits

If the traveler has previously visited the hotel and signed the guest registration form containing an FSC, then the courts in Florida have found that the adequate advance notice requirement has been satisfied.[17]

VIII. Emails

If the travel purveyor sends emails advising the traveler of the existence of the FSC in a guest registration form which must be signed upon arrival, then Florida courts may find adequate advance notice.[18]

IX. Informing Travel Agents

If the travel purveyor informs the consumer's travel agent of the existence and applicability of a FSC, then Florida courts may find adequate advance notice.[19]

X. New York Case Law

The courts in New York State have taken a different approach by enforcing FSCs in travel cases without any requirement that there be some form of advance notice of the applicability of a FSC before arriving at the resort.[20]

XI. Conclusion

FSCs can have a dramatic effect upon the injured traveler's ability to prosecute those travel purveyors which may be responsible for his or her injuries. Travelers are well-advised to determine, before purchasing specific travel services, whether they may be bound by a FSC.

Endnotes

1. Thomas A. Dickerson, *Travel Law*, § 1.03(4) (2015); Thomas A. Dickerson, *Litigating International Torts in U.S. Courts*, Chapter 10 (2015).
2. See *Cleveland v. Kerzner Int'l Resorts, Inc*., No. 1:2014cv23897, 2015 U.S. Dist. LEXIS 131126, at *3–4 (S.D. Fla. 2015) ("The [U.S.] Supreme Court [*Atl. Marine Const. Co. v. U.S. Dist. Ct.,* 134 S. Ct. 568, 580 (2013)] has stated that 'the appropriate way to enforce a [FSC] pointing to a state or foreign forum is through the doctrine of forum non conveniens.'…When there is a valid [FSC], the court's forum non conveniens analysis changes in three ways: (1) 'the plaintiff's choice of forum merits no weight'; (2) the court 'should not consider arguments about the parties' private interests'; and (3) the choice-of-law rules of the original venue are not transferred to the new venue…[T]he practical result is that [FSCs] should control except in unusual cases.'… The Court's preliminary step, therefore, is to determine whether there is a valid [FSC]."
3. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).
4. See *Cleveland*, No. 1:2014cv23897, LEXIS 131126 at *1, 4–7 (inner tube accident during "river ride at Atlantis" resort; Bahamas FSC enforced); *Noel v. Walt Disney Parks & Resorts*, No. 10-40071-FDS, 2011 WL 1326667 at *1, 4, 9–15 (D. Mass. 2011) (change machine falls on hotel guest; Florida FSC enforced).
5. See *Hall v. Ski Shawnee, Inc.*, No. 06-CV-274, 2006 WL 2869528 (E.D. Pa. 2006) (snow tubing accident at ski resort; "this action has a stronger connection to…Pennsylvania…where the accident occurred and the contract was entered into as well as [where] defendant is headquartered and conducts business").
6. See *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896, 897 (W.D. Ky. 2004) (accident on Blue Danube river cruise ship; Switzerland FSC enforced).
7. See *Caldwell v. CheapCaribbean.com, Inc*., 2:09-cv-13828, 2010 WL 3603778 (E.D. Mich. 2010) (Bucks County, Pennsylvania FSC not enforced because decedents did not see website).
8. See *Van Humbeck v. Robinson Helicopter Co., Inc.*, 2007 WL 4340996 (Cal. App. 2007) (crash in British Columbia; forum non conveniens motion denied).
9. See *In re Ski Train Fire in Kaprun, Austria*, No. 3:01-1794, 2002 U.S. Dist. LEXIS 14929 (S.D.N.Y. 2002) (ski train fire in tunnel; Austrian FSC not enforced).
10. See *D'Elia v. Grand Caribbean Co., Ltd.*, No. 1:09-cv-01707, 2010 WL 1372027 (D.N.J. 2010) (Mexico FSC not enforced).
11. See *Venard v. Jackson Hole Paragliding, LLC*, 292 P. 3d 165, 168 (Wyo. 2013) (California FSC not enforced against non-signatories).
12. See *Di Ruocco v. Flamingo Beach Hotel & Casino, Inc.*, 163 A.D. 2d 270, 271 (1990) (scuba diving accident; Bonaire FSC enforced).
13. See *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009).
14. 184 F. Supp. 2d 1246, 1262 (S.D. Fla. 2001).
15. Citing *Shute* at 499 U.S. 595.
16. See *Foster v. Sun Int'l Hotels, Ltd*., No. 01-1290-CIV-KING, 2002 WL 34576251 (S.D. Fla. 2002) (Bahamas FSC in hotel registration form not enforced for first time guest who did not have "adequate opportunity to consider the clause and reject his contract with the Atlantis hotel"); *Ward v. Kerzner Int'l Hotels Ltd*., No. 03-23087-CIV-JORDAN, 2005 WL 2456191 (S.D. Fla. 2005) ("Mr. Ward did not sign or clearly accept the terms of the [FSC] pertaining to the type of accident involved in this case"); *Larsen v. Kerzner Int'l Hotels, Ltd*., No. 08-22031, 2009 WL 1759585 (S.D. Fla. 2009) (FSC in hotel registration form not enforced; plaintiff "did not receive prior notice of the forum selection clause").
17. See *Krenkel*, 579 F.3d 1279 (guest signed hotel registration form containing a FSC and choice of law clause on a prior visit; Bahamas FSC enforced); *Son v. Kerzner Int'l Resorts, Inc.*, No. 07-61171, 2008 WL 4186979 (S.D. Fla. 2008) (guest on prior visit signed form and was advised by email of need to sign form upon arrival); *Horberg v. Kerzner Int'l Hotels Ltd*., 744 F. Supp. 2d 1284,1288 (S.D. Fla. 2007) (guest signed hotel registration form containing FSC on four prior occasions).
18. See *Son*, No. 07-61171, 2008 WL 4186979 (guest was advised by email of need to sign hotel registration form upon arrival); *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F. 3d 1233, 1236 (11th Cir. 2012) (applicability of FSC communicated to cruise passengers five times before arrival); Larsen, No. 08-22031, 2009 WL 1759585 (resort sent notice by email of the FSC in hotel registration form but plaintiff's sister never advised; not bound by FSC).
19. See *McArthur v. Kerzner Int'l. Bahamas Ltd*., 607 Fed. App'x 845, 847-48 (11th Cir. 2015) (traveler has constructive notice of FSC where "[t]he travel agent, via its contact with the resort, knew that the attendees at the resort were subject to certain additional terms and conditions, agreed to notify their clients regarding the terms and conditions, and knew where to obtain the specific terms and conditions"); *Cleveland*, No. 1:2014cv23897, LEXIS 131126 at *6-7 (plaintiffs "made their travel arrangements through the use of a travel agent at Viking Travel Service, who in turn was an agent for Funjet Vacations [which] through its agreement with Kerzner International Resorts, Inc., had knowledge of the [FSC] in question").
20. See *Molino v. Sagamore*, 105 A.D. 3d 922, 923 (2d Dept. 2013) (slip and fall accident at Sagamore Resort in Warren County; traveler arrived at hotel and signed a "Rental Agreement" containing a proviso that "'if there is a claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County… Here, the fact that the Rental Agreement containing the (FSC) was presented to the plaintiffs at registration and was not the product of negotiation does not render it unenforceable"); *Bhonlay v. Raquette Lake Camps, Inc*., 120 A.D. 3d 1015,1016 (1st Dept. 2014) (accident at camp; Hamilton County venue clause enforced); *Karlsberg v. Hunter Mountain* No. 2014-05431 (A.D.3d, June 22, 2015) (snowboarding accident at ski resort; Greene County FSC enforced; "Contrary to the plaintiff's contentions, the 'Equipment Rental Form and Release of Liability' was not an unenforceable contract of adhesion, and enforcement of the [FSC] contained therein does not contravene public policy"; see concurring opinion).

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Statutory Indemnification of Corporate Directors and Officers: Foresight Is Power

By Michael C. Rakower and Melissa Yang

In New York, directors and officers sued for actions or inactions taken in connection with their corporate post have another avenue to seek relief from litigation costs if their corporation denies them indemnification: pursuant to the Business Corporation Law ("BCL") and the Not-For-Profit Corporation Law ("N-PCL"), courts have authority to award an advancement of litigation expenses or indemnification to directors and officers of for-profit and not-for-profit corporations (collectively, "corporations").[1] The court's authority extends not just to instances in which third parties sue directors and officers, but also to those situations where the corporation itself has brought suit. This article focuses on the standard for directors and officers to obtain an advancement of fees and indemnification under the BCL or N-PCL and provides practical insights for corporations interested in affecting the scope of the court's authority to award such an advancement.[2]

Indemnification *Pendente Lite* (Advancement of Fees During the Pendency of the Action)

Under BCL § 724(c) or N-PCL § 724(c), directors and officers may obtain a court-ordered advancement from their employer to finance their defense costs. In particular, the statute provides:

> Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

As a result of the New York Nonprofit Revitalization Act of 2013, directors and officers who seek advancement of fees from a not-for-profit corporation under N-PCL § 724(c) must copy the New York Attorney General on their application to the Court.[3]

Here, the statute uses a seeming misnomer when it references "indemnification" to signify an advancement of fees. Case law qualifies this term by referring to "indemnification *pendente lite.*"[4] Courts have held that the statute's "genuine issues of fact or law" requirement is a *lesser* standard than that required to defeat summary judgment.[5] Indeed, defendants have met this standard by denying the allegations against them and asserting that they acted in good faith for a purpose reasonably believed to be in the best interests of the organization.[6]

Our research has uncovered only *one* case in which a court denied advancement of fees on the grounds that "no genuine issues of fact or law" existed. In *Vacco v. Diamandopoulos*, the state court refused to award an advancement of fees to former trustees of a not-for-profit university in an action brought by the New York State Attorney General.[7] The court's decision, however, was premised upon the fact that prior to that action, the university had paid for the defendant trustees' defense during a 27-day hearing conducted by the Board of Regents.[8] A three-member panel concluded that the former trustees had severely violated their duties, and the Board of Regents ordered the immediate removal of the trustees from their post.[9] Recognizing the length of the prior hearing and "the scope of the findings of neglect of duty by the Regents," the court in *Vacco* held an advancement of fees was unwarranted.[10]

In addition to showing that "genuine issues of fact or law" exist, directors and officers must also show that they were sued in their corporate (rather than individual) capacity (*i.e.*, that the suit concerns actions or inactions taken while they were corporate employees and acting within the scope of their employment responsibilities).[11] For those defendants sued both in their corporate and individual capacities, the court may limit an award for advancement of fees to the defense of those claims that concern the defendant's corporate conduct.[12]

Defendants may obtain an advancement of fees to defend against claims brought by third parties and by the entity responsible for paying the advancement.[13] In making such an application, defendants should be careful to seek an advancement of fees under the correct provision of the BCL or N-PCL because failure to rely upon the appropriate provision may result in a denial of the request.[14] The court possesses the discretion to award reimbursement of expenses incurred prior to the filing of the motion or, alternatively, to limit an award to future expenses.[15]

If defendants are successful in obtaining an advancement of fees, it is important to note that this is a preliminary award only. Pursuant to BCL §725(a) or N-PCL § 725(a), a defendant must repay the advancement to the paying entity if, at the conclusion of the action, the defendant is found liable for the claim alleged.

Indemnification (Awarded After the Resolution of the Action)

In addition to advancement of fees, BCL § 724(a) and N-PCL § 724(a) offer indemnification to directors or officers of corporations.[16] New York courts have construed an advancement of fees and indemnification to be "two distinct corporate obligations"; whereas an advancement

concerns interim relief during the pendency of the action, indemnification is available only after resolution of the action and only if the defendant is found not liable for the claim alleged.[17] Unlike advancement of fees, however, indemnification under section 724(a) is mandatory if defendants meet the applicable standards. This is true even when the entity has refused to indemnify the defendant. In particular, section 724(a) provides:

> Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the shareholders in the specific case under section 723 (Payment of indemnification other than by court award), indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723.

In other words, under section 724(a), directors and officers *must* be awarded indemnification when they "ha[ve] been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding" if they are found to have "acted, in good faith, for a purpose which [they] reasonably believed to be in, or…not opposed to, the best interests of the corporation and, in criminal actions and proceedings, in addition, had no reasonable cause to believe that [their] conduct was unlawful."[18] In cases where directors and officers are sued by the corporation to which they serve, courts are *not required* to—but may after considering all of the circumstances—award indemnification to directors and officers if (a) the action, actual or threatened, was settled or otherwise disposed of, or (b) they are adjudged to be liable to the corporation for any claim, issue, or matter unless the court in which the action was brought, or any court of competent jurisdiction if no action was brought, concludes that they are entitled to indemnification.[19]

The request for indemnification must be made either (1) in the civil action or proceeding in which defendants incurred the expenses or (2) in a separate proceeding brought in New York Supreme Court. If the latter option is pursued, then the defendants must set forth (a) the disposition of any prior application for indemnification and (b) reasonable cause why they did not seek indemnification in the action or proceeding in which they incurred the expenses. The failure to establish reasonable cause for seeking indemnification in a separate action could result in a denial of the application.[20]

Limitations on the Court's Authority to Award Advancement of Fees or Indemnification

While section 724 provides courts with authority to award an advancement of fees or indemnification, section 725(b) sets forth limitations upon that authority. In particular, courts cannot award an advancement of fees or indemnification if such an award would be inconsistent or contrary to (a) the laws of the jurisdiction in which a (foreign) corporation was incorporated;[21] (b) "the certificate of incorporation, a by-law, a resolution of the board or the members, an agreement or other proper corporate action, in effect at the time of the accrual of the alleged cause of action asserted in the threatened or pending action or proceeding in which the expenses were incurred or other amounts were paid";[22] or (c) the terms of a court-approved settlement agreement.[23] Thus, any corporation seeking to limit the circumstances in which a court may order advancement or indemnification should do so by amending its by-laws, adopting a resolution, or executing an agreement that *expressly* defines the parameters for any advancement or indemnification. Courts will not construe the absence of language permitting certain forms of indemnification as an indication that the corporation meant to preclude them.[24] Nonetheless, to be safe, directors and officers would be wise to obtain by contract a warranty that any efforts by the company to opt out of its statutory indemnification obligations shall not apply to them.

Closing Remarks

The provisions providing for court-ordered advancement of fees or indemnification under the BCL or N-PCL operate on a separate track from any indemnification rights a for-profit or a not-for-profit entity may wish to bestow upon its directors and officers. If an entity wishes to limit the authority of a court to compel it to pay a particular type of indemnification to an officer or director (*e.g.*, advancement of legal fees), then it must expressly limit its exposure to court-ordered indemnification by amendment to its certificate of incorporation, by-laws, through corporate resolution, or via contract with its directors and officers before the right to indemnification has accrued. Conversely, prudent directors and officers should obtain contractual protection expressly affording them statutory indemnification notwithstanding anything stated to the contrary in the company's by-laws or elsewhere. Of course, any for-profit or not-for-profit entity may offer broader indemnification than that provided by statute so long as the directors or officers are not found to have acted in bad faith or with active or deliberative dishonesty or to have personally gained a financial profit or advantage to which they were not entitled.[25]

Endnotes

1. *See* BCL §§ 721, *et seq*. and N-PCL §§ 721, *et seq*. References to "corporation" and "not-for-profit corporations" are intended to carry the meaning attributed to them under BCL § 103 and N-PCL § 103, respectively.
2. In this article, we rely on authorities analyzing the BCL because there is a dearth of case law concerning the provisions for indemnification under the N-PCL and the language and purposes of the BCL and N-PCL are aligned. *See* Practice Commentaries by Rose Mary Bailly, William Josephson, and Peter J. Kiernan for N-PCL § 724 n.2 ("This section is the same, both in substance and in language, as Bus. Corp. § 725 [now Business Corporation Law § 724]…. This section is intended to serve the same purpose for directors and officers of a non-profit corporation as the corresponding Bus. Corp. L. section serves….") (alteration in original).

3. N-PCL § 724(a).
4. *See, e.g., Tilden of New Jersey, Inc. v. Regency Leasing Sys., Inc.*, 237 A.D.2d 431 (2d Dep't 1997); *Schlossberg v. Schwartz*, 43 Misc. 3d 1224(A) (N.Y. Sup. Ct. 2014); *Golisano v. Turek*, No. 14-CV-6411-CJS, 2015 WL 3522470 (W.D.N.Y. June 4, 2015); *Wasitowski v. Pali Holdings, Inc.*, No. 09 Civ. 8243 (PKC), 2010 WL 1459767 (S.D.N.Y. Apr. 8, 2010).
5. *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 137 F. Supp. 2d 228, 237 (W.D.N.Y. 2000) ("The standard by which a genuine issue of fact or law has been raised, thereby entitling a defendant to an advance award of litigation fees under N.Y. Bus. Corp. Law § 724(c) is 'a far less demanding standard' than that necessary on a motion for summary judgment.") (quoting *Sequa Corp. v. Gelmin*, 828 F. Supp. 203, 206 (S.D.N.Y. 1993)); *see also Prof'l Ins. Co. of New York v. Barry*, 60 Misc. 2d 424, 427-28 (N.Y. Sup. Ct. 1969) (rejecting argument that defendant needed to show "reasonable probability of success" on the merits), *decision limited on other grounds by Baker v. Health Mgmt. Sys., Inc.*, 98 N.Y.2d 80 (2002).
6. *Sequa Corp.*, 828 F. Supp. at 206-07 (awarding advancement of fees under BCL § 724(c) to former executive who met standard by providing affidavit denying corporation's fraud allegations); *Happy Kids, Inc. v. Glasgow*, No. 01 Civ. 6434 (GEL), 2002 WL 72937, at *2 (S.D.N.Y. Jan. 17, 2002) (relying on defendant's answer and motion to dismiss to hold he was entitled to advancement under BCL § 724(c)); *Booth Oil Site Administrative Group*, 137 F. Supp. 2d at 237-38 (granting defendants indemnification based on affidavits denying liability and asserting good faith); *Lemle v. Lemle*, 92 A.D.3d 494, 500 (3d Dep't. 2012) (affirming award of advancement of fees where defendants "raised genuine issues of fact or law" under § 724(c)); *Gen. Plumbing Corp. v. Parklot Holding Co.*, 44 Misc. 3d 1218(A), 4-5 (N.Y. Sup. Ct. 2014) (granting indemnification to former president of plaintiff company based on denial of wrongdoing in pleadings and court submissions); *Professional Ins. Co. of New York*, 60 Misc. 2d at 428-29 (awarding advancement of fees because director showed "genuine issues of fact or law" concerning his good faith and actions taken for the benefit of corporation in his pleadings).
7. 185 Misc. 2d 724 (N.Y. Sup. Ct. 1998).
8. *Id.* at 725-26.
9. *Id.* at 726, 729.
10. *Id.* at 729.
11. *Bensen v. Am. Ultramar Ltd.*, No. 92 Civ. 4420 (KMW) (NRB), 1996 WL 435039, at *2-3 (S.D.N.Y. Aug. 2, 1996) (denying advancement of fees where director was sued in personal capacity for engaging in wrongful conduct during negotiations for his compensation); *Tilden of New Jersey, Inc.*, 237 A.D.2d 431 (affirming denial of advancement because defendant was sued based on a personal guaranty); *General Plumbing Corp.*, 44 Misc. 3d at 5 (holding defendant not entitled to advancement for defense of claims concerning actions taken when he was *not* company president); *Kaufman v. CBS Inc.*, 135 Misc. 2d 64, 65 (N.Y. Civ. Ct. 1987) (stating former vice-president's lewd gestures and remarks to subordinate employee were outside the scope of employment).
12. *Booth Oil Site Administrative Group*, 137 F. Supp. 2d at 238 (apportioning advancement to preclude years in which defendant did not serve as a company director); *Happy Kids, Inc.*, 2002 WL 72937, at *4 (restricting advancement to defense of fiduciary duty claims).
13. *Sierra Rutile Ltd. v. Katz*, No. 90 Civ. 4913 (JFK), 1997 WL 431119, at *1 (S.D.N.Y. July 31, 1997) ("If the director or officer satisfies the BCL's requirements, the Court may order their corporation to advance litigation expenses, notwithstanding the corporation's allegations that the director or officer engaged in wrongdoing against the corporation.").
14. *Qantel Corp. v. Niemuller*, 771 F. Supp. 1372, 1374-75 (S.D.N.Y. 1991) (denying request for advancement of fees, without prejudice, because director brought motion under BCL §§ 722 and 723 instead of BCL § 724(c)).
15. *Compare United States v. Weissman*, No. S2 94 CR. 760 (CSH), 1997 WL 334966, at *15-16 (S.D.N.Y. June 16, 1997), *supplemented by* 1997 WL 539774 (S.D.N.Y. Aug. 28, 1997) (requiring company to pay legal expenses already incurred by defendant); *Schlossberg*, 43 Misc. 3d at *10-11 (awarding reimbursement of expenses already incurred and setting protocol for payment of future expenses); *Professional Ins. Co. of New York*, 60 Misc. 2d at 428-29 (awarding advancement of unpaid legal expenses already incurred), *with Sequa Corp.*, 828 F. Supp. 203 (granting advancement of expenses on a prospective basis).
16. As discussed, *supra*, an application for indemnification under N-PCL § 724(a) must be made on notice to the New York Attorney General.
17. *Booth Oil Site Administrative Group*, 137 F. Supp. 2d at 236 ("[A]lthough a court may not award complete indemnification under N.Y. Bus. Corp. Law § 724(a) until all corporate capacity and 'good faith' issues have been resolved, N.Y. Bus. Corp. Law § 724(c) provides for limited relief of litigation expenses, including attorney fees, to be awarded during the pendency of an action upon the movant's demonstration that such fees and expenses are reasonable and necessary in connection with the defense, and that the movant has raised a genuine issue of fact or law as to whether indemnification is required."); *Crossroads ABL LLC v. Canaras Capital Mgmt., LLC*, 105 A.D.3d 645, 645 (3d Dep't 2013) ("Indemnification and advancement of legal fees are two distinct corporate obligations (*see Ficus Investments, Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 9 (3d Dep't 2009), and given these separate purposes, the motion court properly determined that the servicing agreement distinguished between the relief available to a corporate officer at the conclusion of the proceedings and that which is available while the proceedings are ongoing.").
18. BCL §§ 722(a) and 723(a); N-PCL §§ 722(a) and 723(a). *Compare Buffalo Forge Co. v. Ogden Corp.*, 595 F. Supp. 593 (W.D.N.Y. 1984) (awarding indemnification to director who was "wholly successful" on the merits) *with Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 666-67 (2000) (denying indemnification of punitive damages assessed against president of cooperative corporation because jury concluded that he acted in bad faith and breached his fiduciary duty when he denied proposed tenant's sublease application based on race and retaliated against shareholder for opposing the denial).
19. BCL § 722(c).
20. *See Wasitowski*, 2010 WL 1459767, at *5-6 (dismissing complaint for indemnification under § 724(a) because former director failed to establish reasonable cause for seeking such relief in a separate proceeding); *Klimczak v. Connrex Corp.*, 49 A.D.2d 1031, 1031 (2d Dep't 1975) (denying indemnification request in special proceeding where director failed to show reasonable cause for seeking indemnification three years later in a separate proceeding).
21. *See, e.g., Bear, Stearns & Co. Inc. v. D. F. King & Co.*, 243 A.D.2d 252, 253-54 (2d Dep't 1997) (reversing award of advancement of fees against a Delaware corporation because Delaware law does not provide for court-ordered interim fees).
22. *See Booth Oil Site Administrative Group*, 137 F. Supp. 2d at 233-34 (defining "accrual of the alleged cause of action" in BCL § 725(b)(2) to mean "when a suit may be maintained thereon").
23. BCL § 725(b)(1)-(3); N-PCL § 725(b)(1)-(3).
24. *See Happy Kids, Inc.* 2002 WL 72937, at *4 (awarding advancement to former director under BCL § 724(c) after rejecting argument that indemnification would be inconsistent with bylaws, where bylaws did not expressly prohibit indemnification); *Crossroads ABL LLC*, 105 A.D.3d at 645-46 (concluding that agreement did not preclude indemnification of intra-party claims where the agreement lacked any limiting language).
25. BCL § 721; N-PCL § 721.

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The Tyranny of the Litigation Hold

By Richard Reice

In the past, restrictive covenant disputes often began with a boilerplate cease-and-desist letter from an aggrieved former employer. The letter usually began: "We have been retained by…and it has come to our attention…" and then reminded the former employee and perhaps his or her new employer of the former employee's non-solicitation, confidentiality, and non-compete agreements. The letter often ended with a demand that the employee cease all breaching conduct and a never-accepted invitation to "feel free" to contact the sender "should you have any questions." More often than not, such letters were ignored and thrown away.

Today, when most of our information is stored on disc drives and servers, not drawers and filing cabinets, cease-and-desist letters arrive with a set of lengthy and detailed instructions on how to initiate a "litigation hold" to preserve all evidence relating to hiring, employment, and commercial activities. The chilling effect of these letters—which are often aimed at individuals with little legal expertise—is considerable. Now, instead of circularly filing a cease-and-desist letter, the recipient is faced with a litigation-like obligation to locate and safeguard relevant documents and the often unwelcome prospect that internal documents related to recruiting and hiring may one day be open to scrutiny by others. Thus, instead of hiring an employee who can hit the ground running, the new employer is faced with multiple complications. Most employers don't like complications.

The Duty to Preserve

The duty to preserve documents that may be relevant to a probable litigation started with a series of discovery-related decisions in the Southern District of New York case *Zubulake v. UBS Warburgh LLC*.[1] In addressing the plaintiff's discovery requests relating to certain digital files and UBS's spoliation (destruction) of certain backup tapes, Judge Shira A. Scheindlin ("Judge Scheindlin") articulated several standards that have become the norm across the country. In her decision, Judge Scheindlin explained that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[2] In a later related decision, Judge Scheindlin explained that this requires counsel to communicate directly with the "key players" in the litigation regarding their preservation duties and issue periodic reminders.[3] Counsel should also "instruct all employees to produce electronic copies of their relevant active files" and "make sure that all backup media which the party is required to retain is identified and stored in a safe place."[4]

Failure to preserve documents in the face of probable litigation can result in spoliation sanctions that could have a severe impact on one's case. In New York, a party may be sanctioned if the other side can show that evidence (regardless of form) was not maintained and that (1) the spoliating party had an obligation to preserve the evidence; (2) the evidence was destroyed with a culpable state of mind; and (3) the lost evidence was relevant to the other side's claim or defense.[5] Sanctions can include an adverse inference or even a judgment against the spoliating party.[6]

What to Do?

If an individual or a company receives a cease-and-desist or a demand letter that threatens legal action, it is likely that they are now under an affirmative obligation to initiate a litigation hold. What are the issues to be sensitive to? First, the recipient of a cease-and-desist letter should understand whether a duty to preserve evidence has been triggered. Was the letter actually threatening litigation or just a "friendly" reminder about the terms of a restrictive covenant? A duty to preserve arises under the former; under the latter, where litigation is possible but not necessarily probable, the recipient's counsel should review case law in the relevant jurisdiction to understand the scope of any obligation to preserve.

Second, the recipient needs to consider what information to preserve. To begin with, relevant evidence likely includes all documents relating to the employee's sourcing, hiring, job duties, documents (electronic and hard copy) brought over from his former employer, the hard drives on the new hire's computers (both at home and at the office) and PDAs, and emails generated by the employee and the employer that relate to the employee's job duties. This obligation is ongoing until the requirement to preserve no longer exits. Relevant documents should be preserved in their native format, be it hardcopy or electronic.

Third, how long must the recipient preserve relevant evidence? The duty to preserve does not last forever, but it may well last the duration of the restrictive covenant and a reasonable period of time thereafter. If some sort of arrangement is reached with the former employer and the threat of litigation is lifted, then the duty to preserve would be lifted as well. Of course, if the cease-and-desist letter turns into actual litigation, then the relevant evidence should be preserved for the duration of the case.

Conclusion

Zubulake has spread like wildfire through local, state and federal courts and has resulted in new rules regarding electronic discovery. In restrictive covenant cases, former employers are using it to put teeth to their cease-and-desist letters. No longer just words on page, the letters now require action that may cost money, disrupt the normal operations of a business, and make that new hire—who

may have come with some risk already—even more problematic.

Endnotes

1. 02 Civ. 1243 (SAS).
2. *Zubulake v. UBS Warburgh LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
3. *Zubulake v. UBS Warburgh LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004)
4. *Id*. at 434.
5. *Zubulake*, 220 F.R.D. at 219.
6. *See Ortega v. City of New York*, 9 N..3d 69, 76, 845 N.Y.S.2d 773, 776 (2007).

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Problems and the Usefulness of Categorical Privilege Logs

By Yitzy Nissenbaum

I. Introduction

Over the past two decades, with the expansion of the digital age, litigation costs have skyrocketed. In 2007, it was previously assessed that the cost of review for a single gigabyte of data can cost upwards of $30,000.[1] While the estimated cost of review has likely been reduced since 2007, attributable to the employment of contract attorneys and an increase in high-performing, efficient technological tools, the costs of performing E-Discovery are still prohibitive. Intellectual property cases, especially patent cases, tend to be particularly costly, with one study finding that IP cases are 62% more costly than other cases.[2]

In light of the growing concerns regarding E-Discovery, the Federal Rules of Civil Procedure were amended in 2006 to address the growing scope of E-Discovery. The Federal Rules of Civil Procedure were once again revised, effective December 1, 2015, with those changes intended to further reduce the costs associated with E-Discovery by in part emphasizing the need for proportionality and revising the rule for issuing spoliation sanctions. In order to stem the costs of E-Discovery, several district courts, including in New York, have adopted local rules with respect to E-Discovery. Moreover, many of the district courts, including the U.S. Court of Appeals for the Federal Circuit (CAFC), have established a Model Order Regarding E-Discovery, with some of the District Court E-Discovery Model Orders specifically tailored for patent matters.[3]

Nonetheless, even with all the measures taken to reduce discovery costs, E-Discovery costs continue to rise. This is particularly reflected by the compelling need to once again change the Federal Rules of Civil Procedure. The E-Discovery process is comprised of several steps; some of the primary cost drivers are collection, processing, review, production, and post production. By almost all accounts, the most expensive portion of the E-Discovery process is by far the review process.[4] One of the most expensive, if not the most expensive, portion of review is privilege review and the logging of privileged documents on a privilege log, which can often be a fruitless endeavor.[5] Lately there has been a growing movement towards the use of categorical privilege logs, in which privileged documents are logged by category as opposed to a document-by-document description of why the document is privileged. In fact, the New York Supreme Court Commercial Division has adopted a rule expressing a preference for categorical designations.[6]

This article aims to explain the background concerning the use of privilege, potential problems with privilege logs, and how categorical privilege logs might be useful. An emphasis will be placed on explaining how and why categorical privilege logs are a tool to be utilized, as well as any limitations its use might have in federal practice. Furthermore, this article aims to impart practical advice with respect to the construction and pitfalls of a categorical privilege log.

II. Background on Privilege in the Federal Rules

Privilege logs have begun to play a prominent role in the current legal discovery context. Logs are governed by the common law of privilege and by Federal Rule of Civil Procedure (FRCP) 26(b)(5). The proliferation of electronically stored information (ESI) led to the establishment of Federal Rule of Evidence (FRE) 502, in 2008, in order to place a limitation on the waiver of attorney-client privilege and work product. As will be explained, any categorical privilege log must be constructed within the context of FRE 502 and FRCP 26(b)(5).

The FRCP were first promulgated in 1938, combining the procedural rules for suits involving law and equity, under the Federal Equity Rules and the Conformity Act (28 U.S.C. § 724).[7] Over the years, the FRCP has been revised considerably from the originally established set of rules. In 1946, subdivision (b) of Rule 26 was amended to "make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence."[8] In 1970, section (b)(3) of Rule 26 was amended to cover work product (documents prepared in anticipation of trial), which was considered the "most controversial and vexing problems to emerge from the discovery rules."[9] As part of the amendment to Rule 26, the "good cause" showing, for trial preparation materials, from Rule 34 was eliminated, and instead a party would be required to make a "special showing" to get the disclosure of work product.[10]

In 1980, the Advisory Committee added subsection (f), in response to the "widespread criticism of abuse of discovery," in order to provide a mechanism for court assistance. When counsel is dealing with uncooperative opposing counsel, this amendment helped create "a reasonable program or plan for discovery."[11] Abusive discovery continued to be a problem, which led to the establishment of subsection (g), in 1983, to impose "an affirmative duty to engage in pretrial discovery in a responsible manner…" in order "to curb discovery abuse by explicitly encouraging the imposition of sanctions."[12] Prior to the 1993 amendments to Rule 26(b), there was no specific rule that addressed privilege logs. The rules of privilege logging were controlled by Local Rules, leading to a complex morass of conflicting and unclear standards regarding what was deemed a sufficient log.[13]

The inclusion of subdivision (b)(5) to Rule 26 was the first time a party was required under the rules "to notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product production."[14] A party's failure to comply would open that party up to sanctions under Rule 37 or the waiver

of privilege. The purported goal behind the rule was to give the opposing party information to "evaluate the applicability of the claimed privilege or protection" and to allow the court to determine if the privilege applies.[15] Nonetheless, the Advisory Committee specifically refused "to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc. may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be *described by categories*."[16] This provision would clearly indicate that categorical assertions of privilege should be allowed.

As ESI proliferated and played a more prominent role in discovery, Rule 26 was further revised, in 2006, to account for these changes. In response to the growing concerns of privilege wavier, as ESI exponentially increased the volume of discoverable material, the provision for Rule 26(b)(5)(B) was added.[17] While the amendment allowed a party to claw back produced privileged information, it did not prevent waiver of the privilege of the produced information. As the Advisory Committee noted in the comments "[r]ule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production."[18] This was intended to keep in place court developed standards for when waiver applied with respect to the inadvertent production of privileged information.[19]

Concurrently, with the promulgation of FRCP 26(b)(5)(B), subdivision (f) of Rule 26 was established to "direct the parties to discuss discovery of electronically stored information" at the initial conference.[20] One of the primary topics to be covered at the Rule 26(f) conference includes discussions concerning "quick peek" or "clawback" agreements to prevent waiver. The Advisory note also encourages the parties to "discuss any issues relating to assertions of privilege or protection as trial-preparation materials," which would obviously include the privilege log.[21] In 2008, FRE 502 was implemented in response to "widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver."[22] The Advisory Committee specifically noted that this "is especially troubling in cases involving electronic discovery."[23]

FRE 502 offers an attorney a powerful tool to prevent subject matter waiver. FRE 502(b) establishes that privilege is not waived for an inadvertently disclosed privilege document, so long as reasonable steps were taken to prevent disclosure and to rectify the error, in accordance with FRCP 26(b)(5)(B). Under Rule 502(d), in which an agreement becomes part of a court order, waiver will not result in any other court proceeding, and according to some courts it can act to categorically prevent waiver of disclosed privileged material.[24] It is such a powerful tool that FRCP 16(b)(3)(B), regarding permitted contents for scheduling orders, is set to be amended to make specific reference to agreements reached under FRE 502.[25] One judge has even gone so far as to state that the failure to seek a 502(d) order may constitute malpractice.[26]

III. Primary Issues with Respect to a Privilege Log

Despite changes to the rules and the implementation of FRE 502, problems continue to persist regarding privilege logs. While the various rule changes serve to limit the damage of subject matter waiver, some of those changes have compelled a party to explain the basis for withholding privileged information. Thus, the rules compel a party to provide an account of why the information is privileged, essentially requiring a privilege log.

There are numerous difficulties that exist with respect to privilege logs, including the fact that there is an inconsistent standard regarding what is deemed an adequate privilege log.[27] Moreover, all too often the privilege description is insufficient to permit anyone to make any determination regarding the actual basis for privilege protection.[28] This problem is further magnified by the increased volume of ESI, as well as the rote and tedious nature of constructing a privilege log. The deficient privilege log runs counter to the intended goal of FRCP 26(b)(5) to "reduce the need for in camera examination of the documents."[29]

Another common issue that occurs is with email strings, which involves a continuous conversation. Email strings present distinctive problems regarding privilege logging, even when the string is only between two people.[30] Courts may find that only the emails placed on the log are privileged, leading to waiver of the communications of all the emails that are not placed on the log. Another potential issue is with respect to attachments to privilege emails. Oftentimes the attachment may not be privileged and a Court might find that privilege is waived if the attachment was not placed on the log.[31]

IV. Framework and Recommendation for Using Categorical Privilege Log

Until now courts have predominantly expressed a preference for a "document-by-document" log, rejecting the use of categorical privilege logs.[32] Nonetheless, the concept of a categorical privilege log is clearly not a recent innovation, as the Committee Advisory Notes made clear with the implementation of rule 26(b)(5). Although a categorical privilege log is not a novel concept, the framework for its use was first fully articulated in a law review article by Judge John M. Facciola and Jonathan M. Redgrave "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, "4 Fed. Ct. L. Rev. 19 (2010). With the growth of ESI, the categorical privilege log has gained much greater traction with courts. However, a litigant must keep in mind several considerations and take certain steps to best utilize a categorical privilege log.

Prior to considering the prospective use of a categorical privilege log, a party should factor in the potential volume of ESI that will need to be produced, particularly with respect to how much privileged information will be with-

held. The framework for when a categorical privilege log will be permitted in a court has largely been attributed to the decision in *SEC v. Thrasher,* No. 92 CIV. 6987 (JFK), 1996 WL 125661, (S.D.N.Y. Mar. 20, 1996). In *Thrasher*, the Court laid out a two-part test for when a categorical log might be allowed: when "(a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded." *Id*. at *1. Thus, the first consideration should be towards an eye regarding how long the privilege log will likely be, with patent cases often involving very large productions.[33]

At the outset, a party should get a handle on the volume of potentially discoverable ESI. If a party can initially tell that a document-by-document privilege log would be too onerous, it needs to come prepared to discuss the parameters of the privilege review at the Rule 26(f) meet and confer. While there may be some concern that the court will out of hand reject the use of a categorical privilege log, this is becoming less and less likely as categorical privilege logs are becoming more widely accepted.[34]

In choosing a categorical privilege log, an attorney must bear in mind that a categorical privilege log will still require an attorney to provide "specific" information to satisfy the basis of privilege.[35] The Court in *Thrasher* required that the categorical log contain: "(1) an identification of the time period encompassed by the withheld documents; (2) a listing of the individuals who were authors or addresses or were copied on the documents; and (3) a representation by counsel as to whether all of the documents either (a) were prepared to assist in anticipated or pending litigation or (b) contain information reflecting communications between (i) counsel or counsel's representatives and (ii) the client or the client's representatives, for the purpose of facilitating the rendition of legal services to the client." *Thrasher* at *2.

The Rule 26(f) conference is critical in negotiating the use of these logs. Similarly, it is essential for both parties to cooperate to enable an efficient and inexpensive discovery process. The emphasis on cooperation has become a critical point in litigation, beginning with The Sedona Conference: Cooperation Proclamation, as also pointed out in the amendment to FRCP 1, set to be amended by Dec. 1, 2015, to emphasize the point that it is an obligation on "*and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."[36]

At the Rule 26(f) conference, the parties should focus on several vital issues with respect to issues of privilege. At the outset it is important for the parties to engage in a discussion of the volume of privileged information. If there is a limited volume of privileged information, a categorical privilege log may not be the best choice. Obviously, assuming that there will be a large volume of information, the parties should engage in defining the parameters of what might need to go on the privilege log. First, the parties should try to find common ground regarding communications that can be excluded from logging. A prime, but simplistic, example of documents that could be excluded is communication between the client and trial counsel.[37] This could equally apply to exact duplicates of privileged documents, which is all the more common with email. The parties may not be required to log the documents, but the parties should agree to preserve the documents in case an *in camera* review becomes necessary.

With respect to documents that are not presumptively privileged, the parties should hash out what information should be described on the log. The *Thrasher* decision might provide a prudent guideline with respect to what should be detailed on the privilege log, although the parties should confer and attempt to agree on what might be deemed sufficient. An attorney needs to recognize that an insufficient categorical description might lead a court to order a detailed log, assuming the categorical description is insufficient.[38] In an extreme case, a court, after an *in camera* review, might determine that privilege is waived. It is essential for counsel to come to terms on what should be included on the log, with sufficient detail to permit the opponent to assess the privilege. While it may be difficult to adequately describe a privilege category for a set of documents, there is definitely a minimized risk that any categorical description might reveal the privilege information.

With the rise of Technology-Assisted-Review (TAR), it is essential that parties keep in mind the use of these tools for privilege. The purpose of using TAR is to limit the amount of documents that need to be manually reviewed, which can often be accomplished through sampling. If TAR, or whatever sampling method is chosen, is employed, it should be negotiated that the party utilizing this method for screening privileged information be obligated to describe the chosen method. The use of sophisticated tools may also serve to create logs, especially with emails, that are analogous to a traditional privilege log. Consideration of technological tools cannot be understated as the Advisory Committee Notes on FRE 502 specifically noted that "a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure."[39] Hence, it was specifically contemplated in the rule making process that analytical software can be used as a tool to limit the cost of privilege review and in creating a categorical privilege log. Moreover, where a party refuses to allow the use of sophisticated analytical tools to screen for privilege, a party can seek a 502 order to prevent the waiver of privilege through the use of these tools, so long as proper methods are taken.[40]

At the same time, the parties should agree as to how the producing party can certify its privilege assertions. It has been suggested that the requesting party could request that a supervisory attorney, specifically not a junior attorney, submit some form of attestation, such as an affidavit certifying to the validity of the assertion of privilege. One of the major concerns with a categorical privilege log is

that a party may try to "hide the ball" by holding back a critical but questionable or non-privileged document. This concern is somewhat mitigated by having one of the attorneys in charge of the case attest to the claims of privilege, although it might be argued that FRCP 26(g) already requires a party to certify that discovery is complete and attorneys consistently play games with discovery.[41]

Judicial intervention can be a critical point in managing this process, as the concern that if an *in camera* review would result in the waiver of all privileged documents may prevent a party from withholding non-privilege information. Moreover, on a very large privilege log it is often difficult to spot the non-privileged documents. It is more likely that the critical documents will be discovered based on gaps in productions. Furthermore, if a party is trying to "hide the ball" it is more likely that they would not even list the document on the privilege log, making it less likely that a party would be able to spot the missing document off a deficient log. Another factor that might prevent such tactics is the use of technological tools that would permit the issuance of a report/spreadsheet of the communications between an author and a recipient.[42] This would prevent a party from hiding critical communications between two scientists, which is clearly not privileged, on a categorical privilege log.

There are numerous other considerations that are critical towards creating a categorical privilege log. Parties should be willing to submit some documents in a traditional privilege log format, for documents that might not neatly fall into a specific category. Another point that might need to be negotiated is how to log redacted documents, although with the repeating nature of emails this might be able to garner its own category. A litigant intending to utilize a categorical privilege log should be prepared to at times submit sub-categories for documents listed in the general category to ensure sufficient information is described. Parties should be prepared to have to meet and confer once production begins in order to coordinate with each other regarding categorization of privileged documents for rolling productions.[43]

One of the more vexing issues that must be dealt with regarding categorical privilege logs is with respect to near duplicates, redacted documents, emails and attachments. These issues are particularly troublesome because the asserted privilege may be different for these types of documents. The parties should cover these issues and develop a plan for logging these types of documents. For emails it may be possible to log the latest dated email, although this is difficult as email threads oftentimes do not simply involve two people. On the other hand attachments will need to be logged separately, as the basis for privilege will almost certainly be different from the email to which it is attached. The use of email threading tools can definitely serve to minimize the time spent on this issue; however, the parties will have come to an agreement as to whether an email thread, potentially involving different topics, can be categorically designated. How to categorize and log redacted documents will also need to be discussed. This is particularly true with email strings, although oftentimes the redactions will be for the same basis and those documents can be categorically logged. On the other hand, while near duplicates may be slightly different it may be easier to log them in the same category as other near duplicates.

Understanding the framework of FRCP 26(b)(5) and FRE 502 is critical regarding privilege logging in general, particularly with the pitfalls of a categorical privilege log. The use of categorical logs may entail some potential complications, such as the potential increase for disputes challenging the assertions of privilege, which may ultimately require constant and extensive *in camera* review.[44] The games that litigants may try will be mitigated by active judicial management. Judges may order sampling, or review all the asserted privilege, which can lead to the waiver of privilege, costing a party the case. On the other hand, a party might be reluctant to constantly raise issues, potentially invoking the ire of the judge, with frivolous contentions against an adequate log. The most difficult quandary a litigant may face is with respect to ensuring that the categories have adequate descriptions, especially as courts have demonstrated different standards with respect to what is adequate, but this information may be negotiated at the Rule 26(f) meeting. Admittedly, it is often difficult to assess at the early stages of litigation, although as litigation progresses the parties can set up to meet and confer to negotiate the level of detail necessary for categorical logs.

Overall, parties should be ready to cooperate, but have a good strategy in place to ensure that the categorical log will meet the necessary criteria under the rules. At the same time, the parties should be ready to meet and confer concerning issues that will almost certainly arise, with respect to the logs, as the litigation progresses.

Endnotes

1. Herbert L. Roitblat, Search & Information Retrieval Science, 8 Sedona Conf. J. 192, 192 (Fall 2007); *cf.* Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery at 17 (RAND Institute for Civil Justice 2012) (hereinafter 2012 Rand Study), available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf ("...the total costs per gigabyte reviewed were generally around $18,000, with the first and third quartiles in the 35 cases with complete information at $12,000 and $30,000, respectively. There was one instance in which total costs for each gigabyte of data reviewed was $358,000…").
2. *See* Emery G. Lee III & Thomas E. Willging, Litigation Costs in Civil Cases: Multivariate Analysis 8 (Fed. Jud. Ctr. 2010) ("Intellectual Property cases had costs almost 62% higher, all else equal, than the baseline 'Other' category."); *see also* Thomas E. Willging et al., Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases 38-39 (Fed. Jud. Ctr. 1997) (finding that patent cases "stood out for their high discovery expenses").
3. The Southern District of California has a Model Order Governing Discovery of Electronically Stored Information in Patent Cases. The Northern District of Illinois has local Patent Rules for Electronically Stored Information. The Southern District of Indiana has a Case Management Plans, specifically for Patent cases, requiring an ESI Supplement to Report of Parties' Planning Meeting, with different

reports required at different stages of the litigation. The Western District of New York, as part of its Local Patent Rules, has a [Model] Order regarding E-Discovery in Patent Cases. The District of Oregon has a Model Order Regarding E-Discovery in Patent Cases, as does the Eastern District of Texas. The Southern District of New York has established a Standard Order (In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York [see in particular, Exhibit B: Joint Electronic Submission and Proposed Order]).

4. *See* 2012 Rand Study, *supra* note 1 (finding that 73% of the cost is attributable to review).
5. *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist on "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").
6. 22 N.Y.C.R.R. § 202.7(g) Rule 11-b.
7. *See* Fed. R. Civ. P. 1 advisory committee's note to the 1937 amendments.
8. Fed. R. Civ. P. 26(b) advisory committee's note to the 1946 amendment.
9. Fed. R. Civ. P. 26(b) advisory committee's note to the 1970 amendment.
10. *Id.*
11. Fed. R. Civ. P. 26(f) advisory committee's note to the 1980 amendment.
12. Fed. R. Civ. P. 26(g) advisory committee's note to the 1980 amendment.
13. *See generally*, Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Ct. L. Rev. 19, 24-27 (2009).
14. Fed. R. Civ. P. 26(b)(5) advisory committee's note to the 1993 amendment.
15. *Id.*
16. *Id.* (emphasis added).
17. Fed. R. Civ. P. 26(b)(5)(B) ("*Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.").
18. Fed. R. Civ. P. 26(b)(5)(B) advisory committee's note to the 2006 amendment.
19. *Id.*
20. Fed. R. Civ. P. 26(f) advisory committee's note to the 2006 amendment.
21. *Id.*
22. Fed. R. Evid. 502 Explanatory note on Evidence Rule 502.
23. *Id.*
24. *See Great-West Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, Case No. 2:11-cv-02082-APG-CWH, 2013 U.S. Dist LEXIS 135750, at *45 (D. Nev. Sept. 23, 2013) ("However, it is the Court's view that the parties' agreement clearly provides that inadvertently produced documents, upon a determination that the documents are privileged, must be returned without waiver to the disclosing party regardless of the care taken by the disclosing party.") (emphasis added).
25. *See* Summary of the Report of Judicial Conference Committee on Rules of Practice and Procedure, Agenda E-19 (Summary) Rules at 101, Sept. 2014, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf (last visited February 5, 2015) (hereinafter Summary Report on Rule Changes).
26. *See* Evan Koblentz, *View from the Bench: Judges on E-Discovery at LegalTech Day Two*, Legal Technology News, Jan. 31, 2013. (Magistrate Judge Peck has commented that it is malpractice not to seek a 502(d) order prior to seeking documents.).
27. *See* Facciola & Redgrave Privilege Framework, *supra* note 13, at 31-32.
28. *Id.*
29. Fed. R. Civ. P. 26(b)(5) advisory committee's note to the 1993 amendment.
30. *See* Facciola & Redgrave Privilege Framework, *supra* note 13, at 38-39.
31. *Id*. at 39-40.
32. *Id*. at 32.
33. *See, e.g., In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (citing *S.E.C. v. Thrasher*, No. 92-CV-6987, 1996 WL 125661 at *1–3 (S.D.N.Y Mar. 20, 1996)); *Caliper Techs. Corp. v. Molecular Devices Corp.*, 213 F.R.D. 555, 562-63 (N.D. Cal. 2003).
34. *See* S.D.N.Y. & E.D.N.Y. Local Rule 26.2 (c); 22 N.Y.C.R.R. § 202.7(g) Rule 11-b; Guideline 7(b)(ii), Delaware Court of Chancery Guidelines for the Collection and Review of Documents in Discovery.
35. *See* 22 N.Y.C.R.R. § 202.7(g) Rule 11-b(b)(1) ("For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 N.Y.C.R.R. § 130-1. 1a, setting forth with specificity those facts supporting the privilege or protected status of the information included within the category.").
36. *See* Summary Report on Rule Changes, *supra* note 25, at 95.
37. *See* Report of the Special Committee on Discovery and Case Management in Federal Litigation at 83, New York State Bar Association (June 23, 2012).
38. *See Chevron Corp. v. Salazar*, 2011 WL 4388326 (S.D.N.Y., Sept. 20, 2011) ("Inspection of the individual documents reveals that the categorization process engaged in Chevron obscures rather than illuminates the nature of the materials withheld"….The Court ordered Chevron to identify the withheld discovery "including (1) the type of document, (2) the general subject matter, (3) the date, and (4) any other information necessary to identify the document and evaluate the claim of privilege…").
39. Fed. R. Evid. 502 Explanatory note on Evidence Rule 502.
40. *See* John Martin & Joe Howie, *Reducing Privilege Log Costs and Delays: Negotiating a Quasi-Categorical Approach,* 4 EDDE Journal 2 (Spring 2013).
41. *See* 22 N.Y.C.R.R. § 202.7(g) Rule 11-b(b)(3)(d) ("Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.").
42. *See* Facciola & Redgrave Privilege Framework, *supra* note 13, at 46.
43. *Id*. at 48.
44. *See* Hon. Ira B. Warshawsky, *More Changes are Coming to the Commercial Division*, New York Law Journal, May 19, 2014.

Social Media Jury Instruction Report

of the Commercial and Federal Litigation Section of the New York State Bar Association Updated December 8, 2015

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Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

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I. Introduction

> Technology is so ubiquitous. For many people, it's their way of life. They tweet, they blog, they look up things online. It's literally in their pocket. It's their routine. You can't just tell people they can't do this and that. You have to tell them why and the consequences.[1]

Social media has revolutionized how we communicate. It routinely serves as both a means of communication and a source of information for jurors and counsel. Its use must be anticipated and its impact addressed during jury selection, at trial, prior to and during jury delibera-

tions, and after trial.[2] This report examines how jurors and attorneys use social media and its possible impact on jury trials and on our judicial system.

The use of social media by jurors and attorneys has been addressed in a 2014 Federal Judicial Center Report, entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (the "FJC Report"). In addition, in 2014-15, the Commercial and Federal Litigation Section (the "Section") of the New York State Bar Association surveyed its members concerning the use of social media at trial. Prior to developing its recommendations relating to social media jury admonitions, the Section analyzed the results of its survey and reviewed the analyses contained in the FJC Report, which sets out some of the measures used by federal judges to deal with the use of social media by jurors.

A. Jurors' Use of Social Media

During trial and deliberations, jurors have been found to have: (1) performed their own Internet research concerning the case; (2) communicated with parties, witnesses, experts and/or counsel using social media; (3) used emails, blogs, texts, tweets, and chat rooms, among other electronic media, to communicate their opinions and prejudices about the case on which they are sitting; (4) not followed jury instructions as evidenced by their social media communications; (5) intentionally or unwittingly failed to disclose "prejudicial" connections to parties, witnesses, counsel or others as evidenced by jurors' social media communications; and (6) otherwise engaged in misconduct through the use of social media technology. Such conduct, which is now often easily discoverable, may make its way to trial counsel who then may question the integrity of jury verdicts.[3] As such, the use of the Internet and social media by jurors has increasingly resulted in mistrials and jurors being held in contempt.

Given that jurors use electronic devices and social media in their daily lives, explicit rules concerning jurors' social media usage are required to ensure that social media is not misused during trial.[4] Such rules are needed as it is just too easy and too convenient for even conscientious and careful jurors to misuse social media perhaps on the way to the courthouse, while waiting for the trial to begin, during breaks, and during deliberations. The risk that improper social media communications may occur can be reduced through frequent admonitions during *voir dire* and trial,[5] and appropriate jury instructions using plain language.[6]

It has been argued that advising jurors that attorneys or their agents may have investigated juror backgrounds and/or may monitor their "public" social media posts throughout the trial and deliberations may upset jurors or cause them to think that their privacy is being invaded, both of which, in turn, may discourage jury service. There is a fine line which needs to be considered in how to appropriately instruct jurors about the social cost to the efficacy of the jury system resulting from improper social media communications relating to a trial and jurors' right to freely communicate in a manner that they do every day. We note in this regard that the American Bar Association Standing Committee on Ethics and Responsibility stated:

> **[J]udges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites.**[7]

(emphasis added).

Some have also argued that instructing jurors that their social media communications may not be "public" may have the opposite of the desired effect of decreasing such communications and may actually increase the likelihood that certain jurors may instead make their previously "public" social communications "private," and thus not easily discoverable, or cause jurors to potentially engage in "undetectable" misconduct that they may not have otherwise considered.

Further research and data is needed in this relatively unexplored area before the Section takes a position on whether the above issues need to be specifically addressed with the jury, and, if so, what form such admonitions should take. However, the Section believes that these issues should at least be addressed with counsel at the beginning of the trial and prior to the jury being charged.

Putting aside issues relating to notifying jurors of potential attorney monitoring of their social media communications and the implications of communicating "publicly" as opposed to "privately" over social media, the Section believes that the increasing pervasive usage of social media by jurors requires affirmative and proactive intervention by reminding jurors not to engage in improper electronic communications. Without such proactive intervention, social media usage will threaten the integrity of the jury system.[8]

Real risks are associated with juror misuse of social media during a trial. Relying on jurors to assume that a general jury instruction applies to all aspects of social media communications seems ineffective. Jurors should be provided with a detailed explanation of the dangers of using social media during the trial. Among the reasons for a ban on social media during the trial is the need to exclude information not properly admitted as evidence for the jury's consideration. Social media communications are external influences that can both consciously and unconsciously influence a juror's ability to evaluate the

evidence in a particular case. If the significance of inappropriate social media communications is not sufficiently explained to jurors, admonitions and jury instructions—no matter how often a judge gives them—may not have their desired effect. Without personalizing the consequences[9] of a juror's improper usage of social media too much by, for instance, affirmatively advising of the possibility of contempt or sanctions and thereby potentially discouraging jury service, jurors must be made aware in admonitions of the seriousness of such conduct and that denying parties their right to be tried based on admitted evidence creates the risk of a mistrial.

B. Use of Social Media by Attorneys to Investigate and Monitor Jurors

The issue of whether jurors should be made aware that attorneys may have investigated their backgrounds or may monitor their "public" use of social media during trial or deliberations needs to be continued to be reviewed.

It is well known that jurors often regard their social media communications as "private" even when they are "public," as users may not understand the privacy setting of their social media services or that posts may be shared in ways that make their "private" posts "public," and that such communications are increasingly becoming known to counsel, their agents and the court. Even in the absence of detailed juror research on the issue of whether such an instruction should be given as a matter of course, the Section believes that consideration should be given to apprising jurors, on a case-by-case basis, of the reality that many social media communications are "publicly" viewable.

Concomitantly, consideration also must be given whether to advise jurors that counsel may have researched them and that during trial and/or jury deliberations counsel may continue to view, monitor or "follow" juror "public" social media communications.[10]

A social media site also may enable an account user to see who has viewed their social media profile or may automatically send a notification noting the viewer's identity to the account holder.[11] While such notifications to jurors during trial and/or deliberations do not appear to be widespread, the Section believes that consideration should be given to advising jurors, on a case-by-case basis, of such potential to attempt to minimize the surprise a juror might feel if she learns that an attorney sitting nearby in the courtroom has reviewed her "public" social media posts.

Regardless of whether or to what extent a jury admonition or instruction is given to the jury concerning the potential for lawyers to review or monitor juror "public" social media, consistent with the judicial survey results reported in the FJC Report discussed below, the Section believes that, at a minimum, judges should consult with and address these issues with counsel prior to jury selection and determine whether or not any such instructions or admonitions are appropriate on a case-by-case basis concerning whether counsel will review and/or monitor "public" juror social media communications during jury selection, trial and/or deliberations, and, if so, discuss, for instance, such potential issues as: (i) what social media services will be reviewed; (ii) whether counsel or her reviewing agent is a member of each such social media service, and will they be logged in when such monitoring takes place; and (iii) whether, other than evidence of jury misconduct, the results of such monitoring will be shared with opposing counsel and/or the court during the various stages of the trial.

C. Section Recommendations

To reduce the potential impact of improper social media communications on jury trials, the Section recommends that courts, as discussed above, should: (1) consult with counsel prior to jury selection concerning the potential review and/or monitoring of "public" juror social media communications during jury selection, trial and/or deliberations; (2) consider the Section's revised model New York's Pattern Jury Instructions; and (3) consider displaying in the jury deliberation room a social media usage poster warning of the consequences of improper social media communications.

The objective of the Section's proposed model admonitions to New York's Pattern Jury Instructions is to better inform jurors about the dangers of discussing the trial on social media and to remove social media influences from deliberations.

Accordingly, the Section proposes that courts should consider amending their jury instructions to be more specific about the problems associated with the use of social media at trial. And without taking a position on whether such instructions must be given, the Section provides a proposed model instruction for consideration and use in the event that the court decides to advise jurors that: (i) their social media profiles, even though they might appear to be "private," may actually be "publicly" reviewable by others, or (ii) their "public" social media communications may have been or will be viewed and/or may be or will be monitored or "followed" by counsel during trial and afterwards.[12] We note that the Section's proposed model language in this regard, if adopted, may be one of the first of its kind in the country. The bracketed language in the Section's model instructions seeks to address the above.

The desired effect of the Section's model language is in part to cause jurors to be as forthright as possible when answering questions during *voir dire* about personal or sensitive areas that counsel should be informed about that would otherwise be prejudicial to the trial, but which may have already been revealed to some degree in jurors' extant "public" social media postings. More candid juror responses may also have the salutary effect of educating

counsel whether certain jurors should not be chosen given their manner and usage of social media. In addition, such suggested admonitions would hopefully discourage jurors from engaging in inappropriate social media communications that might taint jury deliberations. The Section does appreciate, however, that such admonitions may provide some degree of pause for people wanting to avoid serving as a juror.

The suggested revisions would need to be tailored to the mores of the region of New York where the trial is being held and to the particular idiosyncrasies of the trial. The Section appreciates and acknowledges that judges are generally comfortable with the "tried and true" New York Pattern Jury Instructions which have been honed over the years by experienced judges, who then customize such jury instructions based on personal experience.

However, the Section believes that with the ubiquity of juror and attorney social media and mobile device usage and where the judiciary may not be as knowledgeable as counsel and jurors with respect to the use of social media and similar tools, such as blogging, standard jury instructions must deal with this reality. As such, the Section's proposed revisions are suggested additions to the extant model Pattern Jury Instructions and should be used as a framework when crafting jury instructions in this new electronic era.

In addition to the suggested changes to the language of New York's Pattern Jury Instructions, the Section recommends that a poster regarding social media usage be prominently displayed in jury deliberation rooms. The purpose of this poster is to further remind jurors of the potential risks—and ensuing consequences—of unauthorized social media use related to the trial.

The suggested changes to the standard jury instructions, along with the poster, would hopefully provide appropriate reminders to jurors while they are in the courtroom concerning the proper and improper use of social media.

The objective of the Section's recommendations is to ensure the integrity of our jury system.

II. A Synopsis of the Federal Judicial Center's Report: "Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations"

The Federal Judicial Center issued a May 1, 2014 report entitled "*Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations*," A Report to the Judicial Conference Committee on Court Administration and Case Management (FJC Report).[13]

The FJC Report summarized its conclusions by stating that "detected social media use by jurors is infrequent and that most judges have taken steps to ensure jurors do not use social media in the courtroom."[14]

All active and senior federal district judges were sent a survey addressing the use of social media. Questions in the survey addressed judicial practices used to control juror social media usage, judicial views on the utility and extent of social media investigation of jurors during *voir dire*, and whether such investigations raised concerns or genuine difficulties. Four hundred and ninety-four federal district court judges responded to the survey.

A. Jurors' Use of Social Media During Trial

The FJC Report acknowledges that it is difficult for judges to police juror social media usage. The most common strategies that judges applied were preventive: explaining the reasons behind the ban on improper social media use in plain language, and incorporating directions on social media usage into jury instructions.

In total, 33 judges reported instances of detected social media usage by jurors during trial or deliberations, with the majority taking place during criminal trials. The detected prohibited uses of social media took several forms:[15]

- 6 judges reported that a juror divulged confidential information about the case;
- 5 judges reported a juror performing case-related research;
- 3 judges reported a juror sharing general jury service information;
- 3 judges reported that a juror communicated or attempted to communicate directly with case participants;
- 2 judges reported that a juror revealed aspects of the deliberation process;
- 1 judge reported a juror "friending" or an attempt to "friend" participants in the case; and
- 1 judge reported a juror texting.

Twenty-seven judges indicated how they had learned of the inappropriate use of social media by jurors: 12 reported that other jurors had alerted the court; 8 reported that attorneys had advised the court; 6 reported that the court was advised by court staff; 1 reported that the court was advised by a party; 1 observed the social media use through personal observation in court; and 3 learned of the behavior through post-trial motions.

The FJC Report indicated that, when a judge became aware of a juror's use of social media in his or her courtroom, 70% of the judges cautioned the juror, but allowed him or her to remain on the jury, and 30% percent of the judges removed the juror.

The most common measures used by judges to prevent inappropriate social media usage were (in descending order):

- explain in plain language the reason behind the ban of social media (74%);
- instruct jurors at multiple points throughout the trial (70%);
- remind jurors at *voir dire* to refrain from using social media while serving as a juror (54%);
- use the Committee's model jury instructions before trial (53%);
- use other jury instructions before trial (46%);
- use the Committee's model jury instructions before deliberations (45%);
- use other jury instructions before deliberations (35%);
- confiscate phones and other electronic devices during deliberation (30%);
- confiscate phones and other electronic devices at the start of each day of trial (22%); and
- require jurors to sign a statement of compliance or written pledge agreeing to refrain from using social media while serving as a juror (2%).

In addition, some judges reported that they posted a notice in the jury assembly or deliberation room regarding the use of social media.

B. Judicial Knowledge of Attorneys' Use of Social Media During Trial

The FJC Report asked judges about whether and how attorneys used social media to investigate jurors during *voir dire*. Seventy-three percent of responding judges answered that they did not know how many of their trials during the relevant period involved attorneys performing social media investigations of jurors. Further, approximately 91% of the 329 responding judges indicated that they were unaware of what type(s) of juror social media that attorneys reviewed, if any. The remaining judges indicated that attorneys reviewed prospective jurors' Facebook pages (5%), LinkedIn profiles (2%), personal blogs/websites (2%), or ran prospective jurors' names through a search engine such as Google or Bing (5%).

Approximately 26% of judges surveyed forbade attorneys from using social media to investigate prospective jurors. Overall, judges who did not permit social media investigations cited both juror privacy concerns and logistical considerations. Specifically, 20% indicated they did not allow attorneys to research prospective jurors during *voir dire* in order to protect the jurors' privacy, 4% were worried about intimidating potential jurors, 17% thought such activity would be distracting, and 16% believed that this type of research would prolong *voir dire*. Moreover, one-third of the responding judges indicated that attorneys' use of social media to research jurors during *voir dire* was unnecessary because attorneys can conduct research before they arrive at court or because the information provided during *voir dire* is sufficient.

In addition to privacy and logistical issues, a small number of judges also noted that allowing attorneys to research potential jurors during *voir dire* may create an unfair advantage for one side, and that there is no way to evaluate the accuracy of the information gathered. In contrast to judges who forbade social media usage, of the judges who permitted social media research of potential jurors during *voir dire*: 62% did not require the attorneys to share results with the court or other attorneys; 2% reported that they required attorneys to share results with both the court and other attorneys; and one judge required that the results be shared only with the court. Over one-third of the responding judges, however, did not know whether such information was shared with other attorneys. Judges did not report many problems with attorneys using social media. When asked about attorneys' conduct during *voir dire*, 5% of the 64 responding judges indicated experience with an attorney who followed a prospective juror on Twitter. No judges reported attorneys "friending" or attempting to "friend" a prospective juror on Facebook or "subscribing" to a prospective juror's personal blog.

C. Notifying Jurors of Potential Social Media Investigations by Attorneys

The FJC Report also asked judges "whether they disclosed to the venire panel that attorneys may be looking at their social media accounts."[16] Ninety-four percent reported that they do not disclose such information to potential jurors versus 2% who did make such disclosure. The FJC Report further stated that four judges "admitted that their focus is more on the use of social media by jurors and less on attorneys' actions concerning social media."[17]

III. Analysis of Survey of Commercial and Federal Litigation Section Members Concerning Social Media Usage as It Relates to Jurors

The Section surveyed its members in 2015 concerning attorneys' use of social media as it relates to jurors. The survey was sent electronically to members of the Section and provided to attendees of the Section's 2015 Annual and Spring Meetings.

A limited group of 61 attorneys responded to the survey and, to the extent respondents' cases went to a jury, approximately two-thirds were state court jury trials and approximately one-third was federal court jury trials.

Of those who indicated that their cases went to the jury, the following approximate percentages of respondents indicated "*no*" when asked whether admonitions concerning the use of social media by jurors were given by the court at the below stages of trial:

No admonition given during:	
jury selection or prior to the commencement of trial	37%
the course of the trial, but prior to the case being presented to the jury	42%
jury deliberations	50%

Over 85% of those respondents who indicated that their cases had gone to trial, stated "no" when asked if they were "aware that a member of the jury utilized social media during the course of the trial or during jury deliberations to discuss any aspect of the trial." Of those few who reported the use of social media by a juror, one respondent responded that he or she found such communication by searching Facebook and the other two respondents indicated that such usage was reported to the court by fellow jurors and it concerned the use of Facebook and Twitter. In each case, the court was alerted to such usage and it was dealt with through a *voir dire* of the individual juror and then the jury panel. In addition, in the second case, it was further addressed by an admonition to the jury. In the third instance, the court was only first advised of such usage post-trial.

Over two-thirds of those who responded to the question indicated "no," when asked whether counsel or his or her agent used social media to investigate jurors prior to their being empaneled or to monitor sitting jurors' communications during trial or jury deliberations.

Further, almost all indicated "no" when then asked if their client had engaged in such monitoring of juror social media. When monitoring by an attorney's agent took place, the amount of such monitoring was equally divided among paralegals, investigators and jury consultants. The most common social media platforms used to monitor jurors were Facebook and LinkedIn, followed by Twitter. Every respondent indicated "no" when asked whether any juror had become aware that counsel had monitored his or her social media account(s).

While the survey pool was not very large, certain general preliminary observations can be made from the above. First, courts do not appear to be sufficiently instructing jurors concerning their use of social media and, when admonitions are given to the jury, counsel believe that such admonitions are insufficient.

It is also apparent that trial counsel are not often monitoring jurors' "public" social media and, as recent authority noted herein is making clearer, there is a risk that jurors may improperly use social media during trial and deliberations, and thereby infect jury deliberations. Knowledge of such "public" social media communications could, among other things, affect how an attorney may conduct her trial and/or reveal juror misconduct that might lead to a mistrial. Given existing technology enabling counsel to anonymously monitor jurors' "public" social media, it may be prudent for counsel to consider the benefits, risks and costs of same and discuss juror monitoring with one's clients.

Last, the survey suggests that it may not be necessary to provide an instruction to jurors that trial counsel may be monitoring their "public" social media. In deciding whether to provide such an instruction, a court should consider the potential that a juror may become sufficiently upset upon learning of such monitoring (even though social media users, including jurors, always have the ability to make their posts "private") to discourage jury service or cause potentially improper "public" social media posts to be made "private" and thus not "non-monitorable."

IV. Commentary to Proposed Revisions to New York's Pattern Jury Instructions

A. Proposed Amendments Addressing Technological Changes

There is an ever-growing universe of devices and services that prospective jurors may use on a daily basis to obtain information and communicate with others. Jury instructions must provide guidance concerning these devices and services. However, due to constant changes in technology and the changing popularity of certain devices or services, it would not be practical to address every device or service by name in jury instructions, and listing too many of them would make jury instructions too difficult to absorb. Nevertheless, specific examples should be provided to offer guidance to jurors as to what is impermissible. We address below the general categories of devices and services, referring to certain examples.

Generally, there are three areas of concern: (i) electronic devices, (ii) software or applications, and (iii) social media platforms, blogging and Internet use in general. Examples of electronic devices are computers, tablets (iPad, Surface), cell phones (iPhone, Galaxy, etc.) and wearable devices (Apple Watch). Some devices, like laptops and computers, may be easily seen when used. Others, however, are small enough to be inconspicuous to a judge or to the lawyers, and improving technology will make it even harder for judges or lawyers to notice such devices.

Each device contains an operating system which itself runs software known as applications or "apps" (for example, there are web browser applications, messaging and email applications, word processing software applications, and mapping applications). An application is a type of software designed to allow the user to perform specific tasks. Applications run services, including social media platforms, through which jurors may communicate. Most mobile devices also contain web browsers, from which websites may be accessed and also from which social media platforms can be accessed.

Examples of social media platforms or services are Facebook, Twitter, Google+, Instagram, LinkedIn, and Vine, located respectively at www.facebook.com, www.twitter.com, www.google.com/plus, www.instagram.com, www.linkedin.com and www.vine.co. These social media platforms, whether web-browser based or application-based, are more than mere tools for communication. They may be used to research witnesses and facts concerning a litigation. There are many other forms of Internet-based communication as well, such as blogs.

To adequately communicate the scope of what prospective jurors may or may not do and what is expected of them, it is necessary to instruct jurors using examples from the technology jurors are likely to use. For example, it may be difficult for some jurors to understand that a general instruction not to use the Internet or social media is also a specific instruction not to use common services and websites such as Google, Bing, Twitter, Facebook, YouTube, Snapchat, Wikipedia, Google Maps or MapQuest to perform "research" on a case.[18]

To this end, we propose that jury instructions address generally the various types of devices and search engines, social media platforms and applications available without listing the names of all such devices or services.

Because jurors should not be engaging in communications that may invite others to communicate with them about jury duty, the court should consider advising the jury that, if a juror feels the need to communicate over social media for personal reasons, she should post a communication that simply says "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it."

Of course, a juror advising a family member over social media that she will be running late due to jury service is a permissible social media communication, and it would not be violation of a court instruction. Similarly, there is nothing improper with a juror tweeting that he is "proud to be discharging my duty by serving on a jury this week" or that jury duty is a "rewarding experience." Admonitions should not prohibit such communications over social media.[19]

B. Proposed Amendments Explaining the Risks of Engaging in Improper Social Media Usage

The popularity of social media calls for more robust restrictions and clearer explanations to jurors of the risks inherent in engaging in improper social media communications during trial and deliberations. Jury instructions should be supplemented in order to clearly address these risks.

First, jury instructions should include detailed and specific explanations of the legal and practical reasons why jurors must not use social media to discuss or research any aspect of a trial. Jury instructions should explain that any discussion of the trial on social media constitutes premature deliberation which is prejudicial to the jury process.

Second, where possible, jury instructions should include examples of specific improper use of social media by jurors and how such actions may lead to a mistrial.[20] One possible example is where a juror conducted Internet research regarding the symptoms of ODD, a psychological disorder, one symptom of which was a propensity to lie, and which disorder allegedly affected a critical witness in a criminal prosecution. The juror shared this information with other jurors and, on review, the appeals court granted a mistrial. *See Wardlaw v. State*, 971 A.2d 331 (Md. 2009).

In another instance, concerning the sexual assault of a minor, the court discovered that a juror had done Internet research about the defendant's culture and religion and that the juror shared some of this research with the other jurors. In the court's view, even if only one juror reported the research, suggesting that the information did not affect the verdict of the other 11 jurors, the defendant was entitled to be tried by 12 impartial jurors and since the information related directly to a subject that pervaded the trial from start to finish, it was impossible to conclude that outside information used by at least one juror to interpret the witnesses' testimony and credibility could have had no impact on the jury verdict. *See State v. Abdi*, 45 A.3d 29 (Vt. 2012).

We suggest that courts should advise jurors that a single juror's Internet or social media research could improperly infect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings and/or potentially a mistrial. For these reasons, jurors should be advised of the importance to take care to heed to the court's admonitions.

Third, the jury instructions should specifically list the range of prohibited activity. Given the prevalence of social media in our lives and the numerous ways in which social media can now be accessed, there is a need to specifically mention multiple ways of engaging in improper social media communications. As a consequence, instructions should clarify that jurors must not, among other things, conduct any Internet research related to the trial, send "friend" requests to or otherwise connect with any trial participant, post messages, photos or videos online, or blog or tweet anything related to the trial. The Section believes that it would be helpful to specifically reference examples of seemingly innocuous acts which could lead to a possible mistrial, like looking up the dictionary definition of a term or expressing sympathy for the alleged crime victim in a case on a social media platform via an emoticon.[21]

Because juror misconduct has become more likely given the prevalence of social media and the corresponding ease with which it may be used, jury instructions need to include detailed and specific explanations of the

reasons certain activities are prohibited, examples of violations drawn from existing case law, and the range of the activity prohibited.

C. Model Instructions Relating to Attorneys' Review of Juror "Public" Social Media

As noted above, although the Section believes that courts should give due consideration to them, the Section takes no position at this time as to whether instructions or admonitions regarding attorney research, "following" or monitoring of jurors' social media accounts and/or advising jurors that their social media communication may be "public" and reviewable by others, including trial counsel, should be given.

Nevertheless, in the event that a court, after consulting with counsel, determines that either or both of these instructions are warranted by the facts of the case or are otherwise appropriate, the Section provides suggested revisions to the Pattern Jury Instructions in order to provide judges with "model" language they can choose to use when instructing jurors in connection with these issues.

1. Advising Jurors That Their Social Media Communications May Not Be "Public"

The Section suggests that consideration be given to generally informing jurors, without going into the issue of the security settings in any particular social media platform, that their social media communications may be "publicly" viewable or that juror posts may be shared in ways that make "private" posts "public," even if it means that such admonition may increase the likelihood that certain jurors may make their previously "public" social communications "private," and thus not easily discoverable or "monitorable," or potentially cause them to engage in now "undetectable" misconduct they may not have otherwise considered.

As such, courts should consider an instruction that jurors be "advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case."

2. Monitoring Jurors' "Public" Social Media Communications

Case law is developing that shows that it is not only permissible for trial counsel to conduct Internet research on prospective jurors, but that it may even be expected. In *Carino v. Muenzen*, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. App. Div. Aug. 30, 2010), an appellate court held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the Internet to research potential jurors during *voir dire*. During jury selection in a medical malpractice case, plaintiff's counsel used a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use his laptop during jury selection because he gave no notice of his intent to conduct Internet research during jury selection. Although the appellate court found that the trial court's ruling was not prejudicial, the appellate court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because Internet access was open to both counsel."[22] *See Cannedy v. Adams*, 706 F.3d 1148, 1164-66 (9th Cir. 2013) (grant of *habeas corpus* petition affirmed where a lawyer's failure to locate and use an abuse victim's recantation on her social networking account constituted ineffective assistance of counsel).

In *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010), a jury verdict was vacated where a juror had denied falsely any prior jury service. In holding that the juror had acted improperly, the court observed that a more thorough investigation of the juror's background would have obviated the need to set aside the jury verdict and conduct a retrial. The trial court chided the attorney for failing to perform Internet research on the juror, and granted a new trial, observing that a party should use reasonable efforts to examine the litigation history of potential jurors.

Given the new realities of juror social media communication, the American Bar Association Standing Committee on Ethics and Responsibility in Formal Opinion 466 stated in April 2015[23] that:

> judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their [electronic social media] and websites. If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and [electronic social media], including on [electronic social media] networks where it is possible or likely that the jurors will be notified that their [electronic social media], is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

The Association of the Bar of the City of New York Committee on Professional Ethics in Formal Opinion 2012-2[24] further noted that:

> Just as the Internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential

> and sitting jurors**, and clients now often expect that attorneys will conduct such research.**
>
> * * * *
>
> It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

(emphasis added).

However, lawyers should use caution when conducting jury research or monitoring to ensure that no communication occurs in any manner with the prospective or sitting juror. Association of the Bar of the City of New York Committee on Professional Ethics Formal Opinion 2012-2 makes clear that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media service (and not directly by counsel) may be considered a technical ethical violation of the ethical rule prohibiting contacting a juror.[25]

In addition to trial counsel's ability to research jurors by performing search engine searches, and viewing individual jurors' "publicly" accessible Facebook or LinkedIn accounts,[26] counsel now can track and monitor social media in "real-time" originating from a certain designated geolocation or neighborhood, including around a courthouse. Relatively inexpensive software can permit counsel to identify and monitor all "public" tweets and other "public" social media posts made, for instance, within a two-block radius of the courthouse, and cull them down to identify potentially improper social media communications made by jurors and then, through identifying metadata, "follow" the social media communications sent or received, for instance, on such juror's way home from jury service concerning the trial.

To this end, the Section has included a "model" jury instruction and admonition addressing the above in the event that a court concludes that such an instruction is warranted.[27]

3. Alerting the Court to Juror Misconduct Resulting from Social Media Communications

Motions for mistrials have been occurring with more frequency as jurors increasingly use social media during trial in ways that potentially adversely interfere with a party's right to receive a fair trial. It is incumbent upon counsel to promptly alert the court to such possible juror misconduct.

The NYCLA Committee on Professional Ethics, in addressing whether it is ethically proper for an attorney to review jurors' social media communications, stated:

> Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court.[28]

V. Suggested Revisions to New York's Pattern Jury Instructions

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions,[29] and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. Do not do so. Even if you happen to live near the location, avoid going to it or past it until the case is over. In addition, do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others—Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will

reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.[30]

Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, iPhones, Android-based devices, or other types of smartphones, iPads or other tablet devices, [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice.*]

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or use any other electronic applications or tools[31] to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly or through your favorite electronic means. For now, and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case having to be retried.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.[32] Accordingly, I expect that you will seriously and faithfully abide by these instructions.

Jury Admonitions in Preliminary Instructions (Revised May 5, 2009)

(Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use the Internet, including maps, Google Earth, social media or any other program or device to search or research or look at the places involved, or at descriptions, pictures, videos or

Internet maps related to the events, discussed in the testimony.[33]

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the Internet, online reports, social media, blog posts or podcasts[34] or any other media.

6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case.[35] Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it." You do not want to do anything that will invite others to communicate with you about your jury duty.[36]

You must also not use search engines like[37] Google, Bing or sites such as Wikipedia[38] or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.[39]

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Our law does not permit jurors to communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified.

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.

There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be

involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instruction.[40] Let me know if there are any questions regarding these instructions.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

JURY SEPARATION DURING DELIBERATIONS
(Revised December 17, 2009)

Members of the jury, today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.
2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.
3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.
4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.
5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.
6. You must not read, view or listen to any accounts or discussions of the case reported in or on newspapers, television, radio, the Internet, social media or any other media.
7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, chat rooms, photograph, video, blog, or through social media websites, such as Facebook, YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes

the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other way.

You must also not use Google or Bing or search online or otherwise for any information about the case, or the law which applies to the case, or the people involved in the case, including any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.[41]

Further, be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.[42]

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

VI. Display of a Modern Social Media Usage Poster in Jury Rooms

We have reviewed three posters used by courts to advise jurors of the risks of using social media during trial: the Washington State Pattern Jury Instructions Committee Poster, which is also the United States Federal Court poster[43] (the "Washington/Federal Poster"); the National Center for the State Courts (the "NCSC") poster (the "NCSC Poster"); and the Western Australia poster (the "Australian poster").

The Washington/Federal Poster is being used in state courts in Washington, Massachusetts, Minnesota and California as well as in the Federal Courts. Our understanding is that in states using that poster that it has found general adoption and is posted in many courthouses across each state. The NCSC sent free copies of its poster to interested courts. These states have requested copies of such posters: Connecticut, Colorado, Kansas, Maryland, Minnesota, New Jersey, and Pennsylvania. Overall, NCSC has distributed approximately 3,500 copies of the poster. There is also a version of the NCSC poster in Spanish. The

adoption of the NCSC poster and increasing incidents of juror misconduct resulting from the improper use of social media in New York demonstrate the need for a direct message to be sent to jurors in the jury deliberation room.

The Section suggests the adoption of a poster that we believe will significantly improve upon the existing posters. It focused on graphic design and images predominating over words as the current posters are not easily readable. Graphic images are well received by today's typical Internet user and follow the trend of ever more visual communication on the Internet. Displaying an ever-present poster is arguably more memorable than oral admonitions and instructions and a graphic poster would ameliorate some problems associated with language limitations. Thus, the Section, with the assistance of the graphic designers of the New York State Bar Association ("NYSBA"), designed the attached social media juror poster which the Section believes appropriately addresses the issues raised above. See Appendix at "B."

While the specific language used seeks to succinctly address the issues raised in this report, the Section appreciates that alternative language might accomplish the desired goals and that judges may differ on the specific wording used. The Section believes that the NYSBA's header on the poster, however, should be downplayed somewhat, as it makes the poster appear as if it is coming from the NYSBA and not from the court system, and thereby potentially lessening its effectiveness.

Endnotes

1. Eric Robinson, Deputy Director of the Reynolds Center for Courts and Media, University of Nevada, Reno, *Juror's Research Led to Murder Mistrial*, STANDARDSPEAKER.COM (Jan. 17, 2011), http://standardspeaker.com/news/juror-s-research-led-to-murder-mistrial-1.1091278.

2. *See United States v. Fumo*, 655 F.3d 288, 305, 331 (3d Cir. 2011) (Nygaard, J., concurring) ("The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program."); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 451 (E.D. Pa. 2011) ("the extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors.").

3. Even lawyers fail to observe court admonitions. Notwithstanding that there was a four-foot sign posted outside the courtroom warning that "photographing, recording or broadcasting is prohibited," an attorney from the spectator's gallery took pictures of evidence which he then tweeted, and may face possible sanctions for violating the ban on photography and cellphone use in the courtroom. *See* Debra Cassens Weiss, *BigLaw Partner Faces Possible Sanction for Tweeting Photos During Trial*, ABA JOURNAL (Nov. 10, 2015 7:49 AM), http://www.abajournal.com/news/article/biglaw_partner_faces_possible_sanction_for_tweeting_photos_during_trial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

4. As courts have become increasingly aware—and wary—of jurors using social media and other Internet tools to communicate to or from the courthouse or do research into cases during trial or deliberations, several jurisdictions have adopted or proposed model jury instructions which explicitly tell jurors not to access information about cases on the Internet, or discuss the case on the Internet or social media.

   Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 Reynolds Courts & L.J., 307, 310 (Sept., 2011), http://issuu.com/rnccm/docs/jury_instructions_for_the_modern_age.

5. Here, while the district court gave an appropriate instruction at the start of the jury's deliberations, it does not appear that it did so earlier. As demonstrated by this case, instructions at the beginning of deliberations may not be enough. We think it would be wise for trial judges to give the Committee's proposed instructions both at the start of trial and as deliberations begin, and to issue similar reminders throughout the trial before dismissing the jury each day. While situations like the one in this case will not always require a new trial, it is the better practice for trial judges to be proactive in warning jurors about the risks attending their use of social media.

   United States v. Ganias, 755 F.3d 125, 133 (2d Cir. 2014), *reh'g granted en banc*, 791 F.3d 290 (June 29, 2015).

   As explained below, the results show a small but significant number of jurors who were tempted to communicate about the case through social media. Almost all of these jurors ultimately decided not to do so because of the court's social-media instruction. Even jurors who were not tempted to communicate about the case through social media indicated that the court's instruction was effective in keeping their temptation at bay.

   Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From The #Jury Box: The Latest On Juries And Social Media*, 12 Duke L. & Tech. Rev. 64, 78 (2014), http://dltr.law.duke.edu/2014/02/24/the-jury-box/.

6. United States Courts, *Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial* (Aug. 21, 2012) ("[J]udges recommended that jurors frequently be reminded about the prohibition on social media before the trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate."), http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial.

7. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 466 (2014), http://www.americanbar.org/content/dam/aba/publications/YourABA/fo466.authcheckdam.pdf.

8. To tackle the rising tide of jury misconduct related to oversharing on the Web, a recently published report urged the judiciary to "hit social media on its head" by insisting on online silence during jury instructions. Roughly one in 12 jurors in Illinois surveyed about their attitudes regarding using social media tools like Twitter in the course of a trial were "tempted" to publicize their thoughts on the proceedings, according to the report by U.S. District Judge Amy St. Eve of the Northern District of Illinois.

   Andrew Strickler, *Jurors Must Be Warned About Social Media Use, Study Says*, LAW360 (March 18, 2014, 6:42 PM). http://www.law360.com/articles/519752/jurors-must-be-warned-about-social-media-use-study-says.

9. *See supra* note 6, "A [Federal] Judicial Conference Committee has updated the model set of jury instructions federal judges use to deter jurors from using social media to research or communicate about cases on which they serve. The new guidelines provide

detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage."

10. Ass'n of the Bar of the City of New York Comm. on Prof'l Ethics Formal Op. 2012-2 (2012) ("[i]t is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives."). http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

11. LinkedIn is the primary social media platform that currently has this feature. If a viewer is logged in and her account is left to the LinkedIn default settings, the viewing of a LinkedIn profile may cause the person whose page has been viewed to receive a notification that her profile had been viewed by the viewer, who may be an attorney or an agent of the attorney.

12. *See* Colorado Bar Ass'n, Formal Ethics Op. 127 (2015) ("[e]ven if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media."). https://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_127.pdf.

13. Megan Dunn, Federal Judicial Center. http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf.

14. *Id.* at 3.

15. Surveyed judges could select more than one behavior in many questions, thus, the number of behaviors/incidents/issues identified exceeded number of respondents.

16. FJC Report at 14.

17. *Id.* at 15.

18. For instance, in *Quilez-Velar v. Ox Bodies, Inc.*, 2015 U.S. Dist. LEXIS 20817, *36 (D.P.R. Feb. 19, 2015), the court explicitly instructed jurors that

> [d]uring your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

19. The State of Washington's Pattern Jury Instruction, however, provides that a juror shall not "even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter." Washington Pattern Jury Instructions 1.01 Advance Oral Instruction—Beginning of Proceedings.

20. Martha Neil, *Juror is fined $1K for posting on Facebook and causing mistrial*, ABA Journal (Nov. 4, 2015 4:30 PM) (noting "'Dying from boredom' while serving as a juror in a New York City robbery case in September, Kimberly Ellis couldn't resist posting on her emotional state and details of the jury's deliberations, the New York Daily News reports. The result was a mistrial in the Queens case, because no alternate juror was available to take her place. Held in contempt and fined $1,000, Ellis was apologetic and regretful about her mistake. 'I continued my personal life as if I was not there to judge a trial,' she told the newspaper. 'It was my first time as a juror, and I was naive.' The forbidden postings came to light because a Facebook friend of Ellis, a former federal and state prosecutor, blew the whistle." http://www.abajournal.com/news/article/juror_is_fined_1k_for_posting_on_facebook_and_causing_mistrial/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

21. > When the embrace of social media is ubiquitous, it cannot be surprising that examples of jurors using platforms like Facebook and Twitter are legion. And because of the risks inherent in such activity, "vigilance on the part of trial judges is warranted." On this record, however, Defendants' claim must fail. Juror 2 was an attentive juror who, while engaging in banter with fellow Twitter users about her experience, was nonetheless careful never to discuss the substance of the case, as instructed by the Court. The record is devoid of any evidence that she was either dishonest or biased, or that Defendants were prejudiced by her tweets in any way.

    United States v. Liu, 69 F. Supp. 3d 374, 386 (S.D.N.Y. 2014) (internal citations and quotations omitted).

22. In *Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. 2012), the court and counsel for both parties agreed to conduct a search on Case.net prior to *voir dire* to ascertain whether potential jurors might be disqualified based upon discrepancies between their responses during *voir dire* and Case.net's report on the jurors' history of litigation. However, the following day after the jury had been empaneled, defense counsel moved to strike one of the jurors based upon information that counsel had found on a juror's Facebook page that allegedly indicated prejudicial bias and the failure to disclose that bias. The trial court granted a motion to strike the juror. The appellate court affirmed, noting that the trial court had not abused its discretion and commented further "Neither Johnson nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that any and all research—Internet based or otherwise—into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court before the jury is empanelled or the complaining party waives the right to seek relief from the trial court. *While the day may come that technological advances may compel our Supreme Court to rethink the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire* before *the jury is empanelled—that day has not arrived as of yet.*" *Id.* at 193, 202-03 (emphasis added). *See also Dubois v. Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (noting that "the widespread use of the Internet ha[s] sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo").

23. *See supra* note 7.

24. *See supra* note 10.

25. Such inadvertent contact can occur by an attorney by merely clicking on the results of a Google search and viewing a juror's LinkedIn profile if the attorney is at the same time logged into his or her LinkedIn account utilizing normal security settings.

26. For instance, during the trial of George Zimmerman for the death of Trayvon Martin, although one of the potential jurors questioned during *voir dire* stated that he had little knowledge of the Zimmerman case, that same juror posted on Facebook exclaiming, "I CAN tell you THIS. 'Justice'…IS Coming." That individual was dismissed. *See* Elicia Dover, *Did Potential Zimmerman Juror Lie to Court?*, ABC News Blog (June 13, 2013, 10:09 AM). http://gma.yahoo.com/blogs/abc-blogs/did-potential-zimmerman-juror-lie-court-034710693.html.

27. Richard Vanderford, *LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial*, Law360 (Sept. 27, 2013 8:10 PM) ("A first-year associate on Friday came close to derailing the high-profile Manhattan fraud trial over a Bank of America Corp. unit's mortgage lending practices, after a juror complained that the attorney had cyberstalked him on LinkedIn. U.S. District Judge Jed S. Rakoff admonished defense attorneys after a juror sent him a note complaining 'the defense was checking on me on

social media.'"). http://www.law360.com/articles/476511/linkedin-search-nearly-upends-bofa-mortgage-fraud-trial.

28. Formal Op. 743 (2011). https://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf.
29. *See* Thaddeus Hoffmeister, *Google, Gadgets, And Guilt: Juror Misconduct In The Digital Age*, 8 Univ. of Colorado. L. Rev. 411 (2013). http://lawreview.colorado.edu/wp-content/uploads/2013/11/8.-Hoffmeister-FINAL_s.pdf.
30. Judicial Council of California Civil Jury Instructions (2015), 100 Preliminary Admonitions.
31. Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (June, 2012).
32. New Jersey Model Civil Jury Charges—Civil 2d 1.11C Preliminary Charge.
33. Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).
34. *Id.*
35. Alaska Criminal Pattern Jury Instruction 1.02.
36. Washington Pattern Jury Instructions 1.01 Advance Oral Instruction—Beginning of Proceedings.
37. Alaska Criminal Pattern Jury Instruction 1.02.
38. Arkansas Supreme Court Committee on Jury Instructions, AMI 101 Cautionary Instructions (iv).
39. Alabama Pattern Jury Instructions 2d. 1.22 Jurors Must Not Refer to Outside Materials.
40. *See supra* note 31.
41. New Jersey Model Civil Jury Charges—Civil 2d 1.11C Preliminary Charge.
42. Jury Instructions from U.S.D.J. Christine M. Arguello (D. Colo.).
43. *See supra* note 6. Federal trial judges have been "provided with a poster stressing the importance of jurors making decisions based on information presented only in the courtroom. The poster is designed to be displayed in the jury deliberation room or other areas where jurors congregate…. 'The Committee believes that the more frequently jurors are reminded of the prohibition on social media, whether the reminders are visually or orally given, the more likely they are to refrain from social media use during trial and deliberations,' said Judge Julie A. Robinson, Chairperson, Conference Committee on Court Administration and Case Management." http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial.

APPENDIX A

Redlined Proposed Revisions to New York's Pattern Jury Instructions

V. Suggested Revisions to New York's Pattern Jury Instructions

The Section does not seek to incorporate all of its suggestions into its proposed model New York Pattern Jury Instructions. Rather, respectfully, the Section first sparingly revised existing instructions and, only where it viewed it as necessary, did the Section make suggested revisions to the existing Pattern Jury Instructions to address some of the more important issues raised above. The Section suggests that courts consider all the issues raised in this report, and consider tailoring its instructions to address each of them. Below is the revised version of the existing Pattern Jury Instructions containing annotations, where applicable, to the sources of the revisions, and the Section's revised version redlined to show changes to the existing Pattern Jury Instructions can be found at Appendix "A." The bracketed language in the Section's proposed model instructions seeks to address the issues of jurors' social media communications being "public" and the viewing and monitoring of such juror communications by attorneys.

PJI 1:10. Do Not Visit Scene

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. ~~Please~~ Do not do so. Even if you happen to live near the location, ~~please~~ avoid going to it or past it until the case is over. In addition, ~~please~~ do not attempt to view the scene by conducting any Internet or social media research or using computer programs such as Google Earth. Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked today or at any time, including at the time of the accident, and as it looks now may be very different. This case involves a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

PJI 1:11. Discussion With Others—Independent Research

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict.

~~Please~~ Do not discuss this case either among yourselves or with anyone else during the course of the trial. This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

Do not do any independent research on any topic you might hear about in the testimony or see in the

exhibits, whether by consulting others, reading books or magazines or conducting an Internet search of any kind. All electronic devices including any cell phones, ~~Blackberries,iphones,~~iPhones, Android-based devices, or other types of smartphones, iPads or other tablet devices, [update as appropriate] laptops or any other personal or wearable electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [*In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice*]

It is important to remember that you may not use any Internet services, such as Google, Bing, Facebook, LinkedIn, Instagram, YouTube, Snapchat [insert any new major social media examples], Twitter or ~~any others~~use any other electronic applications or tools to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers, witnesses, experts or the ~~court~~judge. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.

For now and as long as you are a juror in this case, be careful to remember these rules whenever you use a computer or other personal electronic device ~~during the time you are serving as a juror but you are not in the courtroom~~anywhere.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this ~~case's~~case having to be retried.

~~Accordingly, I expect that you will seriously and faityfully abide by this instruction.~~

Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case. Accordingly, I expect that you will seriously and faithfully abide by these instructions.

Jury Admonitions In Preliminary Instructions
(Revised May 5, 2009)

(Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations.)

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But, you may not talk with them or anyone else about anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.

3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use ~~internet~~the Internet, including maps ~~or,~~ Google Earth, social media or any other program or device to search ~~for and view any location~~or research or look at the places involved, or at descriptions, pictures, videos or Internet maps related to the events, discussed in the testimony.

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the ~~i~~Internet, online reports, social media, blog posts or podcasts or any other media.

6. In recent years, because of the growth in electronic communications, an increasing number of cases have had to be retried, at great expense, because of juror misconduct in obtaining outside information from the Internet, blogs, e-mail, electronic messaging, social networking sites, and other

sources. I need to be assured that each of you will do everything you can to prevent such an unfortunate outcome from happening in this case. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or electronic source. In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, instant messaging, email, ~~i~~Internet chat or chat rooms, photographs, videos, blogs, or social websites, such as Facebook, ~~MySpace~~, YouTube, Snapchat, LinkedIn, or Twitter or any online service.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the electronic or online posting of information about the case, or what you are doing in the case, on any device, or Internet site, including blogs, chat rooms, social websites or any other means.

If you feel a need to post on social media for personal reasons that you are on jury duty simply say "I am on jury duty. I cannot communicate or speak about the case or my service, so please do not ask or contact me about it." You do not want to do anything that will invite others to communicate with you about your jury duty.

You must also not use search engines like Google, Bing or sites such as Wikipedia or otherwise search electronically, digitally or online for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~any party, the witnesses, the lawyers, the experts or the judge. You must not try to find the definition of any word or phrase or concept by looking it up in any book, dictionary, encyclopedia, or on the Internet, or through social media or any other source. It would be highly improper for you to do so.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse ~~with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified~~.

~~also does not permit jurors to converse~~ among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony~~.~~ either in person or via the Internet or over social media or virtually using, for instance, Internet mapping tools. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally,~~ Our law ~~requires that you~~ does not ~~read or listen~~permit jurors to ~~any news accounts of~~ communicate with anyone about the case, or to permit anyone to communicate with jurors about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified.~~and~~

Just as the Internet has affected many aspects of life, it has brought changes to the jury process.

[Be advised that what you may view as a private social media communication made by you or someone you know may or may not be private and can be viewed or followed by the public, including the lawyers in this case.]

[The attorneys involved in this case, or people working with them on this case may conduct research on or monitor you. Specifically, attorneys may look at a juror's public website, public social media posts or blogs that you may maintain, or a social media profile of yours that is publicly accessible. Such monitoring of public social media communications about you may have occurred during jury selection and during the course of this trial, and also may occur during deliberations, and after the trial has ended.

[There is nothing at all improper about attorneys researching or monitoring jurors or potential jurors in connection with a case.]

As I mentioned, nobody involved in this case may communicate with you for any reason in any manner during the course of this trial, including during the time you are deliberating. However, some Internet or social media services may automatically notify you if a person has looked at your social media, and such notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to ~~research any fact, issue, or~~ communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been

involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Just as no one should be communicating orally, in writing or electronically with you about this case other than me or court personnel, you should not communicate orally, in writing or electronically with anyone other than me or court personnel about the case.

Some of you may use social media and the Internet to share many aspects of your lives. While you are a juror, do not share, publicly or privately, any information, facts or your thoughts about this case. [This prohibition applies regardless of how restrictively you set your privacy settings for your social media.]

I also expect you will inform me as soon as you become aware of another juror's violation of these instructions. Let me know if there are any questions regarding these instructions.

Finally, our law requires that you not read or listen to any news accounts of the case,~~related to the case.~~ and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and, our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

JURY SEPARATION DURING DELIBERATIONS
(Revised December 17, 2009)

Members of the jury, today's court session is drawing to a close and I am about to excuse you for the day. You must return [*specify time and place for jurors to reassemble*].

The law requires that, before I excuse you, I review with you the rules that you must follow over the course of this recess. These rules are designed to guarantee the parties a fair trial, and are generally the same ones you were required to follow prior to deliberations. But the law requires that I restate them at this stage in order to emphasize their importance.

The reason for the emphasis is that you are in a critical stage. You are in the process of deliberations and you are not being sequestered. That means you are not being kept together overnight where we can have greater assurance that you are following the rules.

You are being permitted to go home after deliberations have begun. There may now be a greater temptation, for example, to discuss the case with someone else, or to go to the scene. You must resist that temptation. To discuss the case with someone else, or to visit the scene, would not only violate my order, but would also violate the oath you took to follow the rules.

The rules are as follows:

1. Deliberations must be conducted only in the jury room when all jurors are present. Therefore, all deliberations must now cease and must not be resumed until all of you have returned and are together again in the jury room.
2. During the recess, do not converse, either among yourselves or with anyone else, about anything related to the case.
3. You remain under obligation not to request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning the trial.
4. You must promptly report directly to me any incident within your knowledge involving an attempt by any person to communicate with you in writing, orally or electronically or improperly to influence you or any member of the jury.
5. You must not visit or view the premises or place in person or electronically where the charged crime was allegedly committed, or any other premises or place involved in the case.
6. You must not read, view or listen to any accounts or discussions of the case reported ~~by~~in or on newspapers, television, radio, the Internet, social media or any other media.
7. You must not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or ~~on~~by using the Internet, social media or by any other means or source.

Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, ~~internet chat or~~ chat rooms, ~~blogs, or~~photograph, video, blog, or through social media websites, such as Facebook, ~~myspace~~YouTube, Snapchat, LinkedIn, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case other than being a juror, on any device, or Internet site, including blogs, chat rooms, social websites or in any other ~~means~~way.

You must also not use Google or Bing or search online or otherwise ~~search~~ for any information about the case, or the law which applies to the case, or the people involved in the case, including ~~the defendant~~any party, the witnesses, the lawyers, experts or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair—no one else has been so qualified.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

~~nally, our law requires that you not read or listen to any news account of the case, and that ou not attempt to research any fact, issue, or law related to the case.~~ Many of you regularly use the Internet to do research or to examine matters of interest to you. You may have seen or read information in the media that suggests to you that the type or quality of information that you have heard or have been presented with in this particular case is not what you expected or what should be presented to you. This is not for you to determine. You must understand that any information you might access from sources, like the Internet or from social media, outside of what is presented in this courtroom is not evidence that you can consider. One of the problems in accessing such information is that what you are examining electronically from the Internet or on social media may be wrong, incomplete, or inaccurate. That material may be outdated, or may simply not be applicable in this particular case. Indeed, there often is no way to determine whether the information that we obtain from other sources outside of the courtroom, such as the Internet, is correct or has any relevance to this case.

Further, please be advised that a single juror's Internet or social media search or research could improperly affect the entirety of jury deliberations and could result in prolonged proceedings, evidentiary hearings, and/or potentially a mistrial.

Our law requires that you not read or listen to any news accounts of the case, even in electronic or digital form, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

Finally, no one [including the attorneys involved in this case] may communicate with you in any manner for any reason during the course of this trial, including during the time you are deliberating concerning the case. Some Internet or social media services may automatically notify you if a person has looked at your information, and the notification may even provide a name of the person viewing your profile, even though the viewer did not attempt to communicate with you directly or want you to know his or her name.

If you are notified electronically that anyone involved in the case [including the attorneys involved in this case, any of their law firms, or anyone you believe that may be involved in the case] has viewed your online information or any of your social media profiles or content, or if any anyone [including attorneys involved in this case, any of their law firms, or anyone you believe that may have been involved in the case,] has communicated with you, in any manner let me or court employees know as soon as possible.

Violation of these instructions could cause a mistrial, meaning all of our efforts over the course of the trial would have been wasted and we would have to start all over again with a new trial before a new jury.

Again, I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise to me, I know you will do so.

APPENDIX B

Proposed Social Media Usage Poster

Threatening Disciplinary Action Against Attorneys in New York

A Report of the Commercial and Federal Litigation Section
of the New York State Bar Association[1]
November 10, 2015

1. Introduction

This report examines the practice of threatening to report violations of the Rules of Professional Conduct to disciplinary authorities to create leverage in settlement negotiations or to obtain other advantages in a civil suit. This is an issue of importance to commercial litigators, who often are charged with prosecuting and settling actions in which ethical violations may have occurred. This report surveys the authorities on the issue to provide guidance to attorneys who confront violations of the Rules of Professional Conduct by opposing counsel in cases, or who are on the receiving end of threats by opposing counsel.

The ethics opinions and case law addressing the issue in New York are in conflict.[2] Some authorities have held that Rule 3.4 of the Rules of Professional Conduct and its predecessor, DR 7-105, which prohibit lawyers from threatening criminal prosecution solely to obtain an advantage in a civil case, apply to threats to report disciplinary violations as well. Others have held that the rules relating to criminal prosecutions do not apply, but, relying on other rules, hold that in some circumstances threats of discipline may be permissible, while still condemning the practice in other circumstances.

The authorities reviewed below show that there is a great deal of uncertainty about whether it is proper to threaten disciplinary action to obtain an advantage in a civil action, whether for settlement or otherwise. Moreover, while it may be possible to defend the use of such threats in some limited circumstances, it is at best a risky tactic, that may backfire, leaving the attorney who makes the threat exposed to disciplinary charges.

2. New York Authorities Equating Threats to Bring Disciplinary Charges with Threats of Criminal Prosecution Under Rule 3.4

The Rules of Professional Conduct in New York and their predecessor, the Disciplinary Code, do not expressly address whether threats to report disciplinary violations are proper. To fill this void, some authorities have looked to Rule 3.4(e), and its predecessor, DR 7-105, which addresses threats to present criminal charges. Rule 3.4(e) provides:

> A lawyer shall not:
>
> * * *
>
> (e) present, participate in presenting, or threaten to present, criminal charges solely to obtain an advantage in a civil matter.

DR 7-105, which governed before the adoption of the Rules of Professional Conduct in 2009, contained the identical language. New York case law is replete with examples of courts censuring lawyers for threating the institution of criminal actions during civil proceedings.[3]

a. Nassau County Bar Ethics Opinion 98-12.

In 1998, the Nassau County Bar Ethics Committee opined that threatening to file a disciplinary grievance if an adversary attorney refused to improve a settlement offer would violate DR 7-105, even though the rule says nothing about threats of disciplinary actions. *See* Op. 98-12 (1998). The matter arose out of a child support proceeding. There, counsel for the respondent submitted papers stating that his client could not pay child support because he was injured and could not work. Counsel for the petitioner seeking child support learned from an investigator who independently communicated with the respondent, without the advance knowledge of the petitioner's attorney, that the respondent was working "off the books" refinishing floors.[4] Respondent also told the investigator that he had used his attorney in the child support proceeding as a work reference. The petitioner's attorney, being unsure of how to proceed, posed the dilemma to the Ethics Committee.

The Committee stated that the petitioner's lawyer should first attempt to verify or disprove the apparent improper conduct by confronting the respondent's attorney, explaining that:

> While the information as presented appear to reasonably point in the direction of a possible fraud, the Inquiring Attorney still does not know whether the adversary attorney (1) employed the client in the recent past, (2) is aware of an ongoing use of the attorney's name by the client as a work reference; and (3) knows that this employment was "off-the-books," which may have implications for violations of child support obligations.

The Committee found authority for this recommendation in EC 1-5 of the old Disciplinary Code, which was then in effect. It states, "A lawyer should maintain high

standards of professional conduct and should encourage other lawyers to do likewise."

The Committee stated that if the respondent's attorney takes the "necessary corrective measures," the petitioner's attorney need not take any further action, but that if respondent's attorney did not take the necessary corrective action, the petitioner's attorney would have to inform the court or a disciplinary board. It based this conclusion on DR 1-103(A), which is essentially the same as Rule 8.3(a) in the Rules of Professional Conduct currently in effect. Rule 8.3(a) states:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

The Committee stated that attorneys have some discretion in determining whether there is sufficient knowledge to make it compulsory for the attorney to report to a tribunal or disciplinary authority, or whether there is merely a suspicion, in which case reporting is optional (citing its prior opinions 93-41 and 93-34).

The Ethics Committee considered whether the petitioner's attorney could use the threat of a disciplinary action to obtain a better settlement offer for petitioner. The Committee advised that while the information acquired through investigation may be used for the benefit of his or her client, the attorney should be mindful of DR 7-105 (current Rule 3.4), stating that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," (citing *People v. Harper*, 75 N.Y.2d 313 (1990)).[5] The Committee concluded that, "An actual threat to file a grievance if the adversary attorney would not offer a better settlement would, however, violate DR 7-105."

b. *Zubulake v. UBS Warburg LLC*

In *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003), Judge Scheindlin extended DR 7-105 beyond the purely criminal context holding that it was impermissible to report a regulatory violation to securities regulators to gain an advantage in a civil suit. Although that case did not involve a threatened disciplinary charge, a disciplinary proceeding might be viewed as a type of regulatory proceeding. Therefore, the court's conclusion that the rule applies to regulatory proceedings could have implications for attorneys threatening disciplinary proceedings.

The plaintiff in *Zubulake*, a securities broker, believed that information she obtained in a deposition revealed that her former employer destroyed backup tapes in violation of record keeping rules governing broker dealers. She wanted to give the deposition transcript to securities regulators, but the information was protected by a confidentiality order, so she asked the court to modify the confidentiality order to allow her to give the deposition to the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). Zubulake claimed that she had an obligation to report the violations under rules of the NYSE and NASD.

Judge Scheindlin concluded that Zubulake did not have a duty to report the violations because she was not a member of the NYSE or NASD. Because a clear professional duty to report the alleged violation was absent, she held:

> The only obvious reason for Zubulake to disclose this material to regulators is to gain leverage against UBS in this action. As a general rule, though, a party to civil litigation cannot threaten to instigate criminal charges solely to gain a strategic advantage. [Citing DR 7-105 and Ethical Consideration 7-21.] The logic of this rule applies with equal force to threats of regulatory enforcement. The analogy is especially apt where, as here, regulatory enforcement can result in industry-wide "censure" and fines upward of one million dollars. In the absence of a clear duty to disclose, therefore, there is no basis for lifting the confidential designation of the Behny deposition.

If the logic of this ruling were extended to disciplinary proceedings against attorneys, an attorney who brings a disciplinary proceeding, or threatens to bring a disciplinary proceeding, solely to gain an advantage in a civil matter, could be violating Rule 3.4 of the Rules of Professional Conduct. Moreover, in *Zubulake*, Judge Scheindlin concluded that sole motivation for reporting the violations was to gain an advantage in a civil suit without discussing other possible motivations. This shows how risky it is even to report a violation, much less threaten to report a violation. A court or regulatory authority could misconstrue an attorney's motives in reporting or threatening to report a violation that relates to a civil matter.

3. New York Authorities Restricting Threats of Discipline on Grounds Other Than Rule 3.4

Not all authorities agree that Rule 3.4 and its predecessor, DR 7-105, restrict threats to commence disciplinary proceedings. However, even those authorities that hold Rule 3.4 inapplicable on the ground that it only applies to criminal proceedings, still find the practice improper in many circumstances applying other provisions of the Rules of Professional Conduct.

a. NYSBA Opinion 772

In 2003, the New York State Bar Association's Committee on Professional Ethics, in its Opinion 772, con-

strued DR 7-105 as it applied to both threats to prosecute criminal actions and administrative or disciplinary charges. The Committee interpreted the rule literally, opining that an attorney did not violate DR 7-105 (now Rule 3.4) by filing or threatening to file a complaint with administrative agencies or disciplinary authorities.

The Committee relied on the plain language of the rule, stating:

> The language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to "administrative or disciplinary charges: in addition to criminal charges," *see* Maine Bar Rule 3.6(c), or just "disciplinary charges," *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning § 7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney "from present[ing] criminal, administrative or disciplinary charges to obtain an advantage in a civil action").

(Footnotes omitted.)

The Committee acknowledged that its interpretation is contrary to ethics opinions from Nassau County (98-12), Illinois (87-7) and Maryland (96-14), which held that DR 7-105(A) (now Rule 3.4) or its analogue bar threats to file complaints with disciplinary or administrative authorities. It described those opinions as being based at least in part on the idea that the criminal and disciplinary systems have the same goal of protecting society as a whole from wrongdoing. The Committee, however, rejected that analogy "in light of the specific language of DR 7-105(A), which concerns only 'criminal charges.'"

Although the Committee concluded that DR 7-105 did not apply, it discussed other rules that could prohibit a lawyer from threatening to make a disciplinary complaint to advance a civil claim. It referenced DR 7-102(A)(1) & (2), now codified at Rule 3.1(a) and (b), which prohibit a lawyer from bringing a frivolous proceeding. Rule 3.1(b) defines a frivolous proceeding as one that the lawyer knows is unwarranted in law or fact, brought merely to injure or harass another, or to delay or prolong litigation. The Committee also discussed DR 7-102(A)(4) & (5) (now largely codified in Rules 3.3 and 3.4), which prohibit dishonesty, fraud, deceit or misrepresentation. A lawyer who threatens or prosecutes a frivolous disciplinary action or who knowingly makes false statements of law or fact in connection with a threat to bring a disciplinary action could be in violation of these rules.

The opinion also contains an instructive discussion of what constitutes a threat. Relying on cases interpreting DR 7-105, it reasoned that a demand letter that references future criminal prosecution, but provides the opportunity to avoid prosecution by taking remedial action, is a threat. The opinion also considered whether more ambiguous communications constitute a threat. Reviewing court rulings and other ethics opinions, the opinion stated:

> Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See, e.g., In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cr.* District of Columbia Opinion 220 (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g., In re McCurdy*, 681 P.2d 131, 132 (Or. 1984)
>
> * * *
>
> In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the

> disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

Although this analysis of threats was in the context of threats of criminal prosecution, the same analysis could apply to threats of disciplinary charges—even a reference to violations of the disciplinary code, without an express threat to file charges, could be interpreted as a threat to file disciplinary charges.

The opinion also discussed the language in 7-105 prohibiting only threats made "solely to obtain an advantage in a civil matter." The Committee viewed this as a fact intensive question turning on the lawyer's intent. The Committee opined that if the lawyer was merely seeking information to determine whether there was a basis for a civil or criminal claim, then the lawyer was not seeking "solely to obtain an advantage in a civil matter."

b. New York City Bar Association Committee on Professional Ethics

In June 2015, the New York City Bar Association Committee on Professional Ethics issued a formal opinion regarding the issue of disciplinary threats (Formal Opinion 2015-5: Whether an Attorney May Threaten to File a Disciplinary Complaint Against Another Lawyer). As an initial matter, the NYCBA opined that Rule 3.4 does not apply to threats to file disciplinary grievances. This is consistent with the NYSBA Opinion 772 but conflicts with Opinion 98-12 of the Nassau County Bar. The City Bar then examined other applicable rules to determine whether threatening to report a disciplinary violation is permissible. It identified four situations in which a threat to report a disciplinary charge is improper.

i. It is improper to threaten to report a violation that a lawyer has a duty to report

The City Bar first analyzed Rule 8.3(a), which provides:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Under this provision, reporting a disciplinary grievance is mandatory when two criteria exist: (1) a lawyer *knows* that another lawyer has violated the Rules of Professional Conduct; and (2) the violation raises a *substantial question* as to the other lawyer's honesty, trustworthiness or fitness as a lawyer.

The definition of "knows" in Rule 1.0(k) bears on this determination. Rule 1.0(k) provides:

> "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

The City Bar concluded that it is improper to threaten to report a violation when reporting the violation is mandatory, because the failure to report misconduct that a lawyer must report is a violation of Rule 8.3(a), and is misconduct under 8.4(a) which prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct. The rationale underlying this analysis seems to be that by threatening to report a disciplinary violation, a lawyer implicitly promises not to report if the threatening lawyer's demands are met. In the circumstance where the lawyer must report the violation, the implicit promise to refrain from reporting is a violation of Rules 8.3(a) and 8.4(a). The City Bar also concluded that if the lawyer threatens to report a grievance that the lawyer has a duty to report, and then ultimately reports the grievance, the reporting lawyer still has attempted to violate the mandatory reporting provisions of Rule 8.3(a). That attempt to violate Rule 8.3(a) constitutes a violation of Rule 8.4(a), which prohibits attempts to violate the Rules.

ii. Threats to report disciplinary violations are improper when the lawyer lacks a good faith basis to report a violation

The City Bar opined that even with respect to disciplinary grievances which are not mandatory to report, there are still circumstances where threatening to report such grievances will run afoul of the New York Rules of Professional Conduct. In order for a grievance to be reportable at all, the reporting attorney must have a good faith belief that the complained-of conduct is, in fact, properly reportable under the NY Rules of Professional Conduct, because Rule 3.1(a) prohibits lawyers from bringing frivolous claims. Thus, if an attorney threatens to report conduct for which he or she does not hold a good faith basis to report, the threat of reporting would violate the Rules of Professional Conduct.

iii. Threats to report disciplinary violations are improper when the only substantial purpose is to embarrass or harm another.

The City Bar concluded that Rule 4.4(a) also prohibits threats to report disciplinary violations when the threat serves no substantial purpose other than to embarrass or harm the other lawyer or the lawyer's client.[6]

iv. Threats to report disciplinary violations are improper if the threat would violate state or federal laws.

Finally, the City Bar opined that a threat of disciplinary action is impermissible if it violates substantive state or federal law. Threatening to report criminal behavior in order to obtain a benefit in a civil matter may constitute, among other crimes, the crime of larceny by extortion. *See* New York Penal Law § 155.05(2)(e)[7] Similarly, a threat of disciplinary action may constitute coercion under NY Penal Law 135.60, or violate the Hobbs Act, 18 U.S.C. 1951.

Coercion includes, among other things, using the threat of exposing facts which would harm another person's business. The Hobbs Act prohibits extortion affecting interstate commerce. Where a lawyer's threats of disciplinary action violate a substantive law, they also would violate Rules of Professional Conduct 3.4(a)(6) (prohibiting a lawyer from engaging in illegal conduct), 8.4(b) (prohibiting illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer) and (d) (prohibiting conduct that is "prejudicial to the administration of justice").

c. *In re Dimick*

In the case of *In re Dimick,* 105 A.D.3d 30 (1st Dep't 2013), the Appellate Division, First Department, had a case of reciprocal discipline in which an attorney had been found to have violated the Indiana Rules of Professional Conduct by making an implied threat to file a grievance against an attorney if the other attorney did not engage in settlement negotiations. The Indiana Court held that the conduct violated Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. The Respondent did not challenge the imposition of reciprocal discipline. In a brief opinion, the Court imposed a public censure, holding,

> Respondent's misconduct in Indiana would also constitute misconduct in New York insofar as engaging in conduct that is prejudicial to the administration of justice also constitutes professional misconduct in New York, pursuant to rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0).

4. Authorities Outside New York

The landscape of this issue nationally is as varied as it is in New York. While the former ABA Model Code had an analog to DR 7-105, the current ABA Model Rules no longer contain such an express prohibition against threatening criminal action. Nor do the Model Rules explicitly address the propriety of threatening disciplinary action. That said, the ABA has made it clear that threats of criminal charges made in a civil action are still prohibited unless (i) the criminal matter is related to the civil claim, (ii) the attorney has a *bona fide* belief that both the civil claim and possible criminal charges are warranted both by the law and the facts, and (iii) the attorney does not try to exert improper influence over the criminal process. Formal Opinion 92-363 (1992). Further, threats of both criminal and disciplinary action can run afoul of other ABA Model Rules—specifically, Rule 8.4 (Misconduct) which provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice or to state or imply an ability improperly to influence a government official or agency; Rule 4.1 (Truthfulness in Statements to Others), which imposes a duty on lawyers to be truthful when dealing with others on a client's behalf; Rule 4.4 (Respect for Rights of Third Persons), which prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person..."; and Rule 3.1 (Meritorious Claims and Contentions), which prohibits an advocate from asserting frivolous claims.

Various states have taken different approaches to the issue. For example, as in New York, Alabama, California, Colorado, Idaho, Tennessee, Texas, Wyoming Connecticut, District of Columbia, Illinois and Louisiana, Florida, Hawaii, Kentucky, Maine, Massachusetts, New Jersey, Oregon, Vermont and Virginia continue to include a specific prohibition against threats of criminal action (whether as part of a standalone rule or in connection with another ethical rule such as "Scope of Representation" or "Reporting Professional Misconduct"). Of the states that have prohibitions against threats of reporting a criminal matter solely to obtain a benefit in a civil matter, many also prohibit making coercive threats regarding administrative proceedings. The District of Columbia and Florida, for example, prohibit threats of disciplinary charges. ABA/BNA Lawyers' Manual on Professional Conduct, §71:607, (2012). Tennessee prohibits threats of lawyer disciplinary charges. *Id*. California, Maine, Texas and Colorado, prohibit threats of disciplinary and administrative misconduct charges. *Id*. Illinois prohibits threats of professional disciplinary charges as well as administrative charges. *See* Illinois State Bar Association Op. 87-7 (1988).

5. Guidance for the Practitioner

When faced with the possibility of employing the threat of disciplinary action in a civil matter in order to obtain a benefit for a client, the New York practitioner is well-advised to proceed with caution and consider the following questions:

(1) Whether he or she is under an affirmative and mandatory obligation to report the offending conduct. If so, then it is not appropriate to threaten disciplinary action.

(2) Whether there is a good faith basis for believing there is a violation of the Rules of Professional Conduct. If not, then it would be improper to make the threat.

(3) Whether the reason for making the threat is to embarrass or harm another lawyer or the other lawyer's client. If so, then the threat is improper.

(4) Whether the threat would constitute extortion, coercion or violate other state or federal criminal laws, in which case it would be improper.

(5) Whether the threat serves solely to gain advantage in a civil matter. If yes, then it may be improper under the line of authorities that apply Rule 3.4 to disciplinary and administrative proceedings. This is a fact specific question of intent, making it difficult to predict how a disciplinary authority will interpret when looking at events in hindsight.

(6) Whether merely raising the possibility of a violation of the Rules of Professional Conduct, without an explicit threat to report the violation or take action on it, might be construed as a threat.

If a New York practitioner is threatened with the possibility of disciplinary action in a civil matter by another attorney who is making the threat in order to secure a benefit for his or her client, the New York practitioner may want to consider the following:

(1) Whether to report the threat to an attorney disciplinary committee. In some cases, reporting the threat may be mandatory. Even if it is not mandatory, the attorney receiving the threat may believe it is prudent to report it;

(2) Whether the threat is a claim that the attorney is required to report to the attorney's insurer under the attorney's malpractice coverage;

(3) Consulting with an attorney, either within or outside the attorney's firm, who is knowledgeable on legal ethics, including how to respond to such threats;

(4) Providing information to the attorney making the threat demonstrating that there is no basis for the allegation of a violation of the Rules of Professional Conduct;

(5) Advising the client of the threat and analyzing whether it creates a conflict with the client, and, if so, whether that conflict may be waived through informed, written consent;

(6) Whether to report the threat to a criminal prosecutor's office.

Endnotes

1. This Report was prepared by the Ethics and Professionalism Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. Its principal authors are Brem Moldovsky, Beverly Braun, James Wicks, Anthony Harwood and Anne Sekel. Opinions expressed in this Report are those of the Section and do not represent those of the New York State Bar Association unless and until the Report had been adopted by the Association's House of Delegates or Executive Committee.

2. Although ethics opinions of bar associations are not binding on the courts that decide disciplinary complaints, their analysis is often thoughtful and comprehensive and therefore they are a source of useful guidance to attorneys in interpreting the rules of professional conduct.

3. *See, e.g., Bianchi v. Leon*, 138 A.D. 215, 122 N.Y.S. 1004 (1st Dep't 1910) (holding that obtaining a settlement under a threat of criminal prosecution is blackmail and that it is of no significance that a criminal threat was made to report a legitimate criminal matter); *In re Hyman,* 226 A.D. 468 (1st Dep't 1929) (censuring lawyer for threatening defendant with criminal and civil actions unless defendant "show[ed] some substantial evidence of [his] willingness to compensate plaintiff for her injuries"); *In re Gelman*, 230 A.D. 524 (1st Dep't 1930) (censuring attorney for threatening adversary with criminal action if monetary judgment was not paid); *In re Beachboard*, 263 N.Y.S. 492 (1st Dep't 1933) (censuring lawyer who threatened to file charges of larceny and embezzlement unless money was paid to plaintiff immediately); *In re Glavin*, 107 A.D.2d 1006 (3rd Dep't 1985) (censuring lawyer for threatening criminal penalties to induce the return of money to lawyer's client and claiming that he would "tell the City not to punish" the client's adversary if he complied with the lawyer's demand); *Jalor Color Graphics, Inc. v. Univ. Advertising Systems, Inc.*, 749 N.Y.S.2d 816 (App. Term 2002) (sanctioning attorney who threatened plaintiff repeatedly with criminal prosecution as "part of a calculated, deliberate strategy designed to harass plaintiff into folding its litigation hand").

4. The committee stated that if the petitioner's attorney had assigned the investigator to communicate with the represented respondent, that would have violated DR 7-104, which states: "During the course of the representation of a client a lawyer shall not…communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." The Rules of Professional Conduct that went into effect in 2009 contain essentially the same provision at Rule 4.2.

5. The citation to *People v. Harper* in the Nassau County opinions seems erroneous. The *Harper* case does not state that threatening a grievance is the same as threatening to file criminal charges.

6. Rule 4.4.(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

7. That statute provides:

> A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will…(iv) Accuse some person of a crime or cause criminal charges to be instated . . . or (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or…(xi) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Note, however, that there is an affirmative defense to larceny by extortion when the extortion consists of instilling in the victim a fear that the victim or another person will be charged with a crime. In that situation, New York Penal Law § 155.15 (2) provides: "it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge." The language of the statute seems to limit this defense to extortion resulting from the threat of criminal prosecution. The statute says nothing about there being a defense when the extortion results from other types of threats not involving criminal prosecution. Thus, the defense may not apply to threats to report a disciplinary violation.

The Differing Standards of Review That Have Been Applied to Rule 19 Determinations

A Report of the Commercial and Federal Litigation Section
of the New York State Bar Association
January 4, 2016

The federal appellate courts differ regarding the standard of review to be applied to district court determinations under Rules 19(a) and (b) of the Federal Rules of Civil Procedure. Rule 19(a) governs whether an absent party is a required party who should be joined if feasible. Rule 19(b) governs whether the action should be dismissed if it is not feasible to join a required party.

The First, Second, Fourth, Fifth, and Eleventh Circuits apply an abuse of discretion standard in reviewing Rule 19(a) and 19(b) determinations. The Eighth Circuit also applies an abuse of discretion standard to Rule 19(b) determinations, but we were unable to find a decision clearly indicating the standard of review applied in that circuit for Rule 19(a) determinations. The Third Circuit applies an abuse of discretion standard to Rule 19(b) determinations, but reviews Rule 19(a) determinations *de novo* if based on conclusions of law, and reviews any subsidiary Rule 19(a) factual findings under a clear error standard. The Sixth Circuit reviews Rule 19(a) determinations under an abuse of discretion standard and Rule 19(b) determinations *de novo*. Both the Ninth and Tenth Circuits apply an abuse of discretion standard to Rule 19(a) and (b) determinations, unless they are based upon a legal conclusion, in which case those determinations are reviewed *de novo*. The Seventh Circuit has declined to adopt a standard of review.

This report discusses the split in authority and whether there is a meaningful difference in the standards being applied.

I. Rule 19

In the American system of civil litigation, a plaintiff is afforded significant discretion to structure a litigation, including the option of whether, and to what extent, to name multiple plaintiffs or multiple defendants. *See* 7 C. Wright, A. Miller & M. Kane, Federal Prac. & Proc.–Civil 3d, § 1602 ("Wright & Miller"); 4-19 Moore's Federal Practice–Civil § 19.02. However, the plaintiff's discretion is not absolute. Rule 19 is an exception to the general practice of allowing the plaintiff the right to choose who shall be parties to the litigation. Under Rule 19 a plaintiff's prerogative will be lost when significant considerations make joinder of particular absent parties desirable. *See* Wright & Miller § 1602. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Supreme Court identified four interests that are relevant to the issue of joinder under Rule 19: (1) the interest of the plaintiff in having a forum; (2) a defendant's desire to avoid multiple litigations, or inconsistent relief, or sole responsibility for a liability it shares with another; (3) the interest of the absentee whom it would have been desirable to join; and (4) the interests of the courts and the public in complete, consistent, and efficient settlement of controversies. *Id*. at 738-39.

Rule 19 provides, in relevant part:

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

* * *

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

District courts generally apply a three-part analysis in determining Rule 19 motions to dismiss. First, the court determines under the standards set forth in Rule 19(a) whether the absent party is a required party who must be joined if feasible. *See* Rule 19(a); Wright & Miller § 1604, p. 39. If one or more of the tests is satisfied, the absent party is a required party who must be joined if feasible. *See* Rule 19(a); Wright & Miller § 1604, p. 39. If the absent party is not a required party, joinder may not be compelled. Moore's Federal Practice–Civil § 19.4[1][c].

If the court determines that an absent party is a required party within the meaning of Rule 19(a), it must then determine whether it is feasible to join that party—whether the absent party is subject to service of process or whether the absentee's joinder will deprive the court of subject matter jurisdiction. *See* Wright & Miller § 1604, pp. 40 & 65-66. "Subject to service of process" means that if service is properly effected, the court will have personal jurisdiction over the absent party." *See* Wright & Miller § 1610, pp. 153-54. If it is not feasible to join the absent party, the court must then decide whether the action should be dismissed under Rule 19(b). *See* Rule 19(b); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props.*, 102 F.3d 677, 681 (2d Cir. 1996); Wright & Miller § 1604, p. 40.

The court's determination under Rule 19(b) turns on the question of "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b). Although no prescribed formula exists to determine whether an absentee is deemed to be indispensable, and factors in addition to those set forth in Rule 19(b) may be considered, *see* Wright & Miller § 1607, p. 88, courts generally weigh four factors in making this determination: (1) the prejudice to the existing parties or the absent party if judgment is entered in the person's absence; (2) whether the court can shape relief to lessen or avoid any prejudice; (3) whether the court can award an adequate remedy among the existing parties without the absent party; and (4) whether an alternative forum exists in which the plaintiff could obtain an adequate remedy if the court dismissed the action for nonjoinder. *See* Rule 19(b) Advisory Committee's Note.

II. Standard of Review Employed by Each Circuit Court

As indicated above, the Circuit Courts differ regarding the standard of review to apply to district court determinations under Rules 19(a) and (b). The standard of review in each of those circuits, and the reasons for that standard, if given, are discussed below.

A. First Circuit

The First Circuit applies an abuse of discretion standard of review to the district court's determinations under Fed. R. Civ. P. 19(a) and (b). *See Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 14-15 (1st Cir. 2008); *Tell v. Dartmouth Coll.*, 145 F.3d 417, 418-19 (1st Cir. 1998); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 634-35 (1st Cir. 1989). In *Picciotto*, the First Circuit explained that it applies an abuse of discretion standard to a Rule 19(b) determination for the following reasons: "This deference is warranted because Rule 19(b) determinations…are anything but pure legal conclusions." 512 F.3d at 14 (quoting *Travelers Indem. Co.*, 884 F.2d at 635). "Instead, they involve the balancing of competing interests and must be steeped in pragmatic considerations." *Travelers Indem. Co.*, 884 F.2d at 635.

In *Picciotto*, the First Circuit also decided that the abuse of discretion standard applies to a Rule 19(a) determination, something that the court had not previously determined. 512 F.3d at 14. "Like Rule 19(b), Rule 19(a) requires the trial court to make pragmatic judgments and to 'decide whether considerations of efficiency and fairness, growing out of the particular circumstances of the case, require that a particular person be joined as a party.'" *Id*. at 14-15. "Such pragmatic judgments generally warrant deference to the trial court because they 'turn [ ] on specific facts, will not recur in identical form and the district judge is closer to the facts…and has a comparative advantage over a reviewing court.'" *Id.* at 15 (quoting *Tell*, 145 F.3d at 418 n.1).

The Court also pointed to the fact that "all of the circuits that have examined the question have applied an abuse of discretion standard to Rule 19(a) determinations." *Id*. at 15 (citing decisions from the Fourth, Sixth, Ninth and Tenth Circuits). The Court did note that the Ninth and Tenth Circuits review Rule 19 determinations under an abuse of discretion standard, but review underlying legal conclusions supporting Rule 19 determinations *de novo*, citing *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002), and *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999). *Id*. at 15 n.9. The Court considered that standard to be "tantamount to an abuse of discretion review." *Id*. "Because a district court by definition abuses its discretion when it makes an error of law, even under an abuse of discretion standard, we 'review the district court's answers to abstract questions of law *de novo*.'" *Id*. at 15 n. 9.

B. Second Circuit

The Second Circuit also reviews a district court's determinations under Rule 19 (a) and (b) for abuse of discretion. *Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 385 (2d Cir. 2006). Although we found no decisions to explain why the Second Circuit applies this standard of review to Rule 19(a) determinations, a handful of decisions with respect to Rule 19(b) do, in fact, enumerate justification for an abuse of discretion standard. According to the Second Circuit, the district court is required to balance a variety of factors, more in the arena of a factual determination than a legal one, when making a Rule 19(b) determination. Therefore, the Second Circuit has determined that the district court should be granted

"substantial discretion" to allow for a "flexible approach" in performing a Rule 19(b) analysis. *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir. 2013); *see also Universal Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 312 F.3d 82, 87 (2d Cir. 2002); *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir. 1984).

In *Envirotech Corp.*, the Southern District weighed the four factors listed in Rule 19(b) to determine that one of the two plaintiffs was an indispensable party to the counterclaim and was non-diverse to the plaintiff-counterclaim defendant, and therefore dismissed the counterclaim for lack of subject matter jurisdiction. The Second Circuit affirmed the Southern District's decision, holding that:

> The language of Rule 19(b) leaves the district court with "substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute." (citation omitted). Concluding that that latitude puts a Rule 19(b) determination more in the arena of a factual determination than a legal one, we have held appellate review to be limited to "abuse of discretion." (citations omitted).

Envirotech Corp., 729 F.2d at 75.

In the Second Circuit, a district court abuses its discretion when "(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Mastercard Int'l Inc.*, 471 F.3d at 385 (applying abuse of discretion standard to Rule 19 determination).[1]

C. Third Circuit

In the Third Circuit, if a Rule 19(a) determination is based on a conclusion of law, review is plenary. However, the Third Circuit reviews any subsidiary findings of fact for clear error. The Third Circuit applies an abuse of discretion standard for reviewing Rule 19(b) determinations. *See Huber v. Taylor*, 532 F.3d 237, 247 (3d Cir. 2008); *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 403-04 (3d Cir. 1993). We did not find any Third Circuit decision which explained the basis for the Court's decisions.

D. Fourth Circuit

Like the First and Second Circuits, the Fourth Circuit reviews a district court's determinations on a motion for joinder pursuant to Rule 19(a) and (b) under the abuse of discretion standard. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 (4th Cir. 2000) ("The district court's Rule 19 dismissal of National Union's action is reviewed for abuse of discretion."); *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) ("We review a district court's denial of a motion for joinder pursuant to Rule 19(a) or (b) under the abuse of discretion standard and its findings of fact under the clear error standard.").

In *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980), the plaintiff, a contractor hired by the Navy to produce modules for the construction of air traffic control towers, commenced suit against the defendant/third-party plaintiff, a manufacturer of panels used to construct the modules, for (among other things) breach of warranty. *Id.* at 1103. The defendant/third-party plaintiff moved under Rule 19 for an order directing joinder of the Navy, arguing that if the Navy were not joined as a party to the action, there would be a substantial risk that the defendant/third-party plaintiff would incur multiple obligations. *Id.* at 1108. The district court denied the Rule 19 motion because the defendant "could only theorize the possibility that the Navy would institute suit against it" and "[n]othing before the court suggested a substantial likelihood of such a suit." *Id.* In its decision affirming the district court's ruling, the Fourth Circuit held: "The inquiry contemplated by Rule 19 is a practical one. 7 C. Wright & A. Miller, Federal Practice and Procedure § 1604 (1972). It is addressed to the sound discretion of the trial court. *General Tire & Rubber Co. v. Watkins*, 326 F.2d 926 (4th Cir.), *cert. denied*, 377 U.S. 952, 84 S. Ct. 1629, 12 L. Ed. 2d 498 (1964). We find no abuse of discretion under the circumstances." *Id.*

E. Fifth Circuit

The Fifth Circuit has stated that "[w]e review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion." *Hood ex rel. Miss. v. City of Memphis, Tenn.*, 570 F.3d 625, 628 (5th Cir. 2009); *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1308 (5th Cir. 1986). "Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor and '[Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be.'" *Hood ex rel Miss.*, 570 F.3d at 628 (quoting *Pulitzer-Polster*, 784 F.2d at 1309). Also, "'[a] court abuses its discretion when its ruling is based on an erroneous view of the law.'" *Id.*

While not specifically addressing the standard of review for the Rule 19(a) and 19(b) components of such a ruling, it is likely that the Fifth Circuit intends to apply the abuse of discretion standard to both Rule 19(a) and 19(b) determinations.

F. Sixth Circuit

The Sixth Circuit had previously adopted an abuse of discretion standard for Rule 19 cases. *See Local 670 v. Int'l Union, United Rubber*, 822 F.2d 613, 618-19 (6th Cir. 1987). However, that standard was modified in 1993 in *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993), where the Sixth Circuit decided that it would "review a Rule 19(a) finding that a party is necessary to an action under an abuse of discretion standard," but would "review a Rule 19(b) determination that a party is indispensable to an action *de novo*." In adopting this modification, the Sixth Circuit determined that "Rule 19(b) is inherently a legal question," whereas "the preliminary determination as to whether a party is necessary to the action, under Rule 19(a), is based solely on a district court's factual findings." *Id*. This dual standard—abuse of discretion for Rule 19(a) determinations and *de novo* for Rule 19(b) determinations—remains the standard employed by the Sixth Circuit. *Laethem Equip. Co. v. Deere & Co.*, 485 F. App'x 39, 43 (6th Cir. 2012).

G. Seventh Circuit

The Seventh Circuit has considered, but not yet decided, whether to review decisions under Rule 19 *de novo* or for an abuse of discretion. *Askew v. Sheriff of Cook Cnty.*, 568 F.3d 632 (7th Cir. 2009); *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999).

In *Thomas*, elections were held to ratify two amendments to a tribal constitution. They were approved, prompting challenges by the losing faction. *Thomas*, 189 F.3d at 664. At the instigation of the losing faction, federal officials overturned the election results, thus causing the plaintiffs to file a lawsuit against certain federal authorities (but not naming the tribal governing board as a party). *Id.* at 665. The district court dismissed the claims against the federal defendants for failure to join the tribal defendants under Rule 19. *Id.* The Seventh Circuit reversed. In its decision, the Seventh Circuit acknowledged that "respectable arguments can be made in favor of each standard [*i.e.*, *de novo* versus abuse of discretion]" and then held that:

> In the cases we have thus far encountered, the result would have been the same using either standard of review (citation omitted). This one is no different. Because the district court made a legal error in its analysis, we would reverse its determination under either standard. We therefore once again postpone resolving the question of the proper standard of review in Rule 19 cases for a day when that issue is of some consequence to the outcome.

Id. at 666.

Ten years after *Thomas* was decided, the Seventh Circuit was afforded another opportunity to adopt a bright-line standard of review for Rule 19 determinations. In *Askew*, 568 F.3d 632, the plaintiff (a detainee) filed a claim alleging that during the plaintiff's incarceration one of the defendants (an officer) threw the plaintiff to the ground without provocation and, after the plaintiff asked to be transferred to another division in the jail, the defendant/officer left him alone with other inmates who stabbed the plaintiff. *Id.* at 633. The district court dismissed the case under Rule 19 because, although the plaintiff named the Sheriff in the claim, the plaintiff failed to name the county. *Id.* at 634. In reversing the district court's decision, the Seventh Circuit again decided to postpone resolution of the question of the proper standard of review in Rule 19 cases because under either standard—*de novo* or abuse of discretion—the district court made a legal error in its analysis. *Id.*

H. Eighth Circuit

The Eighth Circuit applies an abuse of discretion standard to a "district court's dismissal under Federal Rule of Civil Procedure 19(b)." *Scenic Holding, L.L.C. v. New Bd. of Trs. of the Tabernacle Missionary Baptist Church, Inc.*, 506 F.3d 656, 665 (8th Cir. 2007); *Accord United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998); *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992).

In *Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co.*, 451 F.3d 484 (8th Cir. 2006), the Eighth Circuit stated that it was reviewing the district court's decision denying a Rule 19 motion to dismiss under an abuse of discretion standard. *Id*. at 490. The Court did not review the Rule 19(a) determination, and instead limited its review to the rule 19(b) issues. Thus, it appears, but it is not certain, that the Eighth Circuit would apply an abuse of discretion standard of review to a Rule 19(a) determination, as it does with respect to Rule 19(b) determinations.

We did not find any case explaining why the Eighth Circuit chose to apply an abuse of discretion standard of review to Rule 19(b) determinations.

I. Ninth Circuit

As of 1982, the standard of review for Rule 19 cases was unclear. *See Walsh v. Centeio*, 692 F.2d 1239 (9th Cir. 1982). In *Walsh*, the Ninth Circuit was called upon to resolve that issue. In determining that an abuse of discretion standard should apply, the Ninth Circuit held:

> [W]e are convinced that the abuse of discretion standard should apply. As the Supreme Court recognized in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 19 L. Ed. 2d 936, 88 S. Ct. 733 (1968), there is no prescribed formula for determining indispensability. "The decision whether to dismiss (*i.e.*, the decision whether the person missing is 'indispensable ') must be based on factors varying with the different cases, some

> such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id.* at 118-19, 19 L. Ed. 2d at 950. Thus, Rule 19(b) requires the district court to analyze various equitable considerations within the context of particular litigation, rather than to decide a purely legal issue.

Id. at 1242.

In *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992), the Ninth Circuit held that *de novo* review applies to legal conclusions in Rule 19 cases. During the following ten years, the Ninth Circuit wrestled with whether the standard of review on Rule 19 determinations was simply abuse of discretion or also included *de novo* review for legal conclusions. *Compare Faunce v. Bird*, 52 F. App'x 401 (9th Cir. 2002) (abuse of discretion applied to Rule 19 determinations without mention of *de novo* review for legal conclusions); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (same); *Mayes v. Fujimoto*, No. 98-16252, 1999 U.S. App. LEXIS 4876 (9th Cir. Mar. 19, 1999) (same); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (abuse of discretion applied to Rule 19 determinations, but *de novo* review applied to legal conclusions); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 907 (9th Cir. 1994) (same).

Today, it appears that the Ninth Circuit employs an abuse of discretion standard in Rule 19 cases, but applies *de novo* review of legal conclusions. *See Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013) ("We review the district court's denial of the Band's Rule 19 motion for abuse of discretion, but review the legal conclusions underlying that determination *de novo*."); *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012) ("We review a Rule 19 dismissal for abuse of discretion and underlying legal conclusions *de novo*."); *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008) (stating that standard of review of a district court's Rule 19 determination is abuse of discretion, but "[t]o the extent that in its inquiry the district court "decided a question of law, we review that determination de novo."); *San Pasqual Band of Mission Indians v. Cal.*, 295 F. App'x 880, 880-81 (9th Cir. 2008) ("De novo review may therefore extend to determinations whether a third party's interests would be impaired within the meaning of the joinder rules, if that determination decided a question of law.").

None of the cases explain the basis for the Ninth Circuit's determination as to the applicable standard of review.

J. Tenth Circuit

Similar to the Ninth Circuit, the Tenth Circuit also reviews Rule 19 determinations under an abuse of discretion standard and underlying legal conclusions supporting Rule 19 determinations *de novo*. *Davis*, 192 F.3d at 957; *Merrill Scott & Assocs. v. Concilium Ins. Servs.*, 253 F. App'x 756, 762 (10th Cir. 2007). According to the Tenth Circuit, in determining whether the district court abused its discretion, it "must consider 'whether the decision maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion.'" *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996) (citations omitted). The Tenth Circuit further expanded on its rationale for an abuse of discretion standard for Rule 19 cases, by stating: "[t]he standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied 'in a practical and pragmatic but equitable manner.'" *Id*. (citing *Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 878 (10th Cir. 1981)).

K. Eleventh Circuit

The Eleventh Circuit appears to apply an abuse of discretion standard of review to determinations under both Rule 19(a) and Rule 19(b). *See Winn-Dixie Stores, Inc. v. Dolgencorp., L.L.C.*, 746 F.3d 1008, 1039 (11th Cir. 2014) ("We review a district court's decision regarding the joinder of indispensible parties for abuse of discretion"); *United States v. Rigel Ships Agencies, Inc.*, 432 F.3d 1282, 1291 (11th Cir. 2005). "A district court abuses its discretion when, in reaching a decision, it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Winn-Dixie Stores*, 746 F.3d at 1039 (internal quotation marks and citation omitted). The court further stated that "Federal Rule of Civil Procedure 19 sets out two steps for determining whether a party must be joined as indispensable," and then discussed both Rules 19(a) and 19(b). *Id*.

We did not find any case explaining the basis for the Eleventh Circuit's decision to apply an abuse of discretion standard of review.

III. Conclusion

Although there is technically a split in authority concerning the standard of review to be applied to district court determinations under Rule 19, each Circuit (except for the Sixth Circuit) grants a district court significant deference in making factual determinations in a Rule 19 case and will only reverse a district court's factual finding where that district court has abused its discretion. The Sixth Circuit is the only appellate court to employ a *de novo* standard of review to Rule 19(b) determinations. Even though the Third, Ninth and Tenth Circuits have held that legal conclusions in Rule 19 motions are reviewed *de novo*, this subtlety does not change the outcome of appellate review, since a district court that makes a legal error in its analysis is subject to reversal under either a *de novo* or abuse of discretion standard. Therefore, although different standards are employed by the various appellate courts, the difference is without significant consequence (with the exception of the Sixth Circuit).

Endnote

1. *See also CP Solutions PTE, Ltd. v. GE*, 553 F.3d 156, 158 (2d Cir. 2009) (reversing dismissal under Rule 19(b) and holding that lower court properly identified the Rule 19(b) factors but abused its discretion in applying them).

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Book Review: *Commercial Litigation in New York State Courts*, Fourth Edition

(Vols 2-4F, New York Practice Series), Robert L. Haig, Esq., Editor-in-Chief, Thomson Reuters, 2015
Review by Jonathan D. Lupkin

Robert L. Haig's *Commercial Litigation in New York State Courts* is a veritable Swiss Army knife for the New York commercial litigator. It combines an exhaustive treatment of the procedural nuances associated with the labyrinthine New York state court system with extensive analysis of the myriad areas of substantive law that fall under the commercial litigation umbrella. The only treatise of its kind in this specialized area of New York practice, Mr. Haig's multi-volume work is unique in another respect; it reflects not just the views of one or two authors, but benefits from the experience, insight and expertise of 182 contributing authors, including 29 sitting and former trial and appellate judges. That Mr. Haig successfully corralled such a large number of distinguished practitioners and jurists to participate in this project is a testament to his prodigious ability to rally busy professionals around a common, civic-minded cause.

This most recent release is the Fourth Edition of Mr. Haig's masterwork, and a few noteworthy statistics bear mention. This current iteration comprises 10,188 pages of text (2,419 more than the Third Edition) and a total of 53 chapters dedicated exclusively to substantive commercial law. As compared to the Third Edition, Mr. Haig's fourth edition includes 22 entirely new chapters on such varied topics as International Arbitration, Derivatives and Social Media.

Among the many noteworthy features of the treatise is its ability to meld abstract jurisprudence with practical insight into everyday practice and provide guidance regarding how to harness this vast body of law for the benefit of clients, both plaintiffs and defendants alike. As was true in its earlier iterations, the Fourth Edition of *Commercial Litigation in New York State Courts* includes procedural and practice checklists, sample jury instructions and numerous litigation forms, which may also be accessed in electronic format on the CD-ROM that accompanies the treatise.

Commercial litigation in this state has changed dramatically since Mr. Haig published the First Edition of this treatise in 1995. The release coincided with the launch of the then-embryonic Commercial Division of New York State Supreme Court, which was created to address a glaring shortcoming in our state's court system. At that time, according to Mr. Haig:

> [t]he increasing volume of litigation and the increasing complexity of many commercial cases had placed an insupportable burden on the court system that threatened timely and thoughtful resolution of disputes. As a result, many businesses were turning to the federal courts…as well as to the courts of other states such as Delaware and to private dispute resolution. In order to remain the commercial, financial, and banking capital of the world, New York had to have a viable public court system. (Forward at vii)

More than twenty years later, the Commercial Division has become a preferred venue for businesses the world over, and one of the Division's great attributes is its ability and willingness to adapt to the changing needs of litigants and the disputes for which they seek a cost-effective and fair resolution.

The timing for the release of this Fourth Edition in 2015 is almost as auspicious as the release of the First Edition in 1995. Beginning in 2012 and continuing into 2015 (and beyond), the Commercial Division received a major overhaul, which was prompted by the findings of former Chief Judge Jonathan Lippman's "Task Force on Commercial Litigation in the 21st Century." The Task Force conducted an in-depth analysis of the Commercial Division and made concrete recommendations about how to improve practice and maintain the Division's stature as the premier forum for the resolution of complex commercial disputes. The overhaul prompted by the Task Force's findings has taken the form of no fewer than 22 modifications and amendments to the Statewide Rules of the Commercial Division—improvements ranging from fulsome expert disclosure to temporal and numerical limits on depositions and from guidelines for seeking ESI from non-parties to the established preference for categorical (as opposed to itemized) privilege logs.

Due to the unique focus of Mr. Haig's treatise—state court commercial litigation—these significant rule changes receive extensive in-depth treatment in no fewer than three chapters: Chapter 1: "Commercial Litigation in New York State Courts" (by Hon. Jonathan Lippman), Chapter 35: "Practice Before the Commercial Division" (by Hon. Brian M. Cogan and Alan M. Klinger) and Chapter 65: "Techniques for Expediting and Streamlining Litigation" (by Hon. Martin E. Ritholtz). It is safe to say that apart from the Office of Court Administration's website, there is no other single source to which a practitioner may turn for guidance and analysis of these critical rule changes.

Commercial Litigation in New York State Courts remains an indispensable guide for anyone who practices in the New York State Commercial Division and needs to plumb the intricacies of New York's substantive commercial law. It has immense value for both hardened veterans of the state court trenches and newcomers alike, and it continues to find a prominent and readily accessible place on my bookshelf.

Jonathan D. Lupkin is the founding member of Lupkin & Associates PLLC. He is a former chair of the Commercial and Federal Litigation Section and currently sits as an active member of the Chief Judge's Commercial Division Advisory Council.

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