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Inside

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A Message from the Chair

Thanks to Edward Snowden, privacy in an era of "big data" has become a hot topic. Judge Shira Scheindlin addressed the issue in accepting the Section's Fuld Award in January, and her speech is reprinted in this issue of the *NYLitigator*. It also will be a topic covered at the Section's Spring Meeting in May. I too have a few preliminary ruminations, which mostly lead to questions.

The Internet has transformed notions of accessibility to information. Pictures which used to be passed hand-to-hand now "go viral" and may be disseminated to hundreds of thousands of strangers. Thanks to software programs, sellers can tailor their pitches to your personal interests based only on what websites you browse or what items you purchase. I have heard a story, perhaps apocryphal, of a father who confronted his teenage daughter after receiving an e-mail from a company that started, "Now that you are expecting."

Cell phones are ubiquitous. At the end of 2012, there were more mobile subscriber connections in the United States than people. Cell phones are used for far more than merely telephone calls. They send and receive text messages; they are cameras; and they are locators.

Voluntary disclosure of personal information has also become routine. Every credit card purchase, whether over the Internet or in person, involves the release of your credit card number and sometimes other information. Each purchase says something about your interests.

People, especially younger people, regularly post personal information over social media. Even older people form electronic communities to exchange personal information and views.

This is a multi-dimensional problem. How strong must countervailing considerations be to overcome privacy protections? For example, in what circumstances does national security trump privacy? Are privacy considerations different when the government is involved than when it is not? Are privacy concerns mitigated when a service provider gathers the information that is later provided to the government? Should restrictions on surveillance be different for U.S. persons than for foreign persons overseas? Are privacy considerations different for information voluntarily disclosed than for information automatically generated when communication occurs (so-called metadata)? Should content be more protected than the observable facts of a communication, such as the numbers used, the timing and length of the communication, or perhaps the locations of the communicants? Is there any privacy concern when statistical analysis is used to reveal patterns without disclosing the underlying personal information, much less the content of any communication? Should the use of encryption for the content of a communication make a difference in the protection it receives?

Since *Katz v. United States* in 1967, the standard for whether the government has engaged in an unconstitutional search has for the most part been based on a person's reasonable expectation of privacy. But, those expectations are rapidly changing. When you post personal information on a social media site, does that eliminate any expectation of privacy because you have volunteered to show it to third parties? On the other hand, your cell phone generates a map of where you are and have been as it maintains connection with the cell phone network. Do you have an expectation of privacy in that information which the device automatically generates and may be tracked by the service provider?

In *United States v. Jones*, decided in 2012, Justice Scalia for a bare majority of the Supreme Court used a trespass rationale to hold that law enforcement officers who placed a GPS-tracking device on an automobile without a warrant had engaged in a search in violation of the Fourth Amendment. Justice Alito in dissent accused the Court of deciding the case based on 18th-century tort law, which "strains the language of the Fourth Amendment; …has little if any support in current Fourth Amendment case law; and…is highly artificial."

My question then is should there be a new paradigm for digital information, and, if so, what would it be?

Statistical analysis (what Judge Scheindlin called data analytics) can be used to find patterns in aggregated metadata without any disclosure of the content of the communication. That is the nature of the NSA's bulk telephony metadata program. Yet, two district courts came to opposite conclusions about its constitutionality. Judge Pauley upheld it in *American Civil Liberties Union v. Clapper* (S.D.N.Y. Dec. 27, 2013), and Judge Leon found it unconstitutional in *Klayman v. Obama* (D.D.C. Dec. 16, 2013).

My conclusion is that this is an area of the law that could use some fresh insights. On January 17, President Obama announced a comprehensive review of big data and privacy to be led by John Podesta and to be completed within three months. Hopefully that review will inform the debate that has begun and can be expected to continue for some time.

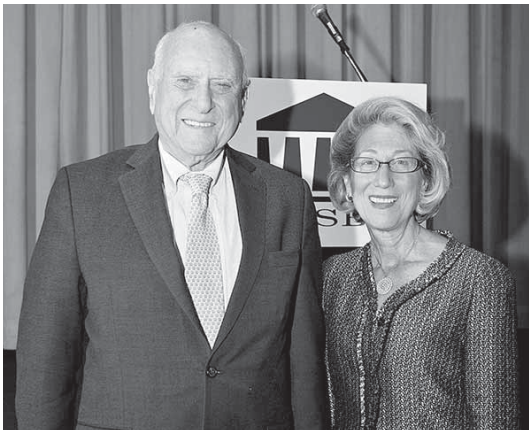
Greg Arenson

Presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation

Award Presenter:
Honorable Jack B. Weinstein

Award Recipient:
Honorable Shira A. Scheindlin

JUDGE WEINSTEIN: Sixty years ago, in January 1954, I joined the New York State Bar Association. Nothing in the intervening years has made me more proud of this Association than its honoring of this great judge. Chief Judge Stanley Fuld would have been awestruck—as I am—by Judge Scheindlin.



Hon. Jack Weinstein and Hon. Shira Scheindlin

Fuld was described by the late legal philosopher Professor Harry Jones of Columbia Law School as one of our half dozen greatest common law judges. The pairing of the names Fuld and Scheindlin suggests the high esteem in which both are held.

Stanley Fuld, Shira Scheindlin and Justice Ruth Bader Ginsburg (one of Judge Scheindlin's mentors) attended Columbia Law School. Starting on a roll, while a student, Judge Scheindlin participated in a case that required equal pay to female academics at City University. She also earned a master's degree in history from Columbia University.

She served as a law clerk to Chief Judge Charles Brieant of the Southern District of New York. He was a much admired judge—one she has followed in his efficient and practical approach to litigation.

Judge Scheindlin was a highly effective Assistant United States Attorney in the Eastern District of New York, General Counsel to the New York City Department of Investigation, a distinguished private practitioner, and a magistrate judge for the Eastern District of New York. As an adjunct professor, she taught for many years at Brooklyn Law School.

It was as a magistrate judge that I first knew Judge Scheindlin. For it was she, who, more than a quarter of a century ago, assembled the enormous amount of data required in the Agent Orange case.

She is particularly admired for her seminal work on electronic records through articles, opinions, and her drafts of federal civil rule revisions. Her opinions on the subject are legal landmarks on electronic communication and record keeping.

The Multidistrict Panel has repeatedly turned to Judge Scheindlin to handle national hot potatoes.

Among her many awards are:

- The Distinguished Jurist Award from the National Association of Criminal Defense Lawyers;
- The William Nelson Cromwell Award for service to the profession and the community from the New York County Lawyers' Association;
- The Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice from the New York County Lawyers' Association;
- The William J. Brennan Award from the Criminal Justice Section of this Association;
- The Robert L. Haig Award for distinguished public service from the Commercial and Federal Litigation Section of this Association; and
- The Special Achievement Award from the United States Department of Justice.

Judge Scheindlin, like Judge Eddie Weinfeld, is known for walking the Brooklyn Bridge for daily exercise. Her opinions—like the Roebling father and son's conception and construction of that great bridge—rest on firm caissons and towers, reaching deeply and highly into history and precedent. Her immensely strong intellect and imagination that so beautifully tie together law and fact are analogous to the giant steel cables of that great bridge.

She labors on court matters nights and weekends and is demanding of her law clerks. The efficiency with which she runs her docket comes from her dedication, her extensive legal experience, and her capacity to manage litigation.

Judge Scheindlin recently issued a 198-page, 783-footnote search and seizure opinion in *Floyd v. City of New York*.[1] The decision and opinion reflects the work of this careful and erudite Judge.

Judge Shira Scheindlin's work will remain a powerful lighthouse, warning of dangerous shoals as we continue

our perilous voyage toward full civil rights for all in a safe, secure and vibrant democracy.

All her work is founded on the law and facts as she finds them after painstaking inquiry. If the appellate court or legislature disagrees with any of her conclusions they can be corrected. But, every knowledgeable person must concede her impartiality and impeccable legal craftsmanship.

Judge Fuld would have welcomed Judge Scheindlin into his small circle of judicial masters. The Fuld Award is presented with my affection.

JUDGE SCHEINDLIN: Thank you, Judge Weinstein, for that wonderful introduction. I began my judicial career nearly 32 years ago under your tutelage and I continue to view myself today as your student and protégé. And we are all aware of the happy symbolism of continuity you provided as a law clerk to Judge Fuld and a recipient of the Fuld award.

I also wish to thank the Commercial and Federal Litigation Section for bestowing on me this great honor. I began my association with this Section before it was a section—when it was the Federal Courts Committee of the State Bar chaired by Bob Haig—and I eventually became the Section's third chair. As the Section's grandmother it is a very special honor to receive this award from so many friends and colleagues. I also want to thank and recognize my small but devoted family who have joined me today for this happy event (and I ask each to stand)—my husband, Dr. Stanley Friedman, who is a very patient and tolerant man; my daughter-in-law Katherine Fong, an accomplished member of the Metropolitan Opera orchestra, representing my son Dov, who also plays with the Met, and who at this very moment is on a plane to Japan with the Orpheus Chamber Orchestra, and one of my first clerks, Julie Kowitz Margolies, who is my daughter-in-residence, as my daughter Dahlia lives in Israel.

I take as my theme today how much the world has changed since Judge Fuld sat, with the greatest distinction, on the New York Court of Appeals. He began in 1946—the year I was born—and ended 27 years later in 1973—only because he reached the mandatory retirement age of 70. (I note that Judge Fuld continued to practice law for many years after his forced retirement from the Court—proving that mandatory retirement at age 70 is totally unnecessary—and that he lived to the age of 99—a record Judge Weinstein will clearly exceed!)

In 1946, there were no women judges on the United States Supreme Court, the New York Court of Appeals, the four appellate divisions, the Second Circuit or any of the federal district courts in the Circuit. Constance Baker Motley was appointed to the Southern District of New York in 1966, Ann Mikoll to the Third Department and Delores Denman to the Fourth Department in 1977, Ellen Burns to the District of Connecticut in 1978, and Amalya Kearse to the Second Circuit in 1979. 1980-1994 saw a spate of first appointments of women judges: Sandra Day O'Connor to the United States Supreme Court in 1981; Judith Kaye to the Court of Appeals in 1983; Geraldine Eiber to the Second Department in 1984; Betty Weinberg Ellerin to the First Department in 1985; Reena Raggi to the Eastern District of New York in 1987; and Rosemary Pooler to the Northern District of New York in 1994. In 1982, I became the first woman Magistrate Judge in the Eastern District of New York, five years before the appointment of the first woman district judge in that district. Finally, in the second decade of the 21st century—forty years after Judge Fuld retired—Elizabeth Wolford was appointed to the Western District of New York, having taken her seat just a month ago. Today, more than half the judges of Judge Fuld's court are women. We women have come a long way since Judge Fuld's years in office.

But the biggest change of all since 1973—Judge Fuld's last year on the bench—is the advent of the era of digital technology that has changed the practice of law—and the daily decisions of judges—in so many ways that Judge Fuld and his colleagues could not have imagined.

I begin with the changes in our own uses of technology. We no longer handwrite or dictate. Shorthand is long gone. Paper is almost an artifact. Smartphones and tablets are the tools of the trade. No need to leave a message for a colleague to answer. E-mail and text have replaced our voice. Stamps are gone. Overnight mail and faxes have been replaced by pdf attachments to e-mails.

As you heard this morning, social media, blogs, and social networks are used by lawyers and clients alike, often creating a record of contemporaneous statements, or images, that are incontestable. With electronic filing and hyperlinks, a full docket is available for review at our fingertips and can be carried on a notebook or tablet, with little need for a briefcase. Most documents are text searchable. It is easy to find each time a particular judge has ruled on a particular issue, and lawyers are smart enough to cite that judge back to herself in the hope that she will be persuaded by such powerful precedents. Access to information is available 24/7—for better or for worse.

And this is only the beginning. The devices we all carry—smartphones, tablets, or a GPS—to name just a few—track our movements and identify who we contacted, when we contacted them, and where we were when we made that contact. And the electronic trails we leave behind us are awesome—to use a word I have learned from my clerks. Every use of a charge card, every Internet purchase, every Google search, is collected and can be analyzed. We can learn what a witness has said in prior public statements as well as on her private social media sites, and often in her e-mails and text messages. An alibi defense may well be a thing of the past since it will not be hard to prove where someone was at a particular time just by obtaining her cell phone records or the metadata on her text messages.

Data privacy is a huge new concern. We live in a very different world than 1973. Many clients are now multinational businesses—indeed many law firms are international—and lawyers represent clients all over the world. This requires lawyers to be familiar with the data privacy rules of all of the jurisdictions in which they practice and even those to which they travel to meet with clients or gather information. Most countries have stronger data privacy laws than we do here in the United States. Privacy is considered a basic human right in many European countries. Personal data—a person's name, address or contact information—and communications from or to that person may not generally be produced to anyone absent consent or exceptional circumstances. The American concept of privacy is, for the most part, more limited—and the difference between our privacy laws and those of other nations is increasingly a point of tension. It should be noted that state lawmakers and attorneys general, led by California and New York, are proposing new legislation and directing enforcement activity targeted at privacy protection. With so much data available, we must have a new awareness and concern as to how it can be accessed, who will be able to access it, and what use can be made of it. Just recently, the Supreme Court granted certiorari in two cases about whether law enforcement officials can search cell phones that were properly seized without first obtaining a search warrant.

New words in our lexicon include *information governance, big data, data analytics, and cybersecurity*. I begin, again, with a look at 1973. At that time there were no personal computers. Digital assistance came in the form of an IBM Selectric typewriter with a small memory card attached. The first personal computers entered the market in the late '70s with the Atari, Apple and Commodore and in 1981 with the IBM PC and the Tandy TRS-80. These early computers first held kilobytes of data, and eventually grew to hold megabytes of information, which is 1,000 times greater than a kilobyte. Today, your cell phone holds many gigabytes of data—a gigabyte being 1,000 megabytes. We now measure data held by individuals in terabytes (1,000x greater than a gigabyte); corporate data volumes are measured in petabytes (1,000x greater than a terabyte), and global data is measured in exabytes (which is 1,000x greater than a petabyte). While the amount of data has increased exponentially, the cost of data storage has dramatically decreased. With so much data available, we need to think about the uses that will be made of that data and how it impacts the practice of law.

Information governance is a new discipline that hardly existed in 1973. The goal of information governance is to actively manage the data maintained by an organization by eliminating superfluous data and preserving—in an organized, useful, and retrievable way—data that is useful to the organization, including that needed to prosecute or defend litigation. The safe disposal of data is tricky and careless disposal of electronic information—even as little as resides on a photocopier whose hard drive may contain social security, credit card, or health information—could harm many people.

Big data is a volume of data larger than we can make sense of using conventional tools. It is a volume of data so large that it must be analyzed using powerful computer hardware and sophisticated software programs. Big data demands new thinking in information governance. The billions of tweets held by Twitter or the petabytes of posts on Facebook reveal trends and patterns that have enormous commercial value and support unprecedented intelligence gathering, with the attendant potential to do great good and great harm.

And that brings us to *data analytics*, which is the use of statistical modeling and machine learning to sort, search, categorize, and glean information from data. Advanced data analytics minimize the tedium of reviewing vast volumes of data and detect patterns that might not be apparent to human reviewers. Your e-mail spam filter is a common example of advanced analytics. Lawyers use data analytics to speed the review of documents in discovery. Elsewhere, algorithms track the websites you visit and the links you click. Merchandisers analyze your buying habits. Your computer knows whether you are likely to buy sneakers in the next three weeks—maybe before you do! And web search data can track the outbreak of diseases around the world.

Law enforcement uses data analytics to identify suspicious activities. While these law enforcement techniques may prove effective, they are obviously highly intrusive. Surveillance teams routinely study the Internet activity of subjects of interest. The NYPD has 350 analysts who obtain data by monitoring Twitter and other social networks. And as we now know, the NSA has gathered data regarding millions if not billions of cell phone calls made or received.

While these cutting-edge technologies can be socially useful—as in the example of tracking and treating epidemics—the downside, as I just discussed, is a potentially great loss of privacy. Balancing the goals of intelligence gathering—for national security or for commercial purposes—against the desire to maintain personal privacy is a challenge we as lawyers and judges will face more and more in the years ahead. Indeed, just two weeks ago President Obama spoke about the delicate balance between national security and privacy—and appeared to thread the needle very very carefully—also known as dancing between the raindrops!

Cybersecurity is the science of protecting our data from hackers and garden variety data breaches. These go far beyond just password protection, data encryption and malware detection. Today, there are sophisticated means of intrusion detection which recognize suspicious behavior and prevent strangers from abusing our credit information, accessing our data or sabotaging the criti-

cal infrastructures that supply us with power, water and other essential services. Another technique is so-called "penetration testing," hiring an expert to see if he or she can break into the system, which alerts the organization to the need for more security. Again, just two weeks ago—in a spectacular failure of cybersecurity—hackers were able to obtain the personal data of 110 million Target shoppers. One can only imagine the lawsuits Target may face as a result of this security breach.

And then there is the world most familiar to us—although not to the lawyers of Judge Fuld's era—and that is e-discovery—the reason I was chosen to receive today's award. E-discovery has revolutionized pretrial discovery. I have already described the data explosion from kilobytes in 1980 to exabytes today. Once upon a time, information doubled every 150 years, then it became every 50 years, then every 10 years, and now it doubles every year. In 1973, lawyers working on big cases searched warehouses with boxes of documents and reviewed them by hand, employing many associates to conduct "doc review"—the task that drove more lawyers out of big law than any other. Today, lawyers can search millions of records with the assistance of technology—keyword searching, advanced analytics, and technology assisted review—to locate relevant and non-privileged information.

My final thoughts, very briefly, are with respect to the way in which technology has impacted the judicial branch. The biggest change is probably electronic case filing, which gives judges 24/7 access to every document filed in a case. Judges and their staff can download these documents to their tablets and read briefs on the airplane or in the comfort of their home study. Lawyers file documents electronically with a click of a button and are alerted by e-mail whenever a document is filed in their case. The public has easy access to our dockets, which increases the transparency of the work done by the judicial branch, and allows researchers to study what we are doing right and what we can be doing better in terms of case management.

The other major change is in the courtroom itself. Judges, lawyers, witnesses, and jurors now have simultaneous access to documents used in a trial. Documents can be shown first to the judge, the witness, and the lawyers on the screen—by activating only those screens—and then to the jurors only when the document is received in evidence. I envision a day when every juror will be handed a clean tablet on which documents received in evidence will be available and searchable, and can be used during jury deliberations. That tablet could also contain the real time transcript of the proceedings—again searchable—as well as the judge's charge. Witnesses in remote locations can be questioned through Skype in real time so that all witnesses can appear live before the jury, regardless of their distance from the courthouse. Reading from a dull deposition transcript should become a thing of the past. Jurors can be given a "virtual" tour of a location or a facility at issue in the trial.

However, the use of technology poses some dangers. In several trials, the court has learned that jurors conducted independent Internet research into disputed issues, thereby obtaining information outside the record. This was always a risk except most jurors were too lazy to go to the library. Now, they can look up a technical term on Wikipedia and judges have no way to police this. Jurors are also using social media to communicate with each other and with outsiders about the case on trial or to access the social media of witnesses or lawyers. There is little we can do to prevent the jurors from doing this. We instruct them not to in every trial but cannot monitor their activity unless we take away all of their electronic devices and sequester every jury—which will never happen. The ease of access to vast amounts of information and our ability to instantly communicate with many people is both a positive and a negative that judges must be aware of.

And how safe is our own information? How many judges are up to date on protecting their own privacy and the work of their Chambers? Do we unwittingly reveal our metadata when we circulate draft opinions? Do we use our personal electronic devices for business purposes and vice versa? Do we realize that our own words and whereabouts can be tracked at all times?

Well, I have gone on longer than I should have, and have probably scared many of you into early retirement. I close by noting that the world has changed dramatically since Judge Fuld left office, and we cannot be sure that all of these changes are for the better. We have gained access to a tremendous amount of information, but we have lost something in the way of privacy. Finding the balance between the two will be the great challenge of the next 25 years.

In closing, I quote from a dissenting opinion Judge Fuld wrote in 1964 in a case addressing whether a frisk following a stop was constitutional: "To what end security if liberty be sacrificed as its price? The privacy which the Constitution guarantees is assured to the best of men only if it is vouchsafed to the worst, however distasteful that may be. Thus, although the defendant before us undoubtedly merits the punishment provided by law for carrying a concealed weapon, I venture that it is better that he go free than that we sanction a significant inroad on the rights of all our citizens."[2] Thank you for presenting me with this award!

Endnotes

1. No. 08 Civ. 1034 (SAS), 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. Aug. 12, 2013), *appeal docketed,* No. 13-3524 (2d Cir. Sept. 12, 2013), *appeal dismissed per stipulation* (2d Cir. Sept. 26, 2013).
2. *People v. Rivera*, 14 N.Y.2d 441, 452-53 (1964).

Report on District Court Review of Magistrate Judges' Reports and Recommendations: Should Arguments Not Previously Made to the Magistrate Judge Be Considered?

I. Introduction

This report addresses the issue of whether a party objecting to a magistrate judge's report and recommendation ("Report & Recommendation") may raise in the district court a legal argument that could have been, but was not, raised before the magistrate judge. This issue has not been addressed by the Second Circuit Court of Appeals. Other circuit courts have reached differing conclusions, as have district court judges within the Second Circuit.

II. Summary

The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") has concluded that whether a party objecting to a magistrate judge's Report & Recommendation may raise before the district court an argument that was not raised before the magistrate judge, even though it could have been, should be a matter of district court discretion, as a number of courts have held. The Section does not agree with the position of the Fourth Circuit that a district court must consider such arguments. It also does not agree with the decisions of other courts that indicate that a district court cannot consider such arguments.

III. The Federal Magistrates Act, Federal Rule of Civil Procedure 72 and General Principles Governing District Court Review of a Magistrate Judge's Order or Report and Recommendation

The Federal Magistrates Act,[1] as amended in 1976, divides pretrial matters into two categories. Under Section 636(b)(1)(A), "a judge may designate a magistrate to hear and determine any pretrial matter" with the exception of eight listed pretrial motions.[2] Those eight listed motions are incorporated by reference into Section 636(b)(1)(B), under which a judge may designate a magistrate judge "to conduct hearings, including evidentiary hearings" and submit "proposed findings of facts and recommendations for the disposition" of the matter to the district judge.[3] Under Section 636(b)(1)(C), the magistrate judge's proposed findings and recommendations under Section 636(b)(1)(B) are to be filed and served.[4]

Federal Rule of Civil Procedure 72, which implements Section 636(b)(1), also divides pretrial matters into two categories, but does not track the language of the statute. Instead, it categorizes pretrial matters into those that are "not dispositive of a party's claim or defense"[5] and those that are "dispositive" of such a claim or defense.[6] Rule 72(a) implements Section 636(b)(1)(A), although the language of the two provisions differ.[7] Rule 72(b) implements Section 636(b)(1)(B) & (C), with the language of the statute and the rule differing in certain respects.[8] How courts have dealt with the language differences between Section 636(b)(1) and Rule 72(a) and (b) is discussed in Wright and Miller.[9]

As noted above, Rule 72(b) applies when a magistrate judge is assigned, "without the parties' consent, to hear a pretrial matter dispositive of a claim or defense."[10] Under Rule 72(b)(1), a magistrate judge "must promptly conduct the required proceedings when assigned…. A record must be made of all evidentiary proceedings…. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact."[11]

Determinations by a magistrate judge under Section 636(b)(1)(A) are subject to review by the district court, which "may reconsider any pretrial matter…where it has been shown that the magistrate's order is *clearly erroneous or contrary to law.*"[12] Rule 72(a) provides that a district court judge "must consider timely objections" to a magistrate judge's order under Rule 72(a), "and modify or set aside any part of the order that is clearly erroneous or is contrary to law."[13]

The standard for district court review of a magistrate judge's Report & Recommendation is governed by Section 636(b)(1)(C) and Rule 72(b), and is different from the standard of review applicable to a magistrate judge's order.[14]

> Within 14 days after being served with a copy [of the Report & Recommendation], any party may serve and file written objections to such proposed findings and recommendations…. A judge of the court shall make a *de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.* A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.[15]

Rules 72(b)(2) and (3) are in accord with the foregoing.[16]

In *Thomas v. Arn*, the Supreme Court had to determine whether a Court of Appeals could validly promulgate a rule that the failure to object to a Report & Recommendation waived the right to appeal from a district court's

judgment adopting the Report & Recommendation.[17] After noting that the Federal Magistrates Act does not require any review in the absence of an objection,[18] the Supreme Court stated in dictum with respect to district court review:

> Petitioner first argues that a failure to object waives only *de novo* review, and that the district judge must still review the magistrate's report under some lesser standard. However, § 636(b)(1)(C) simply does not provide for such review. This omission does not seem to be inadvertent, because Congress provided for a "clearly erroneous or contrary to law" standard of review of a magistrate's disposition of certain pretrial matters in § 636(b)(1)(A).[19]

The Supreme Court further stated,

> Petitioner also argues that, under the Act, the obligatory filing of objections extends only to findings of fact. She urges that Congress, in order to vest final authority over questions of law in an Article III judge, intended that the district judge would automatically review the magistrate's conclusions of law. We reject, however, petitioner's distinction between factual and legal issues. Once again, the plain language of the statute recognizes no such distinction. We also fail to find such a requirement in the legislative history.
>
> It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report.[20]

The Supreme Court concluded that "[t]here is no indication that Congress, in enacting § 636(b)(1)(C), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort."[21] The Fourth Circuit has similarly stated that parties must make a proper objection "to establish the right to district court review."[22]

Contrary to the dictum in *Thomas v. Arn*, the Advisory Committee and various court decisions have concluded that when no timely objection is made to a Report & Recommendation, the district court need only satisfy itself that there is no clear error on the face of the record in order to accept the Report & Recommendation.[23] Wright & Miller has concluded that there is no agreed upon answer to whether, in the absence of an objection, the district court must review a Report & Recommendation at least for clear error before accepting it.[24] That issue is beyond the scope of this Report.

In the absence of an objection, the district court is free to review the Report & Recommendation *de novo*, if it so chooses.[25] As indicated above, 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3) each "explicitly permit the district court to receive additional evidence as part of its review."[26]

However, there is no provision in either 28 U.S.C. § 636 or Fed. R. Civ. P. 72 concerning whether the district court, in reviewing a magistrate judge's Report & Recommendation, may consider legal arguments made for the first time to the district court, but which could have been made to the magistrate judge.

IV. The Circuit Courts Differ Regarding a District Court's Consideration of a Legal Argument Not Raised Before the Magistrate Judge

The circuit courts differ regarding district court consideration of a legal argument not raised before the magistrate judge when the district court reviews a magistrate judge's Report & Recommendation. The Second Circuit has not addressed the issue.[27]

The Fourth Circuit has held that, in reviewing an objection to a Report & Recommendation, the district court must consider all legal arguments relating to the subjects of the objection, "regardless of whether they were raised before the magistrate."[28] The First, Fifth, Eighth, and Tenth Circuits have held that a district court may not consider new legal arguments.[29] The Eleventh Circuit has adopted a middle ground under which the district court may, *in its discretion*, consider an objecting party's legal argument when that argument was not presented to the magistrate judge.[30]

The law in the Ninth Circuit is not clear. In *Farquhar v. Jones*, the Court of Appeals held that the district court properly declined to address a legal issue not raised before the magistrate judge,[31] citing *Greenhow v. Secretary of Health & Human Services*.[32] In *Greenhow*, the Ninth Circuit held that the district court had properly ruled that issues raised for the first time in objections to the magistrate judge's Report & Recommendation had been waived.[33]

In *Bolar v. Blodgett*, the Ninth Circuit held,

> [A]lthough the district court had the discretion to consider Bolar's allegation raised for the first time in his October 22 objections, it did not abuse that discretion

> when it declined to consider the new claim. The purpose of the Magistrates Act would be frustrated if we were to require a district court to consider a claim presented for the first time after the party has fully litigated his claims before the magistrate judge and found that they were unsuccessful.[34]

In *Jones v. Wood*, the Ninth Circuit stated that "[f]ailure to object to a magistrate judge's recommendation waives all objections to the judge's findings of fact. However, in this circuit, failure to object generally does not waive objections to purely legal conclusions." [35]

In *Turner v. Duncan*, the Ninth Circuit similarly stated,

> Failure to object to a magistrate judge's recommendation waives all objections to the magistrate judge's findings of fact. While in most other circuits, failure to object also waives any objection to purely legal conclusions, that is ordinarily not the case in this circuit. Rather, a failure to object to such a conclusion "is a factor to be weighed in considering the propriety of finding a waiver of an issue on appeal."[36]

None of the Ninth Circuit decisions address conflicting language in other Ninth Circuit cases or attempt to reconcile the various cases.

The Sixth Circuit has stated that the failure to assert a claim before the magistrate judge was an "apparent waiver," but went on to reject the claim on the merits.[37] In *Murr v. United States*, the Sixth Circuit held that while the Federal Magistrates Act "permits *de novo* review by the district court if timely objections are filed, *absent compelling reasons*, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate."[38] The court held that the "[p]etitioner's failure to raise this claim before the magistrate [judge] constitute[d] waiver."[39] Thus, the language in *Murr* indicates there may be circumstances under which a district court in the Sixth Circuit may consider a legal argument not presented to the magistrate judge.

Later, in *Glidden Co. v. Kinsella*, the Sixth Circuit stated,

> This Court has not squarely addressed whether a party may raise new arguments before a district judge that were not presented to the Magistrate Judge. In *Murr v. United States*, however, the Court indicated that a party's failure to raise an argument before the Magistrate Judge constitutes a waiver. Other circuits are split regarding this issue.[40]

The Sixth Circuit held that, because the party failed to raise the legal argument before the magistrate judge and the district judge declined to consider the argument on that basis, the legal argument was not properly before the Court of Appeals.[41] "This Court's review is limited to issues 'presented to and considered by the district court, unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or correct clear errors or omissions.'"[42] Thus, it is not clear what the rule is in the Sixth Circuit.

V. District Court Judges in the Second Circuit Also Differ Regarding a District Court's Consideration of a Legal Argument Not Raised Before the Magistrate Judge

District court judges in the Second Circuit also differ on the issue. Some judges have held that it is a matter of district court discretion whether to consider a legal argument presented to the district court which was not presented to the magistrate judge, even though it could have been.[43] Many others have held that legal arguments that could have been raised before the magistrate judge, but were not, cannot be advanced in the district court, without indicating that the district court has discretion in the matter.[44] None of these decisions, however, explicitly addressed the issue of whether new legal arguments can never, under any circumstances, be considered.

Other district court judges in the Second Circuit have also refused to consider legal arguments not presented to the magistrate judge, but the wording of their decisions suggests that there may be circumstances under which new legal arguments could be considered.[45] Those decisions do not identify the circumstances or discuss whether it is a matter of district court discretion.[46] In refusing to consider new legal arguments, these judges have said district courts "generally" or "ordinarily" do not, or "should not," entertain new arguments.[47]

VI. Legislative History of the Federal Magistrates Act and Advisory Committee Notes to Rule 72

There is nothing in the legislative history of the Federal Magistrates Act or the Advisory Committee Notes to Rule 72 addressing whether, in reviewing a magistrate judge's Report & Recommendation, the district court may or must consider legal arguments not presented to the magistrate judge.

As originally enacted in 1968, the Federal Magistrates Act did not provide for *de novo* review by the district court of a magistrate judge's Report & Recommendation. Congress added that requirement in 1976 when it extensively amended Section 636.[48] The requirement of "*de novo*" review was not included in the Senate version of the bill, but was added in the House version.[49]

With respect to the *de novo* review requirement, H.R. Rep. No. 94-1609 states,

> The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in dispositive and post-trial matters. The amendment to subparagraph (b)(1)(C) is intended to clarify the intent of Congress with regard to the review of the magistrate's recommendations; it does not affect the substance of the bill. The amendment states explicitly what the Senate implied: i.e. that *the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party*.[50]

The House Report further discusses the "*de novo* review" requirement in the context of whether the district court would be required to conduct a new hearing on contested issues:

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings.[51]

The foregoing language is quoted with approval by the Supreme Court in *Raddatz*, noting that "[t]he Report goes on to state, quite explicitly, what was intended by 'de novo determination'…."[52]

According to the House Report, the "approach of the Committee as well as that of the Senate, is adopted from a decision of the United States Court of Appeals for the Ninth Circuit in *Campbell v. United States District Court for the Northern District of California*."[53]

> The clarifying amendment merely draws upon the language of the Campbell decision to a greater extent:
>
> "In carrying out its duties the district court will conform to the following procedure:
>
> If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law.
>
> The district court, on application, shall listen to the tape recording of the evidence and proceedings before the magistrate and consider the magistrate's proposed findings of fact and conclusions of law. The court shall make a de novo determination of the facts and the legal conclusions to be drawn therefrom.
>
> The court may call for and receive additional evidence.
>
> * * *
>
> Finally, the court may accept, reject or modify the proposed findings or may enter new findings. It shall make the final determination of the facts and the final adjudication…."[54]

The Supreme Court similarly stated in *Raddatz*,

> It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required "determination."[55]

Tracing the legislative history of the 1976 amendment of Section 636, the Supreme Court explained,

> The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination. Rather, it included only the language permitting the district court to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Yet the Senate Report which accompanied the bill emphasized that the purpose of the bill's language was to vest "ultimate adjudicatory power over dispositive motions" in the district court while granting the "widest discretion" on how to treat the recommendations of the magistrate.[56]

The Supreme Court then addressed the *de novo* determination requirement added in the House version of the amendment:

> The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party. According to the House Report, "[the] amendment states expressly what the Senate implied: i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party." The Report goes on to state, quite explicitly, what was intended by "*de novo* determination:"
>
> "The use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues."[57]

The Advisory Committee Notes to the 1983 amendment to Rule 72(b) merely state that "[t]he term 'de novo' signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required."[58]

VII. Reasons Given for Requiring the District Court to Consider Legal Arguments Not Presented to the Magistrate Judge

In United States v. George, the Fourth Circuit held that the district court must consider legal arguments not raised before the magistrate judge in reviewing properly made objections.[59] The Fourth Circuit based its decision on the requirement in Section 636(b)(1) that the district court "'shall make a *de novo determination* of those portions of the report or specified proposed findings or recommendations to which objection is made.'"[60] As the Fourth Circuit explained:

> *We believe that as part of its obligation to determine de novo any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate. By definition, de novo review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to de novo review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate.* The district court cannot artificially limit the scope of its review by resort to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate's proposed finding or conclusion has been made and the appellant's right to de novo review by the district court thereby established. Not only is this so as a matter of statutory construction; any other conclusion would render the district court's ultimate decision at least vulnerable to constitutional challenge.[61]

VIII. Reasons Given for Not Permitting the District Court to Consider Legal Arguments Not Presented to the Magistrate Judge

Three reasons are given for why a party should not be permitted to raise in the district court legal arguments that were not presented to the magistrate judge. First, it would circumvent the Federal Magistrates Act and defeat its purpose, which is to ease the burdens on the district courts.[62] Second, it would be unfair.[63] Third, it would "undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report [& Recommendation] is issued to advance additional arguments."[64]

In *Ridenour v. Boehringer Ingelheim Pharm., Inc.*, the Eighth Circuit held that the party objecting to a magistrate judge's Report & Recommendation waives its right to make a legal argument when it does not raise the argument before the magistrate judge.[65] As the court explained,

> a claimant must present all his claims squarely to the magistrate judge, that is, the first adversarial forum, to preserve them for review. We have held that the purpose of referring cases to a magistrate for recommended disposition would be contravened if parties were allowed to present only selected issues to the magistrate, reserving their full panoply of contentions for the trial court.[66]

The *Ridenour* court cited, among other cases, *Borden v. Secretary of Health & Human Services*., in which the First Circuit stated that, because the purpose of the Federal Magistrates Act is to relieve the district courts of unnecessary work, it "would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate."[67] In *Borden*, the First Circuit reasoned,

> Appellant was entitled to a de novo review by the district court of the *recommendations to which he objected*, however he was not entitled to a de novo review of an argument never raised. The purpose of the Federal Magistrate's [sic] Act is to relieve courts of unnecessary work. It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magis-

> trate, not only their "best shot" but all of their shots.[68]

As the First Circuit explained in *Paterson-Leitch Co., Inc.*,

> The role played by magistrates within the federal judicial framework is an important one. They exist "to assume some of the burden imposed [on the district courts] by a burgeoning caseload." The system is premised on the notion that magistrates will "relieve courts of unnecessary work." Systemic efficiencies would be frustrated and the magistrate's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round. In addition, it would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge.[69]

The court in *Paterson-Leitch* rejected the argument that the requirement of a *de novo* determination permits a party to present to the district court theories which it failed to raise with the magistrate judge:

> Appellant tells us that Rule 72(b)'s requirement of a "de novo determination" by the district judge means that an entirely new hand is dealt when objection is lodged to a recommendation. That is not so. At most, the party aggrieved is entitled to a review of the bidding rather than to a fresh deal. The rule does not permit a litigant to present new initiatives to the district judge. We hold categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate.[70]

In *Green* and *Gonzalez*, the courts stated that it "would undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments."[71]

IX. Reasons Given to Grant the District Court the Discretion to Consider Legal Arguments Not Presented to the Magistrate Judge

In *Stephens v. Tolbert*, the Eleventh Circuit held that a district court did not abuse its discretion when it considered a legal argument that had not been raised before the magistrate judge.[72] "When a district court refers a dispositive motion to a magistrate judge for a report and recommendation, the district court retains, as a statutory and a constitutional matter, broad discretion over the report and recommendation."[73] The Eleventh Circuit rejected the notion that the district court "was barred, outside of exceptional circumstances, from considering an argument not raised before the magistrate judge."[74]

In *Williams v. McNeil*, the Eleventh Circuit held that the district court "has broad discretion in reviewing a magistrate judge's report and recommendation, and, therefore, the district court did not abuse its discretion in declining to consider Williams's timeliness argument that was not presented to the magistrate judge."[75] In reaching its conclusion, the court first referred to the Supreme Court's discussion of the Federal Magistrates Act in *Raddatz*:

> [T]he Supreme Court noted that the purpose of the Act's language "was to vest 'ultimate adjudicatory power over dispositive motions' in the district court while granting the 'widest discretion' on how to treat the recommendations of the magistrate." "Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." It is clear, however, that the Article III judge must retain final decision-making authority. The district court must retain "total control and jurisdiction" of the entire process if it refers dispositive motions to a magistrate judge for recommendation.[76]

The court in *Williams* then noted that the circuit courts had "differ[ed] on the meaning of *de novo* review" and whether the district court was required to consider all legal arguments, even those that had not been presented to the magistrate judge.[77] The court in *Williams* did not set forth any test or standard for determining whether, in the exercise of discretion, a district court should consider a legal argument not raised before the magistrate judge.[78]

In *Wells Fargo Bank, N.A. v. Sinnott*, the district court of Vermont predicted that the Second Circuit would adopt the same standard that the Eleventh Circuit had adopted in *Williams*—that a district court, as a matter of discretion, may consider a legal argument not raised before the magistrate judge.[79] As the district court explained,

> This approach allows an Article III judge to retain final decision-making authority "while granting 'the widest discretion' on how to treat the recommendations of the magistrate." In contrast, a *per se* rule that either prohibits or requires a district court to consider an argument not raised before

> the magistrate judge undermines the "total control and jurisdiction" the district court retains when it refers dispositive motions to the magistrate judge for recommendation. It is also [sic] contravenes the plain language of § 636(b)(1) which permits the district court to "reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[80]

The district court in *Wells Fargo Bank, N.A.* adopted the following six-part test for determining whether a district court, in the exercise of its discretion, should consider or decline to consider a legal argument not raised before the magistrate judge:

> [T]he court concludes that an exercise of discretion, in this case, should be guided by the following factors: (1) the reason for the litigant's previous failure to raise the new legal argument; (2) whether an intervening case or statute has changed the state of the law; (3) whether the new issue is a pure issue of law for which no additional fact-finding is required; (4) whether the resolution of the new legal issue is not open to serious question; (5) whether efficiency and fairness militate in favor or against consideration of the new argument; and (6) whether manifest injustice will result if the new argument is not considered.[81]

The six-part test was adopted by the Eastern and Southern Districts of New York in *Amadasu*[82] and *Machicote*,[83] respectively. Applying those factors, the judges in *Wells Fargo Bank, N.A.*, *Amadasu* and *Machicote* refused to consider legal arguments not made before the magistrate judge.[84]

The court in *Wells Fargo Bank, N.A.* based its six-part test on the Second Circuit's standard for considering new legal arguments raised for the first time in the district court on a motion for reconsideration and its standard for whether new evidence should be considered on a review of an objection to a Report & Recommendation, stating,

> The failure to raise a legal argument until a motion for reconsideration is not dispositive:
>
> "Although generally this Court will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration[,][t]his 'waiver' rule is one of prudence…and [is] not jurisdictional. This Court retains broad discretion to consider issues not timely raised below. This is especially the case where the issues not addressed below involved purely legal questions."[85]

As to Second Circuit precedent regarding when new evidence should be considered when a district court reviews an objection to a magistrate judge's Report & Recommendation, the court in *Wells Fargo Bank, N.A.* quoted the following language from *Hynes v. Squillace*: "'Considerations of efficiency and fairness militate in favor of a full evidentiary submission for the Magistrate Judge's consideration, and we have upheld the exercise of the district court's discretion in refusing to allow supplementation of the record upon the district court's *de novo* review.'"[86] The district court did not refer to the fact that 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) expressly authorize the district court to receive evidence not presented to the magistrate judge.[87]

X. The Analogous Issue of Whether a Circuit Court of Appeals Will Consider on Appeal a Legal Argument Not Raised in the District Court

An analogous issue is whether, on appeal, a Circuit Court of Appeals may consider a legal argument that the appellant did not raise in the district court. In *Singleton v. Wulff*, the Supreme Court stated,

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where "injustice might otherwise result."[88]

The Supreme Court further stated that the foregoing examples were "not intended to be exclusive."[89]

It is well-settled in the Second Circuit that, on appeal, the Court of Appeals has discretion to consider a legal argument that the appellant did not raise below.[90] As the Second Circuit stated in *Magi XXI, Inc.*,

> [I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal. However, this rule is prudential, not jurisdictional, and we have exercised our discretion to hear otherwise waived arguments, where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding.[91]

In the First Circuit,"[i]t is well settled that, 'absent the most extraordinary circumstances, legal theories not

raised squarely in the lower court cannot be broached for the first time on appeal.'"[92] The court in *River Street Donuts, LLC v. Napolitano* further stated that it "ha[d] the discretion to apply the plain error doctrine and consider issues not adequately raised below."[93] The First Circuit noted that it is "'particularly cautious in exercising [this] discretion and do[es] so only when error is plain and the equities heavily preponderate in favor of correcting it.'"[94]

The Fifth Circuit has held that "we ordinarily do not consider issues that have not been presented to the court of first instance."[95]

The Sixth Circuit has stated, "[i]n general, this court will not review issues raised for the first time on appeal…. The court will consider an issue not raised below only when the proper resolution is beyond doubt or a plain miscarriage of justice might otherwise result."[96]

In the Ninth Circuit, although the court of appeals is "not barred from considering a new argument on appeal, we generally take care to avoid the unfairness inherent in deciding cases on bases not raised or passed upon in the tribunal below."[97]

In the Tenth Circuit, "[g]enerally, an appellate court will not consider an issue raised for the first time on appeal."[98]

In the Eleventh Circuit, "except when we invoke the 'plain error doctrine,' which rarely applies in civil cases, we do not consider arguments raised for the first time on appeal."[99]

Wright & Miller states:

> Ordinarily a party may not present a wholly new legal issue in a reviewing court. In exceptional cases, however, in order to avoid a miscarriage of justice, an appellate court may consider questions of law neither pressed by the parties nor passed upon at the trial by the district court. Some courts of appeals also are willing to consider an issue of law that was not raised below if the issue is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.[100]

XI. Conclusion

The Section has concluded that it should be a matter of district court discretion whether a district court, in reviewing an objection to a magistrate judge's Report & Recommendation, should consider a legal argument that could have been, but was not, presented to the magistrate judge. Permitting district courts to exercise their discretion is consistent with the purpose of the Federal Magistrates Act and the broad discretion it vests in the district court. It is also consistent with Courts of Appeals exercising discretion in deciding whether to consider a legal argument raised by the appellant that was not raised before the district court, or that was first raised on a motion for reconsideration in the district court. Nothing in the Federal Magistrates Act or Fed. R. of Civ. P. 72 precludes the matter from being one of district court discretion and there is no constitutional impediment to that.

"The Section has concluded that it should be a matter of district court discretion whether a district court, in reviewing an objection to a magistrate judge's Report & Recommendation, should consider a legal argument that could have been, but was not, presented to the magistrate judge."

The Section has further concluded, for the reasons courts have given for not considering new legal arguments,[101] that district court consideration of a new legal argument should be the exception, not the rule. It would be contrary to fundamental notions of fairness and would defeat the purpose of the Federal Magistrates Act if district courts routinely considered legal arguments not presented to the magistrate judge. The Section has concluded that the six-part test articulated in *Wells Fargo Bank, N.A.*,[102] is an appropriate test for district courts to apply in determining how to exercise their discretion, but district courts should be free to consider any factors they deem appropriate.

The Section does not believe that a *per se* rule either requiring a district court to consider new legal arguments, or prohibiting a district court from considering such arguments, is required or appropriate. Neither *per se* rule is consistent with the broad discretion that the Federal Magistrates Act vests in the district court, and a rule requiring consideration of new arguments is not necessary to avoid constitutional issues.

A *per se* rule requiring the district court to consider new legal arguments would also undermine the purpose of the Federal Magistrates Act by eliminating efficiencies gained through the assignment of dispositive motions to a magistrate judge to hear and report, and would unfairly benefit litigants who could change their tactics after issuance of the magistrate judge's Report & Recommendation.[103]

Furthermore, a *per se* rule prohibiting consideration of a new legal argument would appear to be inconsistent with the principle that even where no timely objection has been made to portions of the Report & Recommendation, those portions should not be adopted if there is clear error on the face of the record.[104] If the new argument raises the

possibility of clear error, presumably it has to be considered. However, we have not seen a case addressing that issue.

In *George*, the Fourth Circuit cited no authority for its conclusion that if a party is entitled to *de novo* review of an issue, it is entitled to raise before the reviewing court any argument with respect to that issue that it could have raised, but did not raise, before the magistrate judge.[105] Simply because *de novo* review "entails consideration of an issue as if it had not been decided previously[,]"[106] does not inexorably lead to that conclusion. *De novo* review has been described in various ways.[107] *De novo* review means that deference does not have to be shown to the magistrate judge's conclusion.[108]

Moreover, adopting the reasoning of the Fourth Circuit as to what *de novo* review requires would mean that a Circuit Court of Appeals has to hear arguments made by an appellant on appeal that were not made in the district court whenever the standard for the Court of Appeals' review is *de novo*. However, it is well-settled that the issue of whether a Court of Appeals should hear such arguments is a matter of court discretion, not a right of the appellant.[109]

Similarly, the Section does not agree with the Fourth Circuit's conclusion that not requiring the district court to hear a legal argument that could have been, but was not, made before the magistrate judge would raise a constitutional issue under Article III.[110] The district court would still be making the ultimate decision when it reviewed the magistrate judge's Report & Recommendation, particularly if it had discretion to consider a new argument. District courts may constitutionally assign magistrate judges to work on dispositive motions as long as the district judge (the Article III judge) retains final decision-making authority.[111] "Case law has emphasized that under the Federal Magistrates Act the judge always retains authority to make the final determination."[112] As H.R. Rep. No. 94-1609 states:

> The judge is given the widest discretion to "accept, reject or modify" the findings and recommendations proposed by the magistrate…. [T]he ultimate adjudicatory power over dispositive motions… is exercised by a judge of the court after receiving assistance from and the recommendation of the magistrate.[113]

In *Thomas v. Arn*, the Supreme Court held that a Court of Appeals, in the exercise of its supervisory powers, may "establish a rule that the failure to file objections to the magistrate's [Report & Recommendation] waives the right to appeal" from a district court's judgment adopting a magistrate judge's Report & Recommendation.[114] In the course of its opinion, the Supreme Court addressed the argument that the waiver of appellate review violated Article III of the Constitution.[115] *The petitioner argued that the Sixth Circuit Court of Appeals' waiver rule permits a magistrate judge to exercise Article III judicial power, "because the rule forecloses meaningful review of a magistrate [Report & Recommendation] at both the district and appellate levels if no objections are filed."*[116] *The Supreme Court found that argument "untenable":*[117]

> Although a magistrate is not an Article III judge, this court has held that a district court may refer dispositive motions to a magistrate for a recommendation so long as "the entire process takes place under the district court's total control and jurisdiction," and the judge "[exercises] the ultimate authority to issue an appropriate order."[118]

The Supreme Court then explained:

> The waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate. *Even assuming, however, that the effect of the Sixth Circuit's rule is to permit both the district judge and the court of appeals to refuse to review a magistrate's report absent timely objection, we do not believe that the rule elevates the magistrate from an adjunct to the functional equivalent of an Article III judge. The rule merely establishes a procedural default that has no effect on the magistrate's or the court's jurisdiction.* The district judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment. Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard…. The Sixth Circuit's rule, therefore, has not removed "the essential attributes of the judicial power."[119]

If a party can waive district court review of a magistrate judge's Report & Recommendation (by failing to timely assert an objection thereto) without raising Article III issues, as the Supreme Court stated in *dictum* in *Thomas v. Arn*, *a fortiori* precluding a party, based upon the theory of waiver, from raising a legal argument for the first time before the district court (when the argument could have been, but was not, presented to the magistrate judge) cannot raise an Article III issue. Permitting a district court the

discretion to decline to consider a new legal argument, in the language of *Thomas v. Arn*, "merely establishes a procedural default that has no effect on the Magistrate's or the court's jurisdiction."[120]

If, contrary to the Supreme Court's dictum in *Thomas v. Arn*, the district court, before approving a Report & Recommendation, must review it for clear error in the absence of an objection,[121] there would also be no Article III issue. If the newly raised argument in the district court indicates there may be clear error, the district court presumably would have to consider the argument. We have not, however, seen any case addressing that situation. If the new argument did not raise the possibility of clear error, it could be ignored, yet there still would have been district court review under the clear error standard. Hence, there would not be an Article III issue.

Indeed, in *Home Health*, the Fourth Circuit held that a party's failure to object to a portion of the magistrate judge's legal conclusion waived the party's right to a review of that determination.[122] The Court held that its decision in *George* did not compel a contrary result.[123]

In *Wells Fargo Bank, N.A.*, the district court concluded that permitting a district court to have discretion as to whether or not to consider a legal argument that could have been, but was not, presented to the magistrate judge,

> allows an Article III judge to retain final decision-making authority "while granting the widest discretion on how to treat the recommendations of the magistrate." In contrast, a *per se* rule that either prohibits or requires a district court to consider an argument not raised before the magistrate judge undermines the "total control and jurisdiction" the district court retains when it refers dispositive motions to the magistrate judge for recommendation.[124]

Endnotes

1. *See* 28 U.S.C. §§ 631-639 (1976).
2. 28 U.S.C. § 636(b)(1)(A).
3. 28 U.S.C. § 636(b)(1)(B); *see generally* 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3068.2 (2d ed. 1997) [hereinafter Wright & Miller].
4. 28 U.S.C. § 636(b)(1)(C).
5. Fed. R. Civ. P. 72(a).
6. Fed. R. Civ. P. 72(b).
7. *See* Wright & Miller, *supra* note 3, § 3068.2, at 332-33; § 3069, at 346.
8. *Id.*, § 3070, at 356-58.
9. *Id.*, § 3068.2, at 332-33.
10. Fed. R. Civ. P. 72(b)(1).
11. *Id.*
12. 28 U.S.C. § 636(b)(1)(A) (emphasis added).
13. Fed. R. Civ. P. 72(a).
14. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).
15. 28 U.S.C. § 636(b)(1)(C) (emphasis added).
16. *See* Fed. R. Civ. P. 72(b)(2), (3).
17. 474 U.S. 140, 144-145 (1985).
18. *Id.* at 149.
19. *Id.*
20. *Id.* at 150.
21. *Id.* at 152.
22. *In re Search Warrants Served On Home Health & Hospice Care, Inc.*, 121 F.3d 700 (4th Cir. 1997), *reported at* No. 96-4813, 1997 U.S. App. LEXIS 23547, at *33 (4th Cir. Sept. 5, 1997) [hereinafter *Home Health*]; *but see Wimmer v. Cook*, 774 F.2d 68, 72 (4th Cir. 1985) (citation omitted) (internal quotation marks omitted):

    > [A]lthough the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations such weight as [their] merit commands and the sound discretion of the judge warrants, that delegation does not violate Article III as long as the ultimate decision is made by the district court.

23. *See, e.g.*, Fed. R. Civ. P. 72 Advisory Committee Notes (1983); *Martinez v. Connelly*, No. 09-CV-648 (CS) (PED), 2011 U.S. Dist. LEXIS 127293, at *2 (S.D.N.Y. Nov. 3, 2011); *Machicote v. Ercole*, No. 06 Civ. 13320 (DAB) (JCF), 2011 U.S. Dist. LEXIS 95351, at *3-4 (S.D.N.Y. Aug. 25, 2011); *United States v. Riesselman*, 708 F. Supp. 2d 797, 807 (N.D. Iowa 2010) [hereinafter *Riesselman*]; *but see, e.g., Talamantes v. Berkeley County Sch. Dist.*, 340 F. Supp. 2d 684, 689 (D. S.C. 2004) (finding that district court need not review any findings or recommendations not objected to; failure to object constitutes acceptance of the findings and recommendations).
24. Wright & Miller, *supra* note 3, § 3070.1, at 371-72.
25. *See Thomas*, 474 U.S. at 154; *Delgado v. Bowen*, 782 F.2d 79, 82 (2d Cir. 1985); *Riesselman*, *supra* note 23, 708 F. Supp. 2d at 806.
26. *See Amadasu v. Ngati*, No. 05-CV-2585 (RRM)(LB), 2012 U.S. Dist. LEXIS 129283, at *11 (E.D.N.Y. Sept. 9, 2012).
27. *Id.* at *13.
28. *United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992) [hereinafter *George*]; *Weber v. Aiken-Partain*, No. 8:11-cv-02423-GRA, 2012 U.S. Dist. LEXIS 18755, at *12 (D. S.C. Feb. 15, 2012); *see also Home Health*, *supra* note 22, 1997 U.S. App. LEXIS 23547, at *36-37 ("[T]the district court must consider all arguments presented on an issue—including those not presented to the magistrate judge—so long as the objecting party has properly established its right to *de novo* district court review.").
29. *See Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988) ("[A]n unsuccessful party is not entitled as of right to *de novo* review by the judge of an argument never seasonably raised before the magistrate."); *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (same); *Cupit v. Whitley*, 28 F.3d 532, 53 n.5 (5th Cir. 1994) (holding that a party waived a legal argument by failing to raise it before the magistrate judge); *Ridenour v. Boehringer Ingelheim Pharm., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) ("The district court properly refused to consider Ridenour's argument…because this argument was not presented first to the magistrate judge."); *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 1000 (8th Cir. 2004) ("[A] claimant must present all his claims squarely to the magistrate judge…to preserve them for review."); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.").
30. *See United States v. Franklin*, 694 F.3d 1, 6 (11th Cir. 2012) ("A district court does not abuse its discretion by accepting an argument not raised before the magistrate judge."); *Williams v. McNeil*, 557 F.3d

1287, 1291 (11th Cir. 2009) ("The district court has broad discretion in reviewing a magistrate judge's report and recommendation, and, therefore, the district court did not abuse its discretion in declining to consider Williams's timeliness argument that was not presented to the magistrate judge."); *Stephens v. Tolbert*, 471 F.3d 1173, 1176-77 (11th Cir. 2006) (finding that the district court did not abuse its discretion by considering an argument that was not presented to the magistrate judge; whether a district court must consider an argument that is not presented to the magistrate judge is an issue to "be resolved another day in the event that a district court declines to consider a new argument").

31. 141 Fed. Appx. 539, 540 (9th Cir. 2005).

32. 863 F.2d 633 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc).

33. *Greenhow*, 863 F.2d at 635.

34. 29 F.3d 630 (9th Cir 1994), *reported at* No. 93-35326, 1994 U.S. App. LEXIS 17772, at *4 (9th Cir. July 18, 1994) (citing *Greenhow*, 863 F.2d at 638).

35. 207 F.3d 557, 562 n.2 (9th Cir. 2000) (citations omitted).

36. 158 F.3d 449, 455 (9th Cir. 1998) (citations omitted) (quoting *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1980)).

37. *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998).

38. 200 F.3d 895, 902 n.1 (6th Cir. 2000) (emphasis added).

39. *Id.*

40. 386 Fed. Appx. 535, 544 n.2 (6th Cir. 2010) (citing *Murr*, 200 F.3d at 902 n.1).

41. *Glidden Co.*, 386 Fed. Appx. at 544.

42. *Id.* at 544 (quoting *United States v. Markwood*, 48 F.3d 969, 974 (6th Cir. 1995)).

43. *See, e.g.*, *Amadasu*, 2012 U.S. Dist. LEXIS 129283, at *13-20 (E.D.N.Y.) (Mauskopf, J.); *Machicote*, 2011 U.S. Dist. LEXIS 95351, at *17-20 (S.D.N.Y.) (Batts, J.); *Wells Fargo Bank, N.A. v. Sinnott*, No. 5:07-CV-169, 2010 U.S. Dist. LEXIS 4476, at *3-6 (D. Vt. Jan. 19, 2010) (Reis, J.).

44. *See, e.g.*, *Martinez*, 2011 U.S. Dist. LEXIS 127293, at *5 (S.D.N.Y.) (Seibel, J.) (declining to entertain new argument on appeal "both because new arguments raised for the first time in objections and not presented to the Magistrate Judge cannot be considered and because his arguments…[we]re essentially conclusory"); *Shonowsky v. City of Norwich*, No. 3:10-cv-745, 2011 U.S. Dist. LEXIS 103969, at *2-3 (N.D.N.Y. Sept. 14, 2011) (McAvoy, J.) ("[A] party may not advance new theories that were not presented to the magistrate judge in an attempt to obtain the second bite at the apple."); *Fisher v. O'Brien*, No. 09-CV-42 (CBA)(LB), 2010 U.S. Dist. LEXIS 31047, at *3 (E.D.N.Y. Mar. 30, 2010) (Amon, J.) ("Defendants may not now raise new arguments that the magistrate judge did not have an opportunity to consider when drafting her R&R."); *Gonzalez v. Garvin*, No. 99 Civ. 11062 (SAS), 2002 U.S. Dist. LEXIS 7069, at *4-5 (S.D.N.Y. Apr. 19, 2002) (Scheindlin, J.) ("Petitioner's second objection must also be dismissed because it offers a new legal argument that was not presented in his original petition, nor in the accompanying Memorandum of Law."); *Grant v. Shalala*, No. 93-CV-0124E(F), 1995 U.S. Dist. LEXIS 6871, at *4-5 (W.D.N.Y. May 15, 1995) (Elfvin, J.) ("Despite being inclined to reject the plaintiff's Objections solely on its merits, this Court must also reject it because its substance was never presented to Judge Foschio."); *see also Pierce v. Mance*, No. 08 Civ. 4736 (LTS)(KNF), 2009 U.S. Dist. LEXIS 52664, at *2 (S.D.N.Y. June 22, 2009) (Supplemental Report & Recommendation of Fox, M.J.) ("Rule 72(b) does not provide that new claims may be raised in objections to a report and recommendation."); *Abu-Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906 (PKL), 1994 U.S. Dist. LEXIS 11470, at *10 n.2 (S.D.N.Y. Aug. 17, 1994) (Leisure, J.) (holding that arguments not raised before the magistrate judge and not submitted as objections but as new arguments are untimely).

45. *See, e.g.*, *Cobaugh v. Kaplan*, No. 9:12-CV-1798 (GTS / ATB), 2013 U.S. Dist. LEXIS 175519, at *3 (N.D.N.Y. Dec. 11, 2013) (Suddaby, J.) ("[A] district court will *ordinarily* refuse to consider argument that could have been, but was not, presented to the magistrate judge in the first instance." (emphasis added)); *Schwartzbaum v. Emigrant Mtge. Co.*, No. 09 Civ. 3848 (SCR), 2010 U.S. Dist. LEXIS 60201, at *3-4 (S.D.N.Y. June 16, 2010) (Robinson, J.) ("[D]istrict courts *generally* should not entertain new grounds for relief or additional legal arguments not presented to the magistrate." (emphasis added) (internal quotation marks omitted)); *Green v. City of New York*, No. 05-CV-429 (SLT) (ETB), 2010 U.S. Dist. LEXIS 2946, at *12 (E.D.N.Y. Jan. 7, 2010) (Townes, J.) ("[N]ew claims…presented in the form of, or along with, objections…*should* be dismissed." (emphasis added) (internal quotation marks omitted)); *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) (Holwell, J.) ("[A] district court *generally* should not entertain new grounds for relief or additional legal arguments not presented to the magistrate." (emphasis added)).

46. *See id.*

47. *See id.*

48. *See* Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976).

49. *See* H.R. Rep. No. 94-1609 (1976); *see also United States v. Raddatz*, 447 U.S. 667, 674-75 (1980) [hereinafter *Raddatz*]:

> The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination.
>
> ***
>
> The House Judiciary Committee added to the Senate's bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party.

50. H.R. Rep. No. 94-1609, at 3 (emphasis added).

51. *Id.*

52. *Raddatz*, *supra* note 49, 447 U.S. at 675 (quoting H.R. Rep. No. 94-1609, at 3).

53. H.R. Rep. No. 94-1609, at 3 (citing *Campbell*, 501 F.2d 196 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974)).

54. H.R. Rep. No. 94-1609, at 3 (quoting *Campbell*, 501 F.2d at 206-07).

55. *Raddatz*, *supra* note 49, 447 U.S. at 674.

56. *Id.* (quoting S. Rep. No. 94-625, at 10).

57. *Raddatz*, *supra* note 49, 447 U.S. at 675 (quoting H.R. Rep. No. 94-1609, at 3).

58. Fed. R. Civ. P. 72(b) Advisory Committee Notes (1983); *see also Raddatz*, *supra* note 49, 447 U.S. at 693.

59. *George*, *supra* note 28, 971 F.2d at 1117-18.

60. *Id.* at 1117 (quoting 28 U.S.C. § 636(b)(1) (emphasis added)).

61. *George*, *supra* note 28, 971 F.2d at 1118 (emphasis added) (citing *Raddatz*, *supra* note 49, 447 U.S. at 683 (district court's "delegation" of a matter to a magistrate judge "does not violate Art. III so long as the ultimate decision is made by the district court")); *cf. United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) ("*De novo* review of a magistrate's report is both statutorily and constitutionally required."); *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir. 1981) ("The authority to grant or deny a motion to suppress must be retained by a judge appointed pursuant to Article III of the Constitution.").

62. *See Borden*, 836 F.2d at 6; *Grant*, 1995 U.S. Dist. LEXIS 6871, at *6:

> Were this Court to consider the plaintiff's Objections, the Magistrates Act would essentially be circumvented. Such circumvention would allow every party to simply decline to present his or her case before a Magistrate Judge, await the result of that adjudication and, thereaf-

ter and only if necessary, expend the resources needed to file objections in the District Court.

63. *See Paterson-Leitch Co., Inc.*, 840 F.2d at 991.

64. *Abu-Nassar*, 1994 U.S. Dist. LEXIS 11470, at *10 n.2; *see also Paterson-Leitch Co., Inc.*, 840 F.2d at 991.

65. 679 F.3d at 1067.

66. *Id.* (citations omitted) (internal quotation marks omitted); *see also Grant*, 1995 U.S. Dist. LEXIS 6871, at *6.

67. *Borden*, 836 F.2d at 6.

68. *Id.* (citations omitted) (internal quotation marks omitted).

69. *Paterson-Leitch Co., Inc.*, 840 F.2d at 991 (citations omitted) (quoting *Chamblee v. Schweiker*, 518 F. Supp. 519, 520 (N.D. Ga. 1981); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980)); *accord Grant*, 1995 U.S. Dist. LEXIS 6871, at *5-6 (quoting *Borden*, 836 F.2d at 6 (citations omitted) (internal quotation marks omitted)):

> The purpose of the Federal Magistrate's [sic] Act is to relieve courts of unnecessary work. It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, not only their best shot but all of their shots.

See also H.R. REP. NO. 90-1629, at 14 (1968) (the purpose of enacting the Federal Magistrates Act in 1968 was to help relieve the burdens on district judges).

70. *Paterson Leitch Co., Inc.*, 840 F.2d at 990-91.

71. *Green*, 2010 U.S. Dist. LEXIS 2946, at *12 (internal quotation marks omitted); *Gonzalez*, 2002 U.S. Dist. LEXIS 7069, at *5 (internal quotation marks omitted).

72. 471 F.3d at 1176.

73. *Id.*

74. *Id.* at 1176-77.

75. 557 F.3d at 1291.

76. *Id.* (quoting *Raddatz*, *supra* note 49, 447 U.S. at 675, 676, 681-82 (quoting S. REP. NO. 94-625, at 10); *Thomas*, 474 U.S. at 153).

77. *Williams*, 557 F.3d at 1291-92.

78. *See id.* at 1292.

79. *See* 2010 U.S. Dist. Lexis 4476, at *4-5.

80. *Id.* at *5-6 (citations omitted) (quoting *Raddatz*, *supra* note 49, 447 U.S. at 675 (quoting S. REP. NO. 94-625, at 10); 28 U.S.C. § 636(b)(1)(C)).

81. 2010 U.S. Dist. LEXIS 4476, at *9-10.

82. *See* 2012 U.S. Dist. LEXIS 129283, at *15-16.

83. *See* 2011 U.S. Dist. LEXIS 95351, at *17-19.

84. *See Amadasu*, 2012 U.S. Dist. LEXIS 129283, at *17-20; *Machicote*, 2011 U.S. Dist. LEXIS 95351, at *18-20; *Wells Fargo Bank, N.A.*, 2010 U.S. Dist. Lexis 4476, at *10-14.

85. 2010 U.S. Dist. LEXIS 4476, at *7 (citations omitted) (internal quotation marks omitted) (quoting *Pichardo v. Ashcroft*, 374 F.3d 46, 54 (2d Cir. 2004)); *see also Amadasu*, 2012 U.S. Dist. LEXIS 129283, at *16 ("In deciding whether to consider an argument raised for the first time [below] on a motion for reconsideration, the Second Circuit looks to whether the argument is a purely legal question for which there is no need for additional factfinding[,]" and generally confines consideration of a new argument to a legal issue whose "proper resolution is beyond any doubt" (internal quotation marks omitted)); *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003) (citations omitted) (quoting *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000)):

> Generally, we will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration…. We retain "broad discretion" to consider issues not timely raised below. In determining whether to consider such issues, we are more likely to exercise our discretion when either (1) "consideration of the issue is necessary to avoid manifest injustice" or (2) "the issue is purely legal and there is no need for additional factfinding."

86. *Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 4476, at *8-9 (quoting *Hynes v. Squillace*, 143 F.3d 653, 656 (2d Cir. 1998)). *See, e.g.*, *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137-38 (2d Cir. 1994) (no abuse of discretion in district court's refusal to consider new evidence); *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters*, 894 F.2d 36, 40 n.3 (2d Cir. 1990) (no abuse of discretion in denying plaintiff's request to present additional testimony where Pan Am "offered no justification for not offering the testimony at the hearing before the magistrate"); *Wallace v. Tilley*, 41 F.3d 296, 302 (7th Cir. 1994):

> It is not in the interests of justice to allow a party to wait until the Report and Recommendation or Order has been issued and then submit evidence that the party had in its possession but chose not to submit. Doing so would allow parties to undertake trial runs of their motion, adding to the record in bits and pieces depending upon the rulings or recommendation they received.

87. *See Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 4476.

88. 428 U.S. 106, 121 (1976) (citations omitted) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

89. *Singleton*, 428 U.S. at 121 n.8.

90. *See Magi XXI, Inc. v. Stato della Cittá del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013); *Bogle-Assegai v. Conn.*, 470 F.3d 498, 504 (2d Cir. 2006).

91. *Magi XXI, Inc.*, 714 F.3d at 724 (citations omitted) (internal quotation marks omitted); *see also Bogle-Assegai*, 470 F.3d at 504 ("Nonetheless, the circumstances normally 'do not militate in favor of an exercise of discretion to address…new arguments on appeal' where those arguments were 'available to the [parties] below' and they 'proffer no reason for their failure to raise the arguments below.'" (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005))).

92. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (quoting *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992)).

93. 558 F.3d at 114 n.5.

94. *Id.* (quoting *Rocafort v. IBM Corp.*, 334 F.3d 115, 122 (1st Cir. 2003)); *cf. Curet-Velazquez v. ACEMLA De P.R., Inc.*, 656 F.3d 47, 53 (1st Cir. 2011) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal. There is nothing sufficiently compelling about this case to warrant relaxation of such a fundamental rule." (citations omitted) (internal quotation marks omitted)).

95. *Long v. McCotter*, 792 F.2d 1338, 1345 (5th Cir. 1986); *see also Vardas v. Estelle*, 715 F.2d 206, 208 (5th Cir. 1983) (since appellant did not present a legal argument to the district court, "it is not properly before us on appeal").

96. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006); *see also Glidden Co.*, 386 Fed. App'x. at 544 ("This Court's review is limited to issues presented to and considered by the district court, unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or to correct clear errors or omissions." (internal quotation marks omitted)).

97. *Thompson v. Runnels*, 705 F.3d 1089, 1099 (9th Cir. 2013); *accord AlohaCare v. Hawaii*, 572 F.3d 740, 744-45 (9th Cir. 2009) (citations omitted) (internal quotation marks omitted):

> Absent exceptional circumstances we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so. We may exercise this discretion (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.

98. *Tele-Commc'ns, Inc. v. Comm'r of Internal Revenue*, 104 F.3d 1229, 1232 (10th Cir. 1997).

99. *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011); *see also Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) ("We recognize that a circuit court's power to entertain an argument raised for the first time on appeal is not a jurisdictional one; thus we *may* choose to hear the argument under special circumstances[,]" identifying five such circumstances.).

100. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, 440-42 (3d ed. 2008) (internal quotation marks omitted); *see, e.g., Pickup v. Brown*, Nos. 12-17681, 13-15023, 2014 U.S. Dist. Lexis 1878, at *39 n.10 (9th Cir. Jan. 29, 2014).

101. *See supra* Point VIII.

102. *See Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 4476, at *9-10. The six-part test set forth in *Wells Fargo Bank, N.A.* has already been adopted by courts in the Eastern and Southern Districts of New York. *See Amadasu*, 2012 U.S. Dist. LEXIS 129283, at *15-16; *Machicote*, 2011 U.S. Dist. LEXIS 95351, at *17-19.

103. *See Williams*, 557 F.3d at 1291-92; *Paterson-Leitch Co., Inc.*, 840 F.2d at 990-91; *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000).

104. *See supra* note 23; *but see Thomas*, 474 U.S. at 149 (indicating in dictum that no district court review is required in the absence of an objection).

105. *George*, *supra* note 28, 971 F.2d at 1117-18.

106. *Id.* at 1118.

107. *See Raddatz*, *supra* note 49, 447 U.S. at 675 (holding that *de novo* review of a magistrate judge's Report & Recommendation means that a district court must "'give fresh consideration to those issues to which specific objection has been made by a party'") (quoting H.R. REP. NO. 94-1609, at 3)); *accord Riesselman*, *supra* note 23, 708 F. Supp. 2d at 806-07; *see also Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006) (holding that *de novo* review requires the court to "review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered"); *Solis v. Laborer's Int'l Union of N. Am., Local 368*, 775 F. Supp. 2d 1191, 1202 (D. Haw. 2010) (under *de novo* review, "[t]he district court must arrive at its own independent conclusions about those portions of the magistrate judge's report to which objections are made, but a de novo hearing is not required").

108. *See Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable."); *Raddatz*, *supra* note 49, 447 U.S. at 676 (the phrase "*de novo* determination" in Section 636(b)(1) was selected by Congress "to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations"); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007) (under *de novo* review, no deference is given to the district judge's determination); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) ("*De novo* review is review without deference."), *rev'd on other grounds*, 277 F.3d 635 (2002); BLACK'S LAW DICTIONARY 94 (7th ed. 1999) (*de novo* review is "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings"); *see also United States v. Zuckerman*, 88 F. Supp. 2d 9, 11-12 (E.D.N.Y. 2000) ("[T]he District Judge may also, in his sound discretion, afford a degree of deference to the Magistrate Judge's Report and Recommendations.").

109. *See supra* Point X.

110. *See George*, *supra* note 28, 971 F.2d at 1118.

111. *See Raddatz*, *supra* note 49, 447 U.S. at 681-82.

112. *Delgado*, 782 F.2d at 82.

113. H.R. REP. NO. 94-1609, at 11 (quoting FED. R. CIV. P. 72(b)(3)).

114. *Thomas*, 474 U.S. at 142.

115. *See id.* at 153-54.

116. *Id.* at 153 (emphasis added).

117. *Id.* (emphasis added).

118. *Id.* (quoting *Raddatz*, *supra* note 49, 447 U.S. at 681, 682).

119. *Thomas*, 474 U.S. at 153-54 (emphasis added) (quoting *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982)).

120. *Thomas*, 474 U.S. at 154.

121. *See supra* note 23.

122. *Home Health*, *supra* note 22, 1997 U.S. App. LEXIS 23547, at *33-36.

123. *Id.* at *36-37.

124. *See Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 4476, at *5 (quoting *Raddatz*, *supra* note 49, 447 U.S. at 675); *see also Thomas*, 474 U.S. at 153.

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Privilege Logs for the New Millennium[1]

By Melissa A. Crane and Robert L. Becker

Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive[2] case, especially one with many e-mails and e-mail strings. Federal Rule of Civil Procedure 26(b)(5)(A) provides guidance for preparation of privilege logs:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

The Supreme Court added Rule 26(b)(5) in two stages. What is now Rule 26(b)(5)(A) was added in 1993. Initially, the Rule required that, if a party withheld materials otherwise discoverable because of a privilege or work product claim, it had to notify the other party. [3] The withholding party also had to provide sufficient information to permit the other party to evaluate whether the claimed privilege or protection was applicable.[4] Although the Rule required a description of the nature of the withheld document, it did not define what information the party asserting the claim of privilege or work-product protection must provide.[5] The Advisory Committee Notes suggested that details such as time, persons, and general subject matter, might be appropriate to disclose if only a few items were withheld, but that these details might be unduly burdensome to disclose if the withheld documents were voluminous.[6] In the latter situation, using categories to describe the documents might be sufficient.[7]

The Rule was amended in 2006 to add what is currently Rule 26(b)(5)(B).[8] This Rule provides a procedure for handling inadvertently produced documents that may be subject to a privilege or protection claim.[9] The Advisory Committee Notes acknowledge that, where potential privilege or protection involves ESI, the risk of waiver, and the time and effort necessary to avoid it, may increase substantially.[10]

Accordingly, Rule 26(b)(5)(B) provides a procedure for a party to assert a claim of privilege or protection after production. In the event of inadvertent production, the party asserting privilege or protection gives notice to the receiving party of the claim and the basis for it.[11] The notice must be sufficiently specific to permit the receiving party to evaluate the claim of privilege or protection.[12] The receiving party, after notice, "must promptly return, sequester, or destroy the specified information and any copies it has[.]"[13]

If there is a dispute over the assertion of privilege or protection, the receiving party should not use or disclose the information until resolution of the claim of privilege or protection.[14] The receiving party may present the issue of whether the information is privileged or otherwise protected to the court.[15] If a party receives notice of privilege or protection after receiving the information itself, the receiving party must take reasonable steps to retrieve the information and preserve it until the claim is resolved.[16]

Compliance with Rule 26(b)(5)(A) traditionally required, at the very least, a document-by-document list containing the following information:

(i) the type of document, *e.g.*, letter[, e-mail] or memorandum;

(ii) the general subject matter of the document;

(iii) the date of the document; and

(iv) the author of the document, the addressees of the document, and any other recipients [of the document], and, where not apparent, the relationship of the author, addressees and recipients to each other[.][17]

Courts have usually required a detailed, document-by-document privilege log. [18] This approach involves a labor-intensive manual review of each document and then a highly specific description of the contents in the log.[19]

Creating a document-by-document privilege log is often extremely burdensome and difficult to implement considering the volume of documents ESI generates. A "16 gb flash drive can be found for less than $20 and can hold a half-million pages of Microsoft Word documents[,]" yet "creating privilege logs typically remains a manual, document-by-document endeavor."[20] Moreover, a "traditional" privilege log is often useless to the court and the non-generating party. Efforts to streamline the privilege log can result in a log with inadequate information, thereby risking a waiver of the privilege.[21]

Courts may allow logging by category over a document-by-document listing, especially in complex cases where there is voluminous ESI. Magistrate Judge James C. Francis IV recently noted in *Assured Guaranty Municipal Corporation v. UBS Real Estate Security, Inc.* the "enormous burden and expense" document-by-document logging places on counsel, and that "courts in [the Southern District of New York] have endorsed a categorical approach… to reduce such burden."[22]

This article presents a set of guidelines designed to alleviate the burden of preparing privilege logs without sacrificing the protections that the attorney-client privilege or work-product doctrine affords. These guidelines provide some direction about ways to shorten the process of segregating privileged or protected material and creating the privilege log. Counsel should use these guidelines in conjunction with their overall discovery plan. Please note, these guidelines are merely suggestive and do not purport to encompass all the strategies counsel may employ to deal with privileged or protected material in a more cost-effective manner.

The parties must cooperate for these guidelines to work. Legal gamesmanship and litigation by attrition must be paradigms of the past. Parties, courts, and the public at-large simply cannot afford it. Although the parties should drive the discovery process, active judicial case management should make clear that cooperation is expected so that the entire discovery plan, including privilege-related issues, proceeds in a speedy and efficient manner.

I. Guideline 1

> Parties should meet and confer early in the case, as part of their initial discussion about document production, before or at the Rule 26(f) conference, to discuss: (1) the volume of claims of privilege or protection the parties anticipate encountering, (2) how to segregate and exclude presumptively privileged or protected documents from production, and (3) how to handle the inadvertent production of privileged or protected material.[23]

Cooperation is critical to ensure effective and cost-efficient discovery. To that end, counsel should meet and confer early in the case. Rule 26(f) requires counsel to confer "as soon as practicable[.]"[24]

Prior to the Rule 26(f) conference or other initial conference with the court, counsel should ascertain the manner in which their client maintains information, the volume of information potentially discoverable, and the nature and scope of potentially privileged or protected information. In addition, "parties should address the particular fields or categories of information their respective privilege logs will contain *before the parties' privilege logs are produced for the first time*."[25]

At the conference, counsel should be in a position to discuss the extent and nature of the privilege or protection claims they will assert, the volume of documents or information these claims cover, the identity of relevant custodians, and what categories of documents to exclude as presumptively privileged or protected. Counsel should also discuss how to treat the inadvertent disclosure of privileged material utilizing the procedures available under Rule 26(b)(5)(B) and Federal Rule of Evidence 502.[26]

If the parties are in a position to discuss the search process or protocol, they should also discuss how to ensure that the designation of documents or information as privileged or protected is accurate, effective and complete. Parties should agree ahead of time that the sharing of this information is confidential and not a waiver of privilege.

"Prior to the Rule 26(f) conference or other initial conference with the court, counsel should ascertain the manner in which their client maintains information, the volume of information potentially discoverable, and the nature and scope of potentially privileged or protected information."

II. Guideline 2

> Counsel should take advantage of Federal Rule of Evidence 502 by agreeing early in the case that the production of privileged or protected documents will not result in any waivers. The parties should ensure that this agreement becomes incorporated in a court order.[27]

Because of the proliferation of ESI and the impracticality, in many instances, of a page-by-page review of all documents to identify those that are privileged or protected, the parties must agree on how to handle the disclosure of privileged or protected documents. Federal Rule of Evidence 502 "creates a new framework for managing disclosure issues in a cost effective manner in the age of large electronic document productions."[28] Federal Rule of Evidence 502(b) provides that disclosure of privileged or protected information will not operate as a waiver if: (a) the disclosure was inadvertent; (b) the party asserting the privilege or protection took reasonable steps to prevent the disclosure; and (c) reasonable steps were taken to rectify the error.[29]

"Reasonable steps" to prevent disclosure include some method of verifying the accuracy, effectiveness, and completeness of the searches for privileged or protected information. This involves, at the very least, searching for known privileged or protected communications among the documents to be produced prior to their production.[30] Where a third-party vendor searches for privileged or protected documents, the party using the vendor must check to ensure that the production database the vendor prepares does not contain privileged or protected documents.[31] Depending on the case, it may also be a "reasonable step" to take samples of documents, so long as there is variety in the sample and the sample is large enough to constitute a sufficient check.[32]

Federal Rule of Evidence 502(b) covers only inadvertent disclosures in a pending federal action. To protect against the disclosure of privileged or protected information in other federal actions or state proceedings, and in situations such as "quick peeks" and "clawbacks," look to Federal Rule of Evidence 502(d). Under Rule 502(d), a court order can provide that intentional disclosure of privileged information does not waive the privilege or protection in connection with litigation pending before the court, and in any other federal or state proceeding.[33] Such an order should provide for a procedure consistent with Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502(b).[34]

"It was the intention that Federal Rule of Evidence 502 would reduce the costs of privilege review, especially in cases involving ESI, by allowing litigating parties to determine the consequences of a disclosure of privileged or protected information."

Federal Rule of Evidence 502(d), together with Federal Rule of Evidence 502(e), also allows for the entry of a court order providing that disclosure of privileged material does not result in waiver in other federal or state proceedings, and applies to non-parties as well. It was the intention that Federal Rule of Evidence 502 would reduce the costs of privilege review, especially in cases involving ESI, by allowing litigating parties to determine the consequences of a disclosure of privileged or protected information.[35]

The language from Rule 502(d) that "disclosure is also not a waiver in any other federal or state proceeding[,]" is essential to limiting the cost of privilege review. This is because parties are unlikely to risk disclosure, if non-parties to the litigation are able to use the communications or information in another proceeding. Rule 502(e) makes clear that, if parties want to avoid waiver vis-a-vis non-parties, the 502(d) party agreement must incorporate those non-parties in a court order.[36]

Federal Rules of Evidence 502(d) and (e) allow parties to enter into "quick peek" agreements,[37] whereby parties can produce all their documents without first reviewing them for privilege and protection, and then pull back those that are privileged or protected as a review proceeds.[38] While certainly easier, as a practical matter, it is a risky proposition. Even with claw back, the receiving side is not going to forget what it saw.[39]

There appears to be tension between sections (b) and (d) of Federal Rule of Evidence 502. Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502(b) apply in the event of inadvertent production, and require the disclosing party to take reasonable steps to prevent the disclosure and rectify the error. In contrast, Federal Rule of Evidence 502(d) and (e) accommodate both inadvertent and intentional disclosure of privileged material, and the producing party need not establish, as a precondition to maintaining the privilege, that it took reasonable steps to prevent disclosure.

Finally, the court order entered pursuant to Federal Rule of Evidence 502(d) should be distinct from any "so-ordered" confidentiality agreement. This avoids the confusion that could ensue if the Rule 502(d) portion becomes buried in the typically lengthy confidentiality agreement.

III. Guideline 3

> Parties must agree on the form of the privilege log and the level of detail contained in the log. Where possible, counsel should agree to reject a document-by-document privilege log and instead adopt alternative approaches to shorten the process. These alternatives include, but are not limited to: (1) categories of exclusion, (2) logging by category, and (3) special treatment for e-mail chains. Counsel should also be aware of technological tools available to shorten the process of segregating privileged or protected documents and creating the privilege log.[40]

There are ways to reduce the burden and expense relating to the creation of a privilege log. Counsel faced with the task of creating a privilege log would do well to consult Honorable John M. Facciola and Jonathan M. Redgrave's article, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*.[41] That article provides a framework for privilege review that relies on grouping documents that are likely privileged or protected into categories on a rolling basis.[42] Ultimately, the parties "create a set of natural differentiations among documents so the parties can say, once again with confidence, what is true of items within the category is true of the whole."[43] *The Facciola-Redgrave Framework* suggests several methods to alleviate the burden of the privilege review process. These methods and others are discussed below.

1. Categories of Exclusion

Certain types of documents are so obviously privileged or protected that it may serve no purpose to log them at all. A good example is communications exclusively between a party and its trial counsel.[44] Another example is work product, such as legal memoranda, that an attorney prepares after the filing of the complaint.[45] Further, the Southern District of New York Judicial Improvements Committee pilot project ("Judicial Improvements Committee")[46] identifies as obviously privileged

internal communications within a law firm, an in-house legal department or a government law office, and "documents authored by trial counsel for an alleged infringer" in a patent infringement action "even if the infringer is relying on the opinion of other counsel to defend a claim of willful infringement."[47] Counsel should also agree not to log exact duplicates, a problem that e-mail chains can create. Of course, parties can agree to exclude other, more specific categories. For instance, parties might agree to exclude communications between certain custodians, depending on the individual needs of the case.

Bottom line, whether a categorical approach will work depends on the facts and circumstances of a particular case.[48]

The *Facciola-Redgrave Framework* also suggests that, upon request, parties supply evidentiary support for categories.[49] This could take the form of "an affidavit attesting to the facts that support the privileged or protected status of documents and ESI within that category."[50]

2. Logging by Category

Where it is not feasible to exclude a category altogether, parties can opt for a log that lists groups of documents rather than each document separately. Here, documents are logged under a "category" noting the range of control numbers, the beginning date of the earliest document, and the ending date on the latest document with a description. For example, if a litigation concerns a purchase price adjustment, it is sufficient to describe draft contracts, to the extent privileged or protected, as "draft contracts created by counsel that includes legal advice regarding X's rights with respect to the purchase price adjustment clause." Or, it may be appropriate to log e-mails between specific persons, such as the CFO and in-house counsel, as a group. A "players list" can add meaning to a category-by-category log. This is a list identifying all persons whose names appear on the documents and the roles that they play. Counsel should provide information about these individuals and specify if they are attorneys, their titles, and their affiliations with the client. A players list is particularly helpful in situations where lawyers have mixed roles, for example, where someone acts both as a business person and a lawyer.

The challenging part of this endeavor is to describe the category in a way that imparts sufficient information for the other side to assess the privilege or protection. Attorneys often fail in this endeavor.[51] The Southern District of New York endorses logging by category.[52] S.D.N.Y. Local Rule 26.2 expressly provides that when a party is "asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category."[53]

On the negative side, when disputes arise involving logging by category, often courts must conduct *in camera* reviews, depleting court resources and time. Not all courts accept this approach.[54] Further, there are risks that parties will incorrectly identify information or place documents in inappropriate categories.

3. E-mail Chains

An e-mail chain or string is two or more e-mails that effectively constitute a conversation among the persons involved in the chain. Both the *Facciola-Redgrave Framework* and the Judicial Improvements Committee endorse truncated privilege logs for e-mail strings.[55] Both the Framework and the Committee's strategies are useful.

As a starting point, the *Facciola-Redgrave Framework* requires only one entry in the privilege log to identify an e-mail chain.[56] This is a sound and time-saving approach. The *Facciola-Redgrave Framework* calls for the "last-in-time" e-mail in the string to be identified, provided that each e-mail in the string was, at one point in time, the "last-in-time."[57] The authors also recommend that, "[i]f an embedded e-mail communication is not otherwise available, then it must separately be identified…."[58]

Because an e-mail chain often involves a conversation among two or more persons that formerly would have occurred on the telephone or at a meeting, parties may want to truncate the information about the e-mail chain even further, providing only: (1) the first-in-time e-mail, (2) the last-in-time e-mail, (3) a list of all persons involved in the chain, and (4) the reason for asserting the privilege. The Judicial Improvements Committee embraces this approach.[59] The Judicial Improvements Committee requires that the party disclose that the "e-mails are part of an uninterrupted dialogue[,]" but does not define what an "uninterrupted dialogue" means.[60] The Judicial Improvements Committee also mandates disclosure of the number of e-mails within the dialogue, the beginning and ending dates and times, and the names of all recipients of the communications, as well as other requisite privilege log disclosures, such as the reason for asserting the privilege.[61]

Courts are split about whether it is appropriate to log e-mail strings as one entry or each e-mail separately.[62] Case law is still emerging.

Courts are also split as to whether forwarding a non-privileged e-mail for the purpose of seeking or communicating legal advice extends the privilege to that non-privileged e-mail to the extent it was forwarded.[63] The better approach is to disclose any e-mails in the string that are clearly not privileged.

Although one might assume that the initial e-mail, being unprivileged, would wind up as part of the general document production, particularly with the use of deduping software,[64] there is a danger that the non-privileged e-mail in its original form will be deleted.

4. Use of Software

Technology can be a useful tool to make the identification of privileged or protected documents more efficient. Indeed, the Advisory Committee Notes to Federal Rule of Evidence 502(b) contemplate the use of screening software.[65] Thus, counsel should be knowledgeable about computer applications and programs that can be used to review ESI for privileged or protected material.[66]

Alternatively, parties may want to use search terms with existing software to isolate privileged or protected documents. For example, parties can search and segregate those items where one or more names of a party's in-house counsel appears anywhere in the document, including associated metadata along with search terms.

In addition, depending on the software, parties may be able to utilize metadata fields to generate a report and then turn that report into a type of index or log. A simple log can, in many cases, evolve from the "to," "from," and subject line fields.[67] If the subject line reveals privileged or protected information, the parties can always substitute a different description of the item, but should identify the entries they modified.

Courts are starting to accept the use of "computer assisted review" to search ESI for general discovery purposes.[68] "Computer assisted-review"—also referred to as "technology-assisted review," "predictive coding," and "content-based advanced analytics"—is an important development in ESI production. Predictive coding uses complex algorithms to mimic human document review. Parties who use predictive coding can cull out privileged documents from large databases with alacrity. Yet despite predictive coding's speed, it can have errors, much like human review. "Inadvertent production can occur and does occur whether the documents are searched and reviewed electronically or by human eyes."[69]

IV. Guideline 4

> Attachments to e-mails should be identified as attachments and logged separately from the e-mail containing the attachments.[70]

Although an e-mail may be privileged or protected, it does not necessarily follow that a document attached to that e-mail is also privileged or protected. Therefore, each attachment must be reviewed and logged separately from the accompanying e-mail. In *C.T. v. Liberal School District*, plaintiff listed a series of e-mails but did not separately list the attachments.[71] The district court held that "any claim of privilege plaintiff might [have] wish[ed] to raise as to those documents [was] waived."[72] The attached documents, to the extent responsive, had to be produced.[73]

V. Guideline 5

> Counsel should keep track, in written form, of the efforts he or she made to search for privileged or protected documents.[74]

Where the assertion of privilege or protection is challenged, counsel may have to demonstrate to the court that reasonable steps were taken to identify privileged or protected communications. In the event of a challenge to privilege or protection, The Sedona Conference® (Cooperation Proclamation) suggests that a court accept an affidavit or affidavits by the "designating" party to explain why a particular document or documents are privileged or protected."[75] This is a common-sense approach to resolving disputes. Accordingly, it is important that counsel keep track, in written form, of the efforts made to search for privileged or protected documents. At a minimum, counsel should be in a position to explain what automated tools and applications counsel used to search for, identify and withhold privileged or protected communications, and what methodologies counsel used to verify the effectiveness, completeness, and accuracy of the search techniques.

VI. Guideline 6

> Counsel should verify the accuracy and thoroughness of the searches by checking for privileged or protected documents at the beginning of the search process and again at the end of the search process. This verification can be by way of sampling, but the sample, whether random or systematic, should be of a sufficient size and variety so that the results can be considered valid.

Checking the documents for privilege or protection is important for two reasons. First, under Federal Rule of Evidence 502(b), if counsel discloses privileged or protected material by mistake, a court will not find a waiver if counsel has taken reasonable steps to protect the privileged or protected documents. Thus, it may become necessary for counsel to demonstrate that he or she took those reasonable steps. Checking to make sure that the search corralled the right documents is an integral part of these reasonable steps.[76] Checking one's work has the additional benefit of assuring that the privilege review is not over inclusive. This will serve to bolster credibility with the court.

In cases involving voluminous documents, it may be reasonable to check via sampling, rather than performing a more extensive document review (such as checking all documents by key custodians), so long as there is variety in the sample and the sample is large enough to be valid. A sufficient variety could involve, but is not limited to, different custodians, different parts of the company and

different computer systems, depending on how a client stores information, the size of the company, and the like.

VII. Guideline 7

> Treat redactions in the same manner as a document that is privileged or protected in its entirety.

Like documents that are privileged or protected in their entirety, documents containing redactions are amenable to logging by category. However, because only a portion of the document is privileged or protected, redacted documents are also more likely to cross the line into a non-privileged area, like business advice. Thus, logging redacted documents requires a more careful description than the truncated approach that logging by category entails. Parties should be careful not to redact a document to the point where it is indecipherable. This only wastes time and money, and could even reduce counsel's credibility with the court.

The Delaware Court of Chancery has recently updated its procedural rules to accommodate for voluminous ESI discovery and modernize the discovery process.[77] Effective January 1, 2013, these guidelines address privilege logs and the attorney's role with regard to the privilege log.[78] The guidelines address how to log documents containing redactions; "different cases may warrant different approaches to redactions."[79] For example, the parties may agree that each side can withhold the entire document if any part of that document is privileged (i.e., treat the document as entirely privileged).[80] Or, parties may agree to dispense with a log altogether if the non-redacted portion provides sufficient factual information for the non-producing party to assess privilege.[81]

VIII. Guideline 8

> Parties should agree that large-scale challenges to the assertion of privilege or protection should be resolved by the court conducting an *in camera* sampling, rather than a review of all contested documents. The sample, whether random or systematic, should be of a sufficient size and variety so that the results can be considered valid. Parties should then resolve disputes concerning remaining documents in accordance with the court's ruling.

In the event there is a challenge to an assertion of privilege or protection, the party asserting privilege or protection should submit an affidavit that identifies all persons named on a log and perhaps describes in greater detail why a particular document or documents are privileged or protected. If disagreement remains after this point, the parties should promptly bring the dispute to the attention of the court. An *in camera* inspection may become necessary for a subset of documents. Individual court practices and the circumstances of the case will determine whether and how that *in camera* inspection will proceed. For example, some courts may only require a short letter explaining the basis for the privilege or protection. Other courts may require an affidavit or formal motion. Nevertheless, in instances where a large volume of documents are in contention, the parties are encouraged to group the contested documents by category so a ruling on samples can apply to each category.[82]

This approach requires court involvement if it is going to be effective. However, it is far simpler for the court than the traditional approach when the court would entertain a motion and then try to assess each document. If limited judicial resources do not permit the *in camera* inspection to proceed fast enough for the needs of the case, the parties may want to consider proposing the use of a special master from the private sector and split the costs.[83]

IX. Guideline 9

> Senior lawyers should provide guidance on how to create meaningful privilege logs efficiently.

It is primarily junior lawyers who prepare privilege logs. The Delaware Guidelines emphasize that in order "[t]o prepare a privilege log with integrity requires the involvement of senior lawyers who know the applicable standards, understand the precise roles played by the client representatives, and have the relationship and stature with the client to discuss documents frankly and make principled assertions of privilege."[84] To effectuate the involvement of senior lawyers, the Delaware Guidelines suggest that senior lawyers provide specific guidance about: (1) the court standards for asserting privilege; (2) protocols for identifying those documents that warrant a closer review for privilege; (3) protocols to ensure court standards apply to privilege exemptions; and (4) requirements for providing sufficient information so the court and opposing party can fairly assess whether the assertion of privilege was proper.[85] According to the Delaware Guidelines, the court will expect senior lawyers to answer questions about the document collection and review process.[86] Finally, the Delaware Guidelines require senior lawyers to make final decisions on judgment calls concerning privilege.[87] For example, senior lawyers must be able to take the podium and explain the basis for the assertion of privilege and know about the privilege assertion process if there is a hearing.[88]

Endnotes

1. An earlier version of this article appeared as part of a report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, June 23, 2012, *available at* http://www.nysba.org/discoveryreport/ (last visited Feb. 25, 2014).
2. "Document" refers to information on paper and to Electronically Stored Information (ESI).
3. *See* FED. R. CIV. P. 26(b)(5) Advisory Committee Notes (1993).

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* FED. R. CIV. P. 26(b)(5) Advisory Committee Notes (2006).

9. *See id.*

10. *See id.* ("When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed."); *see also* Jeffrey Gross, Re-Thinking Privilege Logs in the Age of E-Discovery, N.Y. L.J., July 11, 2011 ("[T]he volume of ESI can lead to a staggering cost...[f]or example, when Verizon responded to a Department of Justice request several years ago, attorneys reviewed 2.4 million documents and the review to identify privileged documents cost $13.5 million, several million of which related to creating a log."); Bruce Kaliner & Erica Dominitz, Let's Talk: Cooperation With Opposing Counsel Can Contain Discovery Costs, N.Y. L.J., June 14, 2013 ("[I]t is not uncommon for parties to spend hundreds of hours preparing privilege logs.").

11. *See* FED. R. CIV. P. 26(b)(5)(B).

12. *See* FED. R. CIV. P. 26(b)(5) Advisory Committee Notes (2006).

13. FED. R. CIV. P. 26(b)(5)(B).

14. *See* Fed. R. Civ. P. 26(b)(5) Advisory Committee Notes (2006).

15. *See id.*

16. *See id.*

17. E.D.N.Y. R. 26.2(a)(2)(A); S.D.N.Y. R. 26.2(a)(2)(A).

18. *See, e.g., Graham v. Aspen Dental Mgmt., Inc.*, No. 3:09-cv-72-SEB-WGH, 2010 U.S. Dist. LEXIS 36092, at *5-6 (S.D. Ind. Apr. 12, 2010) (rejection of categorized privilege log); *SEC v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009) ("The burden is on the party asserting the privilege to demonstrate how each document satisfies all the elements of the privilege."); *Infinite Energy, Inc. v. Chang*, No. 1:07CV23-SPM / AK, 2008 U.S. Dist. LEXIS 88084, at *6-7 (N.D. Fla. Aug. 29, 2008); *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 244 F.R.D. 434, 438 (N.D. Ill. 2007):

> For each document, the log should identify: (1) the name and capacity of the author and all recipients of the document; (2) a description of the subject matter of the document in sufficient detail to determine if legal advice was sought or revealed, or if the document was made for the primary purpose of litigation; (3) the date of the document and any attachments; (4) the type of document; (5) the privilege asserted; and (6) the Bates number.

Allen v. Woodford, No. CV-F-05-1104 OWW LJO, 2007 U.S. Dist. LEXIS 11002, at *33-34 (E.D. Cal. Jan. 30, 2007) (privilege log must list specific documents), *reh'g denied*, No. 1:05-cv-1104 OWW NEW, 2007 U.S. Dist. LEXIS 24345 (E.D. Cal. Mar. 16, 2007); *Johnson v. Bryco Arms*, Nos. 03 CV 2582, 02 CV 3029, 2005 U.S. Dist. LEXIS 48587, at *8-10 (E.D.N.Y. Mar. 1, 2005) (the privilege log should identify each document).

19. *See id.*

20. Gross, *supra* note 10.

21. *See C.T. v. Liberal Sch. Dist.*, Nos. 06-2093-JWL, 06-2360-JWL, 06-2359-JWL, 2008 U.S. Dist. LEXIS 5863, at *28-29, 31-32 (D. Kan. Jan. 25, 2008); *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006).

22. Nos. 12 Civ. 1579 (HB) (JCF), 12 Civ. 7322 (HB) (JCF), 2013 U.S. Dist. LEXIS 41785, at *29 (S.D.N.Y. Mar. 25, 2013); *see also, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 34026, at *42 (D. Kan. Apr. 3, 2009) ("The court is sympathetic to defendants' argument that individually logging thousands of privileged attorney communications would be immensely burdensome and have little, if any, benefit to plaintiffs."); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (permitting party to submit a category by category log in order "[t]o lessen the burden posed by reviewing and recording a large quantity of protected communications"); *Sec. Exch. Comm'n v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 U.S. Dist. LEXIS 3327, at *2 (S.D.N.Y. Mar. 19, 1996) (category by category log allowed where "(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").

23. *See* FED. R. CIV. P. 26(b); *see also* FED. R. CIV. P. 26(f).

24. FED. R. CIV. P. 26(f)(1).

25. *See* Kaliner, *supra* note 10 (emphasis in original).

26. *See* FED. R. CIV. P. 26(b)(5)(B); *see also* FED. R. EVID. 502.

27. *See* FED. R. EVID. 502(d); FED. R. EVID. 502(e) ("An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.").

28. *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037 (N.D. Ill. 2009).

29. *See* FED. R. EVID. 502(b).

30. *But see* N.Y. RULES OF PROF'L CONDUCT R. 4.4(b) (placing the burden on a *receiving party* who "knows or reasonably should know" that a privileged or protected document was inadvertently sent to notify the producing party promptly).

31. *See Thorncreek Apartments III, LLC v. Vill. of Park Forest*, No. 08-C-1225, 2011 U.S. Dist. LEXIS 88281, at *25-26 (N.D. Ill. Aug. 9, 2011) (holding that the failure to check the database for privileged documents was "strong evidence of the inadequacy of [its] precautions").

32. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md. 2008) ("The only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive or under-inclusive.").

33. *See* FED. R. EVID. 502(d); *see, e.g., Brookfield Asset Mgt., Inc. v. AIG Fin. Prods. Corp.*, 09 CIV. 8285 (PGG) (FM), 2013 U.S Dist. LEXIS 29543, at *2-3 (S.D.N.Y. Jan. 7, 2013) (upholding right to "claw back" based upon court order, which stipulated that "production of any documents in this proceeding shall not, for the purposes of the proceeding or any other proceeding in any other court, constitute a waiver…of any privilege applicable to those documents").

34. See Edwin M. Buffmire, Enter the Order, Protect the Privilege: Considerations for Courts Entering Protective Orders Under Federal Rule of Evidence 502(d), 81 FORDHAM L. REV. 1621, 1635 (2013) ("[A] court should not bypass Rule 26(b)(5)(B) due to the presence of the 502(d) order and fail to analyze the burden and expense of producing information.").

35. *See* FED. R. EVID. 502 Advisory Committee Notes (2007):

> The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

36. *See* FED. R. EVID. 502 Advisory Committee Notes (2007) ("The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order."); *see, e.g.*, R. CT. FED. CL. APPX. FORM 14, *available at* http://www.uscfc.uscourts.gov/sites/default/files/court_info/20130813_rules/Form%2014.pdf (last visited Feb. 25, 2014):

> Pursuant to the agreement of the parties and the authority granted this court under Fed. R. Evid. 502(d), it is hereby ordered that a party's disclosure, in connection with this litigation, of any communication or information covered by the attorney-client privilege or entitled to work-product protection shall not constitute a waiver of such privilege or protection either in this litigation or in any other federal or state proceeding. IT IS SO ORDERED.

37. *See also* FED. R. CIV. P. 26(f) (which contemplates that counsel will discuss and formulate "clawback" agreements during their discovery conference); *see also* Kaliner, *supra* note 10.

38. *See* FED. R. EVID. 502 Advisory Committee Notes (2007) ("[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'clawback 'and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.").

39. *See New Bank of New England v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) ("Any order issued now by the Court would have only limited effect; it could not force NBNE to forget what has already been learned.").

40. *See* Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 44-47 (2009).

41. *Id.*

42. *Id.*

43. *Id.* at 46.

44. *Id.* at 45.

45. *See Am. Broad. Cos., Inc. v. Aereo, Inc.*, Nos. 12 Civ. 1540 (AJN), 12 Civ. 1543, 2013 U.S. Dist. LEXIS 5316, at *9 (S.D.N.Y. Jan. 11, 2013).

46. The Judicial Improvements Committee, which was chaired by U.S. District Judge Shira A. Scheindlin, was comprised of judges from the Southern District and preeminent practitioners in the court. The Judicial Improvements Committee issued its report in early October 2011, and the pilot project began in the Southern District of New York on October 31, 2011. *See* Joel Stashenko, *Pilot Project Seeks Ways to Streamline Complex Civil Litigation*, N.Y. L.J. Nov. 2, 2011.

47. *See In re Pilot Project Regarding Case Mgmt. Techniques for Complex Civil Cases in the Southern District of New York*, Standing Order, No. M10-458, at Point II.D.4 (S.D.N.Y. Oct. 31, 2011) [hereinafter Judicial Improvements Committee Standing Order].

48. *See Am. Broad. Cos., Inc.*, 2013 U.S. Dist. LEXIS 5316, at *9 (court suggested the exclusion of documents created after the litigation commenced and the exclusion of "purely internal communications among counsel and their agents"); *see also In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 34026, at *41-42 (D. Kan. Apr. 3, 2009) (court permitted categorical privilege log that contained information regarding the number of documents, the time period the documents covered, and a statement from counsel about the nature of the privilege).

49. Facciola, *supra* note 40, at 47.

50. *Id.*

51. *See, e.g., Auto. Club of N.Y., Inc. v. The Port Auth. of N.Y. & N.J.*, No. 11 Civ. 6746 (RKE) (HBP), 2013 U.S. Dist. LEXIS 65868, at *2, 22-27 (S.D.N.Y May 8, 2013) (defendant's category-by-category log lacked substantiated information, and the court therefore directed defendant to supplement its log and provide the number of individuals that comprise the "authors" and "recipients" in each category, and provide the number of documents in each category); *see also Chevron Corp. v. Salazar*, No. 11 civ. 3718 (LAK) (JCP), 2011 U.S. Dist. LEXIS 106270, at *6 (S.D.N.Y. Sept. 19, 2011) (plaintiff's short description of categories impeded the process, and the court therefore ordered an itemized privilege log).

52. *See* S.D.N.Y. R. 26.2.

53. *See* S.D.N.Y. R. 26.2(c); *see also Assured Guar. Mun. Corp.*, 2013 U.S. Dist. LEXIS 41785, at *30-31 (court granted defendant's request to produce categorical privilege logs, but the court may conduct an *in camera* review and order re-categorization of the documents if there is a dispute); *Am. Broad. Cos., Inc.*, 2013 U.S. Dist. LEXIS 5316, at *9 (court suggested several options to facilitate cooperation in the logging process, including "'categorical' privilege logs pursuant to Local Rule 26.2," as well as categories of exclusion); *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, No. 11. Civ. 1299 (HB) (FM), 2011 U.S. Dist. LEXIS 133724, at *34-35 (S.D.N.Y. Nov. 10, 2011).

54. *See, e.g. RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 216 (N.D. Ill. 2013).

55. Facciola, *supra* note 40, at 49; Judicial Improvements Committee Standing Order, *supra* note 47, at Point II.E.

56. Facciola, *supra* note 40, at 49.

57. *See id.*

58. *Id.*

59. Judicial Improvements Committee Standing Order, *supra* note 47, at Point II.E (requiring "only one entry on the log to identify withheld e-mails that constitute an uninterrupted dialogue between or among individuals").

60. *See id.* The Judicial Improvements Committee does not suggest whether it is limited temporally or by subject matter, or both. Parties can, and should, agree among themselves as to the parameters for what constitutes an "uninterrupted dialogue."

61. *See id.*

62. *Compare RBS Citizens, N.A.*, 291 F.R.D. at 218-19 (requiring log to identify the date, the author and all recipients, for each separate document, and stating that "'[i]f listing only the recipients of the last e-mail in a chain [does not] disclose everyone to whom an allegedly privilege communication [wa]s sent, the listing cannot be adequate'" (quoting *Acosta v. Target Corp.*, 281 F.R.D. 314, 320 (N.D. Ill. 2012)), *and BreathableBaby, LLC v. Crown Crafts, Inc.*, No. 12–CV–94 (PJS/TNL), 2013 U.S. Dist. LEXIS 95508, at *29 (D. Minn. May 30, 2013) (requiring individual entry of each e-mail in chain), *and Helm v. Alderwoods Group, Inc.*, No. C 08-01184 SI, 2010 U.S. Dist. LEXIS 86353, at *9-10 (N.D. Cal. July 27, 2010) (requiring itemization of each e-mail within the string because the court was "unable to discern whether…an e-mail chain was sent[,] at some point[,] to a third party or an employee not within the scope of the privilege, in which case that e-mail and the preceding e-mails in the chain may not be privileged"), *and Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 240-41 (E.D. Pa. 2008) (each progressive e-mail is its own document and failure to log each e-mail in a chain resulted in waiver of those e-mails that were not logged), *with Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 642 (D. Nev. 2013) (declining to order separate itemization of e-mails), *and Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 517 n.9 (E.D. Cal. 2010) ("Fed. R. Civ. P. 26(b)(5)(A) does not require separate itemization of e-mails in a privilege log." (citing *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007)); *cf. United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002):

> Each e-mail/communication consists of the text of the sender's message as well as all of the prior e-mails that are attached to it. Therefore, [the] assertion that each separate e-mail stands as an independent communication is inaccurate. What is communicated with each

e-mail is the text of the e-mail and all the e-mails forwarded along with it.

63. *Compare Dawe v. Corr. USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009) ("[T]he current weight of authority favors examination of the most recent communication as the means for characterizing the entire e-mail string."), *and Barton v. Zimmer Inc.*, No. 1: 06-CV-208, 2008 U.S. Dist. LEXIS 1296, at *17 (N.D. Ind. Jan. 7, 2008) ("[E]ven though one e-mail is not privileged, a second e-mail forwarding the prior e-mail to counsel might be privileged in its entirety. In this respect, the forwarded material is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney." (citations omitted) (internal quotation marks omitted)), *with BreathableBaby, LLC*, 2013 U.S. Dist. LEXIS 95508, at *29 ("[I]ndividual entries for each e-mail in a chain helps to ensure that parties do not bury non-privileged communications in e-mail chains that were forwarded to counsel for legal advice."), *and Benefitvision Inc. v. Gentiva Health Servs., Inc.*, No. CV 09-473 (DRH) (AKT), 2011 U.S. Dist. LEXIS 71510, at *6 (E.D.N.Y. May 23, 2011) ("If there are e-mail chains in which defendants claim privilege over only parts of the e-mail chain, those allegedly privileged e-mails must be redacted and all non-privileged portions must be produced."); *SEC v. Wyly*, No. 10 CIV. 5760 (SAS), 2011 U.S. Dist. LEXIS 80304, at *12 (S.D.N.Y. July 18, 2011) ("[T]he unprivileged material will have to be produced in some form, as it is the transmission that is protected, not the underlying information.").

64. "Deduping" is the process of removing duplicate items from databases or lists. Data deduping software cleans duplicate entries from lists or databases, like excel spreadsheets and mailing lists.

65. FED. R. EVID. 502(b) Advisory Committee Notes (2008) ("Depending on the circumstances, 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.").

66. *See* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011); 7 ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE ¶ (C)(3) (2d ed. 2011).

67. *See* Facciola, *supra* note 40, at 47 (noting that parties may be able to generate a report where information is in a database).

68. *See Moore v. Publicis Groupe*, 287 F.R.D. 182, 191-92 (S.D.N.Y. 2012), *aff'd*, 2012 U.S. Dist. LEXIS 1279, at *2-3 (S.D.N.Y. Apr. 26, 2012).

69. *See* Buffmire, *supra* note 34, at 1636.

70. *See C.T. v. Liberal Sch. Dist.*, Nos. 06-2093-JWL, 06-2360-JWL, 06-2359-JWL, 2008 U.S. Dist. LEXIS 5863, at *30-31 (D. Kan. Jan. 25, 2008).

71. *Id.* at 30.

72. *Id.* at 30-31.

73. *Id.* at *31; *see also GenOn Mid-Atlantic, LLC*, 2011 U.S. Dist. LEXIS 133724, at *44 ("Since the attachments are primarily business related, they cannot be withheld on the basis of attorney-client privilege.").

74. *See* The Sedona Conference®, *Cooperation Proclamation: Resources for the Judiciary* (August 2011), *available at* https://thesedonaconference.org//publication/The%2520Sedona%2520Conference%25C2%25AE%2520Cooperation%2520Proclamation%253A%2520Resources%2520for%2520the%2520Judiciary (last visited Feb. 25, 2014) [hereinafter the Cooperation Proclamation].

75. *Id.* at 28.

76. *Compare Thorncreek Apartments III, LLC*, 2011 U.S. Dist. LEXIS 88281, at *24-25 (defendant failed to provide sufficient account of review procedure where all counsel said was that he "'spent countless hours reviewing a relatively large amount of documents and marked each document either 'responsive,' 'non-responsive,' or 'privileged'"), *with Datel Holdings Ltd v. Microsoft Corp.*, No. C–09–05535 EDL, 2011 U.S. Dist. LEXIS 30872, at *10-11 (N.D. Cal. Mar. 11, 2011) (defendant demonstrated "fairly robust measures" to avoid inadvertent disclosure where it: (1) hired contract lawyers to review documents for privilege; (2) a team of attorneys initially screened responsive documents and identified potentially privileged documents; (3) a quality control team then reviewed any documents marked potentially privileged; (4) a privilege review team then reviewed any documents that were still designated privileged after the second review; (5) privileged documents were entered into a privilege log; (6) reviewing attorneys had specific instructions on how to identify documents that contained attorney-client communications or work product; (7) defendant's litigation counsel conducted a tutorial for the reviewers; and (8) defense counsel conducted its own quality control check).

77. *See Guidelines on Best Practices for Litigating Cases Before the Court of Chancery* (eff. Jan. 1, 2013), *available at* http://courts.delaware.gov/chancery/docs/CompleteGuidelines_links.pdf (last visited Feb. 25, 2013) [hereinafter Delaware Guidelines].

78. *See id.* at § 7(b).

79. *Id.* at § 7(b)(vii)(b)(iv).

80. *See id.*

81. *See id.*

82. *See Cooperation Proclamation*, *supra* note 74, at 26 ("In the event that the privilege or confidentiality designations of a large volume of documents are challenged, direct the parties to attempt [sic] agree on 'categorizing' disputed information so that a ruling on samples will apply to each category[.]").

83. *Id.* ("Suggest that the parties engage (or order the appointment of) a neutral to rule on challenges to privilege or confidentiality designations[.]").

84. Delaware Guidelines, *supra* note 77, at § 7(b)(vii)(e).

85. *Id.* at § 7(b)(vii)(a).

86. *Id.*

87. *Id.*

88. *Id.*

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Void Versus Voidable Contracts: The Subtle Distinction That Can Affect Good-Faith Purchasers' Title to Goods

By Melissa Yang

The subtle distinction between a void and a voidable contract for the sale of goods has perplexed practitioners over the years. Understanding the difference becomes significant for good-faith purchasers who later buy those goods and find themselves faced with a challenge as to the validity of title. A review of New York case law indicates that the issue of whether contracts for the sale of goods are void or voidable is most often litigated when duress, fraud, and theft are involved. Given that the New York Pattern Jury Instructions currently lack instructions on this issue, and in response to the confusion that has arisen over the years regarding the difference between void and voidable contracts, this article analyzes how duress, fraud, and theft can affect contracts for the sale of goods and, in turn, good-faith purchasers' title to those goods.

I. The Difference Between Void and Voidable Title

Contracts for the sale of goods involving duress, fraud, and theft may be either void or voidable. On one hand, "[a] void contract is no contract at all; it binds no one and is a mere nullity."[1] On the other hand, a contract is "voidable when one of the parties has the power either to avoid or to validate the agreement."[2]

For good-faith purchasers of those goods, the distinction between void and voidable contracts is important; it determines whether the good-faith purchaser received valid title to those goods. Good-faith purchasers who buy goods from a party to a *void* contract have no title and must return the goods to the rightful owner upon demand.[3] By contrast, good-faith purchasers who buy goods from a party to a *voidable* contract will receive good title to those goods.[4]

The following summary analyzes both case law and the New York Uniform Commercial Code (UCC), and discusses how the existence of duress, fraud, and theft in a contract for the sale of goods can affect a subsequent good-faith purchaser's title to those goods.

A. Duress

Generally, duress occurs when one exerts unlawful force upon a party to induce that party's assent to a contract for the sale of goods.[5] The unlawful force is usually a threat, communicated though words or actions, either directly or by inference.[6] To constitute duress, the basis for the party's assent to the contract must be the improper threat.[7] An improper threat may take the form of either physical or economic compulsion.

1. Physical Duress

When the improper threat takes the form of physical compulsion, the resulting contract is void.[8] A good-faith purchaser does not take valid title to goods that originated from a contract which a party was physically compelled to execute.[9]

2. Economic Duress

By contrast, a party's assent to a contract through economic compulsion may be voidable under certain circumstances.[10] If the contract for the sale of goods is considered voidable, then a good-faith purchaser may take good title to those goods.[11]

> *"Good-faith purchasers who buy goods from a party to a* void *contract have no title and must return the goods to the rightful owner upon demand. By contrast, good-faith purchasers who buy goods from a party to a* voidable *contract will receive good title to those goods."*

Economic compulsion generally occurs when a party refuses to engage in an action, even though he or she is under a legal obligation to act, until the other party agrees to execute a contract or, if a contract already exists, to less favorable terms.[12] A contract is voidable as a result of economic duress only if the following three elements are established: (1) the victim was precluded from exercising free will and agreed to execute the contract as a result of an improper threat; (2) the victim could not obtain the goods from another source or supply; and (3) the victim could not be made whole through ordinary breach-of-contract remedies.[13] All three elements were present in *Austin Instrument, Inc. v. Loral Corp.*—the seminal case in New York on economic duress.

In *Austin Instrument, Inc.*, plaintiff had a contract to deliver radar sets to the U.S. Navy and sub-contracted with defendant to purchase gear components for the radar sets.[14] Defendant later refused to deliver the gear components unless plaintiff agreed to pay a higher price and award a second subcontract to defendant.[15] The New York Court of Appeals held that plaintiff was subject to economic duress because (1) defendant's refusal to deliver the gear components was a wrongful threat, (2) plaintiff was unable to purchase substitute components from other vendors with the proper specifications and in time to meet its deadline with the U.S. Navy, and (3) plaintiff would be

liable for liquidated damages in its contract with the U.S. Navy for failing to timely deliver gear components, so ordinary breach-of-contract damages were inadequate.[16]

To provide further illustration, each element of economic duress is discussed in turn.

a. Economic Duress #1—A Wrongful Threat

A wrongful threat occurs when a party refuses to act, even though he or she is legally required to act, to induce the other party into agreeing to execute a contract, or, if a contract already exists, to agree to less favorable terms.[17] Duress does not exist in the absence of a wrongful act or threat that precluded a party from exercising his free will.[18] Courts have found that no wrongful act or threat has occurred where a party is merely exercising his legal right, e.g., not providing the goods until the other party has provided payment.[19]

b. Economic Duress #2—No Alternative Source of Supply

"A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it."[20] For example, in cases where a party wrongfully withholds goods until the other party has agreed to an additional demand, courts have held that there is no economic duress if the other party could have obtained those goods from an alternative source.[21]

c. Economic Duress #3—Contract Remedy Inadequate

Courts have held that recovery based upon economic duress is precluded where breach-of-contract damages are sufficient to make the party whole.[22] Indeed, if plaintiff could recover contract remedies, then plaintiff is precluded from recovering under quasi-contract or tort theories.[23]

d. Economic Duress Involving a Contract Between the Party Exerting Duress and the Victim

Where each of the foregoing elements of economic duress are met, the contract between the party who exerted the duress and the victim of the duress is voidable at the victim's option.[24] The victim of the duress could choose to ratify the contract by simply acquiescing to its terms.[25] If the victim ratified the contract, a good-faith purchaser who later buys those goods would receive good title.[26]

e. Economic Duress Involving a Contract Between the Victim and an Innocent Party

In cases where a third party exerts economic duress to force the victim to enter into a contract with another party, an additional question arises as to whether the contract is voidable at the victim's option.[27] If the other party to the contract is aware of the third party's duress, then the contract *is* voidable at the victim's option.[28] However, if the other party does not have knowledge of the third party's duress, acts in good-faith, and provides value or changes his position materially in reliance on the transaction, then the contract between the other party and the victim is valid and *not* voidable at the victim's option.[29] Given that the contract is valid, it follows that a subsequent good-faith purchaser for value will receive good title.

B. Fraud

Pursuant to UCC § 2-403, a good faith purchaser or a buyer in the ordinary course of business can receive valid title to goods under certain circumstances. The relevant language of UCC § 2-403 is as follows:

> Power to Transfer; Good Faith Purchase of Goods; "Entrusting".
>
> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (a) the transferor was deceived as to the identity of the purchaser, or (b) the delivery was in exchange for a check which is later dishonored, or (c) it was agreed that the transaction was to be a "cash sale," or (d) the delivery was procured through fraud punishable as larcenous under the criminal law. (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

Whereas UCC § 2-403(1) applies in contracts for the sale of goods where the buyer makes false and fraudulent misrepresentations, e.g. providing a bad check to the other party, to induce the seller to make the sale,[30] UCC § 2-403(2) applies in a bailor/bailee situation, where the seller entrusts the goods to a "merchant who deals in goods of that kind" and the merchant subsequently sells those goods to "a buyer in ordinary course of business."[31] Each provision is discussed in turn.

1. UCC § 2-403(1)

UCC § 2-403(1) provides that contracts for the sale of goods procured by fraud are voidable at the option of the party who was defrauded.[32] However, the defrauded party must cancel the contract and seek the return of the goods before they have been sold to a good-faith purchaser for value.[33] If the goods were sold to a subsequent

good-faith purchaser, then under UCC § 2-403(1) the good-faith purchaser has valid title to those goods.

Courts have reasoned that the seller's title to the goods passes to the other party upon the unconditional delivery of the goods, even though the contract was induced by fraud.[34] The defrauded party, however, has the option at his or her election to rescind the entire contract and demand the return of the goods, unless those goods were sold to a good-faith purchaser for value.[35] If the defrauded party still has the opportunity to rescind the contract, the parties would be restored back to their original positions as if the contract had never occurred.[36] Here, the defrauded party must rescind the entire contract; he or she cannot affirm the contract in part and rescind in part.[37]

If the defrauded party chooses to rescind the contract, he or she must not take any course of action that would be inconsistent with the disaffirmance of the transaction, otherwise it could be construed that he or she waived rescission.[38] If the party that perpetrated the fraud refuses to return the goods to the defrauded party, then the defrauded party may bring an action for rescission, or defend an action brought against him or her and raise fraud as a defense.[39]

If the defrauded party chooses to affirm the contract, then he or she could bring an action against the other party for damages, which is measured by "the difference between the value of the subject-matter of the contract as represented and its actual value."[40] The defrauded party can reclaim the goods sold against anyone except a good-faith purchaser for value who did not have notice of the fraud.[41]

2. UCC § 2-403(2)

UCC § 2-403(2) provides that a "buyer in [the] ordinary course of business" may receive valid title to goods when the goods are purchased from "a merchant who deals in goods of that kind." UCC § 2-104(1) defines merchant as,

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Courts in New York have held that both the original owner and the buyer in the ordinary course must be aware that the merchant deals in goods of that kind in order for the protections of UCC § 2-403(2) to apply.[42] In *Porter v. Wentz*, for example, the defendant was not entitled to the protections of UCC § 2-403(2), where he purchased a painting from a person who was not an art dealer but rather a delicatessen employee.[43]

A "buyer in [the] ordinary course" is a type of a good-faith purchaser—one that purchases goods from a person whose business it is to deal in goods of that kind.[44] As defined under UCC § 1-201(9), a "buyer in [the] ordinary course of business" is

> a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

Courts have held that buyers are *not* entitled to protection under UCC § 2-403(2) if there are "warning signs" or "red flags" surrounding the transaction and the buyer moves forward with the sale without conducting further due diligence.[45] "Examples of such warning signs include a purchase price that is obviously below market, a sales procedure that differed from previous transactions between the two parties, or any other 'reason to doubt the seller's ownership of the [goods].'"[46] Moreover, in cases where the buyer is a merchant, courts have imposed a higher standard of good-faith, defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade[,]"[47] and have required that the buyer take additional steps to verify the true owner of the goods to receive protection under UCC § 2-403(2).[48]

C. Theft

As opposed to contracts for the sale of goods procured by economic duress and fraud, contracts for the sale of stolen goods are void.[49] Whereas fraud, economic duress, and theft all involve a wrongful act to procure goods, theft differs because there is no contract and no delivery of the goods with intent to pass title and complete the sale.[50]

At common law, a thief acquires no title to stolen goods and therefore passes no title to a good-faith purchaser of those goods.[51] Because no title can pass, a good-faith purchaser must, upon demand, return the goods purchased to the rightful owner.[52] If the good-faith purchaser refuses, then the rightful owner may initiate a replevin action seeking the return of his or her goods.[53]

New York courts view the rightful owner's demand and the good-faith purchaser's refusal to return the goods as a substantive element for a replevin cause of action, because "[the] good-faith purchaser of stolen property commits no wrong, as a matter of substantive law, until

he or she has first been advised of the plaintiff's claim to possession and given an opportunity to return the chattel."[54] To prevail on a replevin action, the rightful owner must establish that he or she has "legal title or a superior right of possession" over the good-faith purchaser.[55] Here, the rightful owner is only required to prove good title against the good-faith purchaser; the owner need not prove superior title against the whole world.[56] In response, the good-faith purchaser may defend his or her title to the goods by, *inter alia*, establishing that the goods were not stolen, or asserting statute of limitations or laches as affirmative defenses.[57]

II. Conclusion

In cases where good-faith purchasers' title to goods are in question, it is important for practitioners to understand and identify whether those goods originated from a void or a voidable contract. The difference is dispositive as to whether that good-faith purchaser has a claim of right to the goods at issue. Because the distinction between void versus voidable contracts is subtle, the New York Pattern Jury Instructions should adopt instructions for good-faith purchasers of goods that emanated from contracts involving duress, fraud, and theft.

Endnotes

1. 22 N.Y. Jur. 2d *Contracts* §8 (2014).
2. *Id.*
3. *See* Restatement (Second) of Contracts §174 cmt. b (1981).
4. *See id.*
5. *See* Restatement (Second) of Contracts §§ 174, 175 (1981).
6. *See Welford Realty, Inc. v. Brause*, 93 A.D.2d 758, 759, 461 N.Y.S.2d 317, 318 (1st Dep't 1983) ("For duress to void what was done, it must have involved a wrongful act or threat precluding the exercise of free will." (internal quotation marks omitted)); *see also* Restatement (Second) of Contracts § 175 cmt. a (1981).
7. Restatement (Second) of Contracts § 175 (1981).
8. *See id.*; Restatement (Second) of Contracts § 174 (1981); *see also Norton Operating Servs., Inc. v. Perry*, 175 A.D.2d 916, 917, 573 N.Y.S.2d 754, 755 (2d Dep't 1991) (stating that the allegations of physical coercion would render the promissory notes unenforceable).
9. Restatement (Second) of Contracts § 174 cmt. b (1981) ("[A] good faith purchaser may acquire good title to property if he takes it from one who obtained voidable title by duress but not if he takes it from one who obtained 'void title' by duress.").
10. *See* Restatement (Second) of Contracts § 175 (1981).
11. *See* Restatement (Second) of Contracts § 174 cmt. b (1981).
12. *See Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 130-31, 324 N.Y.S.2d 22 (1971); *see also 805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 780 (1983).
13. *Austin Instrument, Inc.*, 29 N.Y.2d. at 130-31.
14. *Id.* at 128-29.
15. *Id.* at 128.
16. *Id.* at 131-33.
17. *Id.* at 130-31.
18. *See Stewart M. Muller Constr. Co. v. N.Y. Tel. Co.*, 40 N.Y.2d 955, 956, 390 N.Y.S. 817, 817 (1976) ("A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will."); *Welford Realty, Inc.*, 93 A.D.2d at 759 (dismissing complaint because plaintiff's claims of economic duress resulted from tough negotiations in arm's-length dealing, rather than from wrongful acts or threats).
19. *See 805 Third Ave., Co.*, 58 N.Y.2d at 453 (holding defendants' refusal to turn over legal documents did not constitute economic duress because they were not obligated to do so under the contract until plaintiffs provided payment paper which they had not done); *Stewart M. Muller Constr. Co.*, 40 N.Y.2d at 956 (dismissing plaintiff's declaratory judgment action, which sought to void a settlement agreement, holding that claimed duress was merely the proper exercise of rights under termination clause in underlying agreement); *Madey v. Carman*, 51 A.D.3d 985, 987, 858 N.Y.S.2d 784, 786 (2d Dep't 2008) (holding plaintiffs were not entitled to rescind contract on the grounds of economic duress because defendants were exercising a legal right).
20. Restatement (Second) of Contracts § 175 cmt. b (1981).
21. *Compare Walbern Press, Inc v. C.V. Commc'ns, Inc.*, 212 A.D.2d 460, 461, 622 N.Y.S.2d 951, 952 (1st Dep't 1995) (holding buyer has no claim for economic duress where buyer could have obtained goods through another source); *with Austin Instrument, Inc.*, 29 N.Y.2d at 132 (finding economic duress existed where government contractor could not have obtained suitable substitute gear components in time to make its delivery to the Navy).
22. *Compare Trafigura Beheer B.V. (Amsterdam) v. South Caribean Trading Ltd.*, 7 Misc. 3d 1010(A), 801 N.Y.S.2d 243, 2004 N.Y. Misc. LEXIS 3060, at *5 (Sup. Ct., N.Y. Co. 2004) (dismissing plaintiff's economic duress claim where plaintiff had an adequate remedy for breach of contract), *with Austin Instrument, Inc.*, 29 N.Y.2d at 131-33 (allowing recovery based on economic duress where breach-of-contract damages were inadequate given government contractor was subject to liquidated penalties for failing to timely deliver gear components).
23. *See id.*
24. Restatement (Second) of Contracts § 175(1) (1981).
25. *See Benjamin Goldstein Prods., Ltd. v. Fish*, 198 A.D.2d 137, 138, 603 N.Y.S.2d 849, 851 (1st Dep't 1993) (finding plaintiffs ratified settlement agreement by accepting payments for more than a year and therefore could not maintain economic duress claim based on that agreement).
26. Restatement (Second) of Contracts § 174 cmt. b (1981).
27. *See* Restatement (Second) of Contracts § 175(2) (1981).
28. *Id.*; *see Mason v. Ariz. Educ. Loan Mktg. Assistance Corp.*, 300 B.R. 160, 165, 167-68 (Bankr. D. Conn. 2003) (allowing plaintiff to void consolidated debt loan because lender either knew third-party callers threatened plaintiff with incarceration if plaintiff did not agree to the consolidated loan, or ratified the third-party callers' conduct).
29. *See* Restatement (Second) of Contracts § 175(2) (1981); *see, e.g.*, Restatement (Second) of Contracts § 175 cmt. e, ill. 10 (1981) ("A, who is not C's agent, induces B by duress to contract with C to sell land to C. C, in good faith, promises B to pay the agreed price. The contract is not voidable by B."); *see also Aylaian v. Town of Huntington*, 459 Fed. Appx. 25, 27 (2d Cir. 2012) (summary order) (finding plaintiff cannot void resignation agreement and waiver of liability on the basis of third-party duress, because defendant had no knowledge of duress and paid value for agreement and waiver).
30. *See, e.g., Davis v. Gifford*, 182 A.D. 99, 100-01, 169 N.Y.S. 492 (1st Dep't 1918) (stating that defendant had power to rescind contract to purchase shares of stock, if exercised promptly, as a result of plaintiff's false and fraudulent misrepresentations); *Sheridan*

Suzuki, Inc. v. Caruso Auto Sales, Inc., 110 Misc. 2d 823, 824-25, 442 N.Y.S.2d 957, 959 (Sup. Ct., Erie Co. 1981) (motorcycle purchased with dishonored check resulted in voidable title).

31. *See, e.g., Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 821 N.Y.S.2d 61 (1st Dep't 2006) (decedent's estate initiated replevin action to recover painting that was left in the care of decedent's brother-in-law who subsequently sold it).

32. *See Davis*, 182 A.D. at 101 ("A contract induced by false and fraudulent representations is not void, but voidable."); *Sheridan Suzuki, Inc.*, 110 Misc. 2d at 824 ("The law is clear that a person receiving goods incident to a transaction involving a dishonored check and a fraud receives only voidable title, at best.").

33. *See* UCC § 2-403(1).

34. *See Stevens v. Hyde*, 32 Barb. 171, 180 (Sup. Ct., N.Y. Co. 1860).

35. *Id.* at 179 (stating that the contract is voidable at the defrauded party's election, the contract is enforceable against the party who committed the fraud); UCC § 2-403(1).

36. *Stevens*, 32 Barb. at 181 (stating that the seller's title in the goods would be restored and the consideration provided in exchange for the goods would be returned to the other party).

37. *Id.* at 182.

38. *Davis*, 182 A.D. at 101.

39. *Id.*

40. *Id.*

41. UCC § 2-403(1); *Stevens*, 32 Barb. at 177 (noting that the seller who was defrauded should disaffirm the contract at the earliest practicable moment).

42. *Dorothy G. Bender Found., Inc. v. Carroll*, 40 Misc. 3d 1231(A), 975 N.Y.S.2d 708, 2013 N.Y. Misc. LEXIS 3711, at *9-10 (Sup. Ct., N.Y. Co. 2013).

43. *Porter v. Wertz*, 68 A.D.2d 141, 145-46, 416 N.Y.S.2d 254, 257 (1st Dep't 1979).

44. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 171, 281 N.Y.S.2d 400, 404-05 (Civ. Ct., N.Y. Co. 1967) (stating that "a buyer in the ordinary course of business" is more restrictive than a "good faith purchaser for value").

45. *Dorothy G. Bender Found, Inc.*, 2013 N.Y. Misc. LEXIS 3711, at *19.

46. *Id.* (quoting *Joseph P. Carroll Ltd. v. Baker*, 889 F. Supp. 2d 593, 604 (S.D.N.Y. 2012)); *see also Atlas Auto Rental Corp.*, 54 Misc. 2d at 171-72 (defendant did not see bill of sale or owner's registration at the time he purchased a car for $300 that he was able to resell immediately for $1,200).

47. UCC § 2-103(1)(b).

48. *See, e.g., Porter*, 68 A.D.2d at 145-47 (defendants-merchants were not "buyers in [the] ordinary course of business," because they failed to investigate whether they were purchasing a painting from an art dealer, and to verify whether seller had title to the painting or was authorized to sell it); *Dorothy G. Bender Found., Inc.*, 2013 N.Y. Misc. LEXIS 3711, at *27-28 (defendant, a sophisticated art dealer, did not observe commercially reasonable standards in failing to investigate the seller's authority to sell the painting in a transaction where the painting was grossly undervalued); *Kozar v. Christie's, Inc.*, 31 Misc. 3d 1228(A), 929 N.Y.S.2d 200, 2011 N.Y. Misc. LEXIS 2350, at *27 (Sup. Ct., Westchester Co. 2011) (defendant merchant failed to observe reasonable commercial standards of fair dealing where defendant paid a bargain price and failed to conduct "a good-faith investigation into the painting's ownership").

49. *Stevens*, 32 Barb. at 176 ("A thing is void which is done against the law at the very time of doing it, and when no person is bound by the act." (internal quotation marks omitted)).

50. *Compare Stevens*, 32 Barb at 179 (finding that a party has void title where "[n]o contract has been *consummated*, no delivery had been made with the intent to pass the property and complete the sale"), *with id.* at 176 (stating that a person obtains voidable title through a contract of sale that was sufficient in law to vest the property and make good title but for the false and fraudulent pretenses), *and Austin Instrument, Inc.*, 29 N.Y.2d at 130-31 (stating that a person obtains voidable title through a contract of sale procured by economic duress).

51. *Stevens*, 32 Barb. at 178 ("[N]o one can convey to another a better title than he has himself."); *Sheridan Suzuki, Inc.*, 110 Misc. 2d at 824 (noting the distinction between a "transfer[] as part of a transaction involving a bad check[,]" which is governed by UCC § 2-403(1), and a transfer that results from "a direct larceny or burglary[,]" which is void as a matter of law).

52. *Stevens*, 32 Barb. at 178 ("[T]here is no general principle in the law that the equity of a bona fide purchaser from one destitute of title, shall overrule the prior legal right of the owner." (internal quotation marks and citations omitted)); *see, e.g., DiLorenzo v. Gen. Motors Acceptance Corp.*, 29 A.D.3d 853, 854, 814 N.Y.S.2d 750, 750 (2d Dep't 2006) (innocent good-faith purchaser had no title to stolen property and cannot maintain action for value of said goods against the rightful owner); *Candela v. Port Motors, Inc.*, 208 A.D.2d 486, 487, 617 N.Y.S.2d 49, 50 (2d Dep't 1996) (plaintiff had void title to vehicle purchased from defendant who purchased said vehicle from a thief or successor of a thief); *Green v. Arcadia Fin. Ltd.*, 174 Misc. 2d 411, 413, 663 N.Y.S.2d 944, 946 (Sup. Ct., Erie Co. 1997) (same), *aff'd*, 261 A.D.2d 896, 689 N.Y.S.2d 596 (1999); *Johnny Dell, Inc. v. N.Y. State Police*, 84 Misc. 2d 360, 363, 375 N.Y.S.2d 545, 548 (Sup. Ct., Onondaga Co. 1975) (same).

53. *See, e.g., Matter of Flamenbaum*, 27 Misc. 3d 1090, 1097, 899 N.Y.S.2d 546, 552 (Sur. Ct., Nassau Co. 2010) (museum initiated replevin action against decedent's estate, to recover gold tablet that disappeared from museum's collection during World War II), *rev'd on other grounds*, 95 A.D.3d 1318, 945 N.Y.S.2d 183 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 962, 978 N.Y.S.2d 708 (2013); *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 147, 550 N.Y.S.2d 618, 620 (1st Dep't 1990) (museum initiated replevin action to recover stolen painting, which was purchased by defendants), *aff'd*, 77 N.Y.2d 311, 569 N.Y.S.2d 426 (1991).

54. *Solomon R. Guggenheim Found.*, 153 A.D.2d at 147; *see also Matter of Flamenbaum*, 27 Misc. 3d at 1097 ("Under New York law, a cause of action to recover a chattel against a party who has lawfully obtained the property arises not when the property is initially taken, but, rather, when there is a demand for the return of the property and the demand is refused.").

55. *Matter of Flamenbaum*, 27 Misc. 3d at 1096.

56. *Id.* at 1097.

57. *See, e.g., Peters*, 34 A.D.3d at 36-37 (holding that the statute of limitations expired over 70 years ago and that petitioner's action is barred by laches for failing to conduct due diligence regarding artwork's whereabouts); *but see Matter of Flamenbaum*, 22 N.Y.3d at 965-66 (holding that estate failed to establish affirmative defense of laches to the museum's failure to report missing gold tablet to authorities); *cf. Solomon R. Guggenheim Found.*, 153 A.D.2d at 153 (holding that the good-faith purchaser bears the burden of proving the painting was not stolen and therefore falls under UCC § 2-403(1)).

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Federal False Claims Act and SEC Whistleblower Program Practice Points

By Hon. Margaret J. Finerty and Richard J. Dircks

I. Introduction

In recent years, the private citizen whistleblower has come to play an increasingly important role in anti-fraud public law enforcement. The Federal False Claims Act, the New York False Claims Act, and the Securities and Exchange Commission Whistleblower Program have empowered and incentivized citizens to come forward and blow the whistle on corporate fraud. The Commercial and Federal Litigation Section's Committee on Civil Prosecution[1] recently sponsored two continuing legal education courses focused on these three areas of whistleblower enforcement.[2] The collective program faculty comprised over twenty seasoned experts and top practitioners who provided practical guidance as they explored the interplay between whistleblower laws, the agencies that administer or utilize them, and the resulting synergies of public and private sector resources.[3]

"In the 27 years since the statute was significantly strengthened in 1986, the FCA resulted in the recovery of over $38 billion. Citizen whistleblower-initiated actions were responsible for approximately 70% of those recoveries, or over $27 billion. Of that amount, whistleblowers received awards totaling over $4.2 billion."

This article highlights ten takeaways from among the many issues raised and discussed during the federal practice portions of the CLE programs.[4] These ten points were selected because of their fundamental importance and their practical utility for practitioners in this field.

II. The Federal False Claims Act

The Federal False Claims Act (FCA),[5] sometimes referred to as the "Lincoln Law," dates back to 1863 when it was passed in an effort to combat unscrupulous war profiteers attempting to defraud the United States government during the Civil War. A defining characteristic of the FCA, then and now, is its powerful *qui tam*[6]—or whistleblower—provisions, which permit those with knowledge of fraud on the government to bring an action on behalf of both the government and the whistleblower. In its current form, the FCA provides that a successful whistleblower may receive an award of up to 30% of the monies recovered by the government.[7] The FCA is potentially applicable in almost any situation where federal funds are lost as the result of fraud on the government.[8]

A. Takeaway #1: The FCA Is the Government's Primary Civil Fraud-Fighting Tool

The first takeaway is that the FCA has risen to prominence as the federal government's primary civil fraud-fighting tool. In the 27 years since the statute was significantly strengthened in 1986, the FCA has resulted in the recovery of over $38 billion.[9] Citizen whistleblower-initiated actions were responsible for approximately 70% of those recoveries, or over $27 billion.[10] Of that amount, whistleblowers received awards totaling over $4.2 billion.[11]

As remarkable as those total numbers are, the impact of whistleblower-initiated actions is particularly pronounced when one looks at the recoveries in the past five years. From fiscal year 2009 through fiscal year 2013, total *qui tam* recoveries topped $13.4 billion, with whistleblowers awards exceeding $2 billion.[12]

In addition to the impressive recovery numbers, the breadth of application (and its continued expansion) of this statute is remarkable. As recently expressed by the United States Department of Justice,

> The False Claims Act is the government's primary civil remedy to redress false claims for government funds and property under government contracts, including national security and defense contracts, as well as under government programs as varied as Medicare, veterans benefits, federally insured loans and mortgages, transportation and research grants, agricultural supports, school lunches and disaster assistance.[13]

Many of the defendants involved in the most significant cases are companies that are well known and whose products many of us use in our daily lives.

The FCA is a statute that needs to be on every attorney's radar and should be of particular relevance to: plaintiffs' counsel who represent (or are interested in representing) whistleblowers with knowledge of fraud on the federal government; in-house counsel at any company whose business involves or has a connection to federal funding; and defense attorneys who act as outside litigation or business counsel to those companies.

B. Takeaway #2: FCA Whistleblower Litigation—The Basics

The second takeaway from the CLE programs was the overview provided on how FCA whistleblower litigation works at its most fundamental level.

1. Liability, Damages, and Knowledge

The FCA statute sets forth seven types of conduct that may form the basis for liability under the Act; of those, only four are invoked with any regularity.[14] Liability may attach to any person who: (i) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;"[15] (ii) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;"[16] (iii) conspires to commit a violation of the FCA;[17] or (iv) acts improperly to avoid having to pay an obligation to the government.[18]

A person who violates the FCA may be liable for treble damages and civil penalties of $5,500–$11,000 per violation.[19] Where a successful action has been brought by a whistleblower, the defendant will also be liable for the whistleblower's attorneys' fees, expenses, and costs.[20]

In order to be liable under the FCA, a person needs to act "knowingly."[21] For the purpose of the FCA, this "mean[s] that a person…has (i) actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information."[22]

2. *Qui Tam* Procedure

The whistleblower—or "relator"—files the Complaint under seal in federal court and serves the complaint, together with a statement of material facts, on the Department of Justice (DOJ).[23] The Government has the opportunity to investigate the allegations of the Complaint during this seal period without alerting the potential subject or target of the investigation.[24] Before the expiration of the seal period,[25] the Government shall elect to intervene in the action or decline to do so.[26] If the Government declines, the relator has the right to conduct the action.[27]

3. Checks and Balances

The FCA contains a number of checks and balances to prevent abuse of the statute. For example, cases are barred if the allegations are substantially the same as those (i) on the public record,[28] or (ii) in an existing filed case.[29] In addition, a defendant may recover attorneys' fees and expenses from the relator if the court finds the case to be "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[30] Finally, a relator's award may be reduced—down to zero in certain circumstances—where the relator was involved in the conduct giving rise to the FCA violations.[31]

C. Takeaway #3: Intervention, Intervention, Intervention

Takeaway number three is like the old joke that asks, "How do you get to Carnegie Hall?"—"Answer: Practice, Practice, Practice." In the area of FCA litigation, the question might be, "How do you get to a successful resolution?" Judging by the statistics, the answer may well be, "Intervention, Intervention, Intervention."

Of the total amount recovered by the government through FCA cases since 1986, a startling 96% (or $26.2 billion) of the recoveries resulted from cases where the government intervened or otherwise pursued the action; four percent (or less than $1 billion) resulted from cases where the government declined and the relator proceeded without the government.[32] Further, we heard from our CLE faculty that the government only intervenes in about 20% of filed FCA cases; in other words, the government declines to intervene in the vast majority (approximately 80%) of filed FCA cases.

These statistics support practical action steps for FCA practitioners: choose your cases carefully and move quickly.

1. The Importance of Case Selection

The FCA envisions a public-private partnership where citizen whistleblowers, and their counsel, can work together with the federal government to prosecute civil fraud and recover monies misappropriated from the national fisc. Together with the potential power of the FCA also comes great responsibility for relators' counsel.

With regard to the government, it is incumbent upon relators' counsel to live up to their part in the public-private partnership and only bring well-founded and well-developed cases to the government. The government has limited resources, yet, at the same time, it is statutorily obligated to investigate the cases that are filed and served on the DOJ. Therefore, in order for the partnership to work, it becomes the responsibility of relators' counsel to thoroughly vet potential matters and only bring the best cases to the government.

Relators' counsel have perhaps an even greater responsibility with respect to the relator client. The last thing one's client wants or needs is to suffer the downside of a whistleblower action—putting at risk one's job, livelihood, and well-being—when there is little to no realistic chance of success. Relators' counsel must protect the relator by only filing the strongest FCA cases.

2. Go in Early

This point was made most strongly by defense counsel faculty: once you learn of an actual or potential FCA action against a client, move quickly to engage the government and present your client's position with a view toward bringing the investigation to a close. A recommended first step is an immediate call to the investigating

agency to find out what you can about the investigation. Answers to questions concerning the origin and scope of the investigation can help counsel get a sense of the type of scrutiny one's client is facing, and determine the best course of action. After moving expeditiously (but thoroughly) to gather the facts through an internal investigation, it is often prudent to seek a meeting with the government as soon as practicable to explain why the matter should not proceed. Defendants often try to demonstrate that the questioned conduct does not result in FCA liability or that, even if there is a potential violation, the damages are such that it would not be worth the government's resources to pursue the matter.

Relators' counsel would also be well-advised to "go in early," albeit in a different context. We heard repeatedly that the government welcomes pre-filing meetings with relator's counsel to discuss potential FCA cases. These meetings can be of great value to both the relator and the government. For the relator, such a meeting provides an opportunity to present the theory of the case to the government and gauge potential interest at a point early in the process. In addition, the relator is given the opportunity to raise specific facts and evaluate the magnitude of potential difficulties with the case (e.g., if there is misconduct attributable to the whistleblower; if the whistleblower has arguably violated a contractual obligation to the defendant; or if the defendant does not have the financial wherewithal to pay damages in the event the FCA action is successful). Finally, a pre-filing meeting affords relator's counsel the opportunity to hear from the government, to the extent the government is willing and able to comment. This may be useful in honing the shape of the case and evaluating whether to proceed with the potential action.

Early meetings may also benefit the government in a number of ways. An early meeting with a defendant may prove to be an efficient means to get to the facts of the matter and move toward resolution or dismissal. Likewise, a pre-filing meeting with relator's counsel may dissuade the filing of an unsuccessful case, or it may provide the government with a head start in terms of thinking about and planning an investigation at a time when the statutory clock for an intervention decision has not yet begun to run.

3. "Not Intervening at this Time"

A notable point that was raised repeatedly is a phenomenon that has arisen in practice, but is nowhere to be found in the FCA statute. There have been a number of instances where, at the end of the seal period when the judge requires the government to make its intervention decision, the government files a notice that it is "not intervening at this time." This is neither an intervention nor a declination,[33] but something in-between. It appears to be recognized as a signal to all involved that, although the seal period has expired, the government has not completed its investigation.

D. Takeaway #4: Wartime Suspension of Limitations Act

The FCA has a six-year statute of limitations that may, under limited circumstances, extend to ten years.[34] This limitations period, however, has been called into question recently by courts applying a statute that dates back to World War II: the Wartime Suspension of Limitations Act (WSLA).[35] This statute provides that,

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces…the running of any statute of limitations applicable to any offense…involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not…shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.[36]

At least one federal Court of Appeals and a number of district courts have applied the WSLA in FCA actions, finding that the WSLA tolled the FCA statute of limitations due to ongoing military activity of the United States.[37] A petition for writ of certiorari on this matter is currently pending before the U.S. Supreme Court,[38] and the Court has invited the Solicitor General to file a brief in the case expressing the views of the United States.[39]

E. Takeaway #5: The FCA Does Not Exist in a Vacuum

A final takeaway regarding the FCA is that the statute, and its enforcement, does not exist in a vacuum. Fraudulent conduct that may violate the FCA may also violate other statutes or enforcement regimes, and for a number of those, there exist avenues for citizen whistleblower civil prosecution. So, for example, a fraudulent loan origination by a financial institution may be the subject of an FCA whistleblower action and a declaration under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[40] Other fraudulent conduct actionable under the FCA may also have a component to be addressed through the Internal Revenue Service whistleblower program (tax) or the Securities and Exchange Commission whistleblower program (securities fraud).

Counsel needs to be aware of and on the lookout for overlapping enforcement programs that may apply to complex commercial fraud—as defense counsel for areas of potential additional exposure, and as plaintiffs' counsel for additional avenues for recovery.

III. The Securities and Exchange Commission Whistleblower Program

The Securities and Exchange Commission (SEC or "Commission") Whistleblower Program is a creation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[41] Dodd-Frank amended the Securities Exchange Act of 1934 ("Exchange Act")[42] by, among other things, adding Section 21F, entitled "Securities Whistleblower Incentives and Protection."[43] This section authorizes the Commission to make monetary awards to eligible individuals who voluntarily provide original information[44] derived from independent knowledge unique to the whistleblower, or independent analysis by the whistleblower, that leads to successful Commission enforcement actions, and successful related actions, resulting in monetary sanctions of over $1,000,000.[45] Successful whistleblowers are entitled to awards in an amount equal to 10% to 30% of the sanctions collected.[46] "The program was designed to incentivize individuals to provide the U.S. Securities and Exchange Commission…with specific, credible, and timely information about possible securities law violations, and thereby enhance the Commission's ability to act swiftly to protect investors from harm and bring violators to justice."[47] The final rules established by the SEC to implement the provisions of Section 21F, and explain the procedures that a whistleblower needs to follow to be eligible for an award, went into effect in August of 2011.[48] Section 924(d) of Dodd-Frank directed the SEC to establish a separate office to administer and enforce the provisions of Section 21F of the Exchange Act. This office, known as the Office of the Whistleblower (OWB), is led by its Chief, Sean X. McKessy, and Deputy Chief, Jane A. Norberg. They supervise a staff of nine attorneys and three paralegals.[49]

A. Takeaway #6: How to File a Whistleblower Case with the SEC—The Basics

The first takeaway from the CLE programs regarding the SEC Whistleblower Program is an overview of how to file a case with the SEC.

1. Submit a Tip

A tip concerning a potential securities law violation may be submitted online by filling out the Tips, Complaints and Referrals ("Form TCR") questionnaire via the OWB's webpage at http://www.sec.gov/whistleblower, or by submitting a Form TCR by mail or fax, to the SEC Office of the Whistleblower, 100 F Street NE, Mail Stop 5553, Washington, DC 20549-5631, Fax (703) 813-9322.[50] If a whistleblower or his or her counsel has questions about how to submit a tip to the Commission, or questions about the program, he or she can call the whistleblower hotline at (202) 551-4790.

Whistleblowers who file a Form TCR via the web will receive a computer-generated confirmation receipt with a TCR submission number. OWB will send an acknowledgement or a deficiency letter to whistleblowers who submit their TCRs by mail or fax, and this notification will also include a TCR submission number. All whistleblower tips received by the Commission are entered into the TCR System, which is the Commission's centralized database for prioritization, assignment, and tracking.

2. Evaluation of the Tip by the Commission

The Commission's Office of Market Intelligence (OMI) within its Enforcement Division evaluates every TCR submitted by a whistleblower and assigns what it determines to be TCRs worthy of further attention and resources to members of Commission staff for follow-up investigation or analysis.[51] The tips that survive this review are assigned to one of the Commission's eleven regional offices, a specialty unit, or to an Enforcement Associate Director depending on the nature and subject matter involved and expertise required. Complaints that relate to an existing investigation are forwarded to the staff already working on that matter. Occasionally, and if warranted, the OWB will arrange meetings between the whistleblower and subject matter experts on the Enforcement staff who are investigating the tip.[52] This is especially true if the whistleblower has significant knowledge or expertise in the matter under investigation. This is a positive step from the whistleblower's perspective because it promotes the successful outcome of the case and also will be considered as a factor in determining the percentage of any award that is ultimately made.[53]

3. How to Collect an Award

Once a matter is concluded and there is a final judgment or order resulting in monetary sanctions exceeding $1,000,000, the OWB posts a Notice of Covered Action (NoCA) pertaining to that matter on its website.[54] Once a NoCA is posted, individuals have 90 calendar days to apply for an award by submitting a completed Form WB-APP to OWB by the claim due date listed for that action.[55] If a claim is denied and the applicant does not object within the statutory time period, then the Preliminary Determination of the Claims Review Staff becomes the Final Order of the Commission.[56] An applicant can request reconsideration, and the procedure for doing this is spelled out in the Commission's Rules.[57]

It is a whistleblower's responsibility to look for a NoCA that pertains to his or her tip, and to proactively claim an award. In most cases, a tip will not lead to a final judgment with monetary sanctions, and the whistleblower will not be officially notified that the tip filed was unfruitful. An attorney who wishes to effectively represent a whistleblower client should endeavor to establish lines of communication with the Commission, even before filing a tip, and to offer as much assistance as the client can provide in pursuing the case.

4. Filing an Appeal

A Final Order from the Commission with respect to a whistleblower's right to an award may be appealed, within 30 days after the Commission issues its final decision, to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the whistleblower resides or has his principal place of business.[58] However, if the Commission has made an award of not less than 10 percent and not more than 30 percent of the monetary sanctions collected, based upon the factors set forth in 17 C.F.R. § 240.21F-6, the amount of the award is not appealable.[59]

5. Some Things to Keep in Mind

There are a number of factors that are important to consider when determining whether to file an SEC whistleblower case on behalf of a client.

a. Vet Your Cases Carefully

The number of tips the Commission receives is increasing as word of the program spreads, and as the Commission issues awards. Last October, the Commission made its largest award to date of $14 million to a whistleblower whose information led to a Commission enforcement action that recovered substantial investor funds less than six months after the whistleblower filed the tip.[60] With the number of potential cases increasing, and limited government resources, the Commission will be looking for tips with specific, credible, and meaningful information that will justify the use of its time and efforts, and that will result in large monetary sanctions or prevent major fraud in the market place. The Commission is willing to meet with whistleblowers and their attorneys in advance of filing a tip, so consider availing yourself of that opportunity in determining whether to report a case.

b. Follow the Rules

Whistleblowers can report incidents involving securities fraud that have occurred, are ongoing, or are about to occur. The information presented in a tip must not only be compelling, but it must comply with the following requirements.

(1) The information must be voluntarily provided.[61] In other words it cannot be information that was compelled, for example, through the issuance of a subpoena or other compulsory process.

(2) The information must be original.[62] In order for your whistleblower submission to be considered original information, it must be derived from independent knowledge or independent analysis. The Commission will *not* consider information to be derived from independent knowledge or independent analysis in any of the following circumstances:

(a) "[i]f you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2)…,[63] the applicable state attorney conduct rules, or otherwise;"[64]

(b) "[i]f you obtained the information in connection with the legal representation of a client…, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise."[65]

(c) the information was obtained by an officer, director, trustee, or partner of an entity, or in an auditing, investigative, compliance or accounting capacity.[66] There are exceptions, however, if the reporting individual has "a reasonable basis to believe that disclosure of the information…is necessary to prevent…substantial injury to… investors;" the "entity is engaging in conduct that will impede investigation of the misconduct;" or "[a]t least 120 days have elapsed since" the individual reported the information to the relevant audit committee, chief legal officer, chief compliance officer, or supervisor (or 120 days from when the individual received information if those entities / individuals were already aware of the information).[67]

(d) There are other provisions in the law that preclude certain individuals from filing tips, e.g., if you are an employee of the Commission or other government law enforcement entity; if you have been criminally convicted in relation to the reported conduct; or if you are an employee of a foreign government entity.[68]

B. Takeaway #7: Protecting the Whistleblower's Identity

Understandably, many whistleblowers fear the consequences, both on a personal and professional level, for themselves and their families, if their identity is revealed. The Commission is cognizant of this legitimate concern and takes precautions not to reveal the whistleblower's identity during the investigation through, and including, the bestowal of an award. The Commission also allows individuals who prefer to remain anonymous to still be eligible under the whistleblower program if they submit their tip through an attorney.[69] This provision is one of several reasons why a whistleblower should seek legal representation in filing a tip under the SEC Whistleblower Program. Although a whistleblower must disclose his or her identity to the Commission when an award is made (obviously taxes must be paid), the Commission does not name the whistleblower when it announces the award.[70]

There is a possibility that the whistleblower will be asked to cooperate with other agencies, e.g., the Department of Justice, in addition to the Commission, during the investigation and enforcement proceeding. Although this cooperation will reveal the whistleblower's identity to

those in the government with whom he or she interacts, this cooperation increases the likelihood of a successful resolution and will be counted in the whistleblower's favor when an award decision is being made.[71] There is the possibility that, if a matter goes to litigation, the whistleblower's identity could be revealed. That being said, the Commission has proclaimed its commitment to protecting the identity of the whistleblower to the fullest extent possible in pursuing an enforcement action arising from the whistleblower's tip, and has demonstrated that commitment in granting awards without publicly identifying the whistleblower. Filing a tip anonymously through an attorney is a meaningful way to protect the whistleblower's identity, and should be seriously considered when counseling a client.

C. Takeaway #8: Anti-Retaliation Protection for Whistleblowers

Protection of whistleblowers from retaliation by their employers is crucial to the success of the SEC Whistleblower Program. Dodd-Frank extended anti-retaliation protections to SEC whistleblowers.[72] The Commission has the authority to enforce these anti-retaliation provisions through civil enforcement actions and proceedings,[73] and the whistleblower may also maintain a private right of action in federal court.[74] For purposes of the anti-retaliation protections, a person is considered a whistleblower if he or she possesses a reasonable belief that the information being provided "relates to a possible securities law violation…that has occurred, is ongoing, or is about to occur," and the information is provided as required by statute.[75] The anti-retaliation protections apply whether or not the whistleblower ultimately qualifies for an award.[76] This is significant because many of the whistleblowers who report tips to the Commission will not receive awards; however, 100% of whistleblowers who report tips based on a reasonable belief of securities law violations receive protection from retaliation.

Furthermore, the Commission's rules prohibit any person from taking action to impede an individual from reporting a securities law violation to the Commission, including through the use of a confidentiality agreement.[77] OWB is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations, or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing. OWB also monitors federal court cases addressing the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002. In addition, OWB reviews employee confidentiality and other agreements provided by whistleblowers for potential conduct by employers that would interfere with a whistleblower's direct communication with the Commission.[78]

The protection against retaliation that Dodd-Frank affords an employee who lawfully provides information to the Commission, or assists the Commission in an investigation, is far reaching. It prohibits not only demotion or discharge, but also guards against threats and harassment, direct or indirect, and any other manner of discrimination.[79] The Dodd-Frank protections are much more expansive than those set forth in Sarbanes-Oxley.[80] Some of the key employment protections are the following:

(1) Private right of action to go directly to federal district court.[81] There is no requirement that administrative proceedings be pursued beforehand.

(2) The statute of limitations is six years after the date that retaliation occurred or three years after discovering the retaliation, but in no event longer than ten years.[82]

(3) Relief includes reinstatement with same seniority status, twice the amount of back pay with interest, and attorneys' fees and litigation costs.[83]

An important case to be aware of when considering protection for whistleblowers from retaliation is *Asadi v. G.E. Energy (USA), L.L.C.*,[84] decided by the United States Court of Appeals for the Fifth Circuit on July 17, 2013, and which the Commission discussed in its 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program. *Asadi* holds that the anti-retaliation provisions of the Dodd-Frank Act provide a private cause of action only for those employees who report allegations of possible securities law violations directly to the Commission.[85] The Commission specifically notes in its 2013 Annual Report that:

> The Fifth Circuit's decision in *Asadi* is contrary to several district court decisions and may contradict a Commission regulation that provides protection for employees from retaliation where they report possible securities violations to persons or authorities other than the Commission, including reporting internally. District courts in both Colorado and California, however, have agreed with the *Asadi* holding.[86]

The Commission recently filed an amicus brief in a case that is currently up on appeal before the United States Court of Appeals for the Second Circuit, *Liu v. Siemens AG*, wherein the Commission makes clear its view that whistleblowers are entitled to Dodd-Frank's full protections against retaliation whether they report their employers' wrongdoing internally or go to the Commission.[87] In its brief, the Commission sets forth its concerns that, if the Dodd-Frank anti-retaliation provisions do not apply in situations where employees report internally, its rules that provide strong incentives for a whistleblower to first report internally will be undermined, and its ability to pursue enforcement action against employ-

ers who retaliate against whistleblowers who report internally would be substantially weakened.[88] These are serious concerns that have a direct impact on whether a whistleblower will choose to report first to the company, or bypass this option and go directly to the Commission. During the rule-making process, many corporations urged the Commission to draft the rules in a way that will not discourage a whistleblower from first reporting perceived wrongdoing to the company, in order for the company to have an opportunity to address the situation on its own in an appropriate way. By not offering whistleblowers who report internally the anti-retaliation protections of Dodd-Frank, case law could make it less likely that whistleblowers will choose to report to the company in the first instance. Neither the Commission nor the corporate community think that this is a good thing.

D. Takeaway #9: The SEC Whistleblower Program Incentivizes Whistleblowers to Report Internally First

The SEC drafted its rules implementing the Whistleblower Program so as to incentivize whistleblowers to report their concerns to their companies in the first instance.

1. Employees—Generally

Ideally, a company would like a whistleblower to report any concerns internally first, instead of going directly to the Commission. That way the company can conduct its own thorough investigation, under the supervision of expert outside counsel, and decide the best course of action to take, including whether the matter needs to be reported to the Commission. The Commission intentionally drafted its rules with provisions that would encourage whistleblowers in appropriate circumstances to first report internally.

Under the rules pertaining to awards, whistleblowers are given credit if they first report internally. Specifically listed as factors that can increase a whistleblower's award are,

> Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and (ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.[89]

Likewise, an award can be decreased if a whistleblower undermined the integrity of a company's compliance or reporting system, or hindered an internal investigation through, for example, delay tactics or making false statements.[90]

In addition, if a whistleblower first reports internally, and within 120 days after that also reports the matter to the Commission, the Commission will treat the date of the internal report to the company as the date of reporting to the Commission for purposes of making an award to the whistleblower.[91] Also, with prior internal reporting the whistleblower receives "credit" for any information provided by the company to the Commission (information which could be much more extensive than the information originally known to the whistleblower), as long as the whistleblower reports to the SEC within 120 days of reporting that information to the company.[92] This is the case even if the company reports to the Commission before the whistleblower does. The assessment of whether the whistleblower presented "original" information will not be affected by the company reporting first under these circumstances. The significance of the whistleblower receiving "credit" for the information provided by the company (as long as the 120-day requirement is met) is to encourage whistleblowers to bring issues to the attention of the company before reporting to the Commission.

2. Gatekeepers

The way the SEC whistleblower rules were written allows even gatekeepers in an organization to report a tip to the Commission, including officers, directors, accountants and even lawyers, if the company does not do the "right thing." Certain senior level people, who otherwise are not permitted to be whistleblowers, can become whistleblowers if they have reported internally first.

Information is not considered original information derived from independent knowledge or analysis (i.e., eligible for a whistleblower award) if it is: (1) a "communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2)…, the applicable state attorney conduct rules, or otherwise"; or (2) if the whistleblower obtained the information as an officer, director, trustee, or partner of an entity or in an auditing, investigative, or accounting capacity,[93] *unless* the whistleblower has "a reasonable basis to believe that disclosure of the information…is necessary to prevent…substantial injury to…investors"; the "entity is engaging in conduct that will impede an investigation of the misconduct"; or at least 120 days have elapsed since the whistleblower reported the information to the relevant audit committee, chief legal officer, chief compliance officer, or supervisor (or 120 days from when the whistleblower received the information if high level management was already aware of the information).[94]

E. Takeaway #10: How to Protect Your Corporate Client Against an SEC Whistleblower

The Commission has limited resources and cannot possibly investigate and pursue all violations of securities law on its own. It is in the government's interest to encourage companies to implement and enforce effective

compliance programs and to self-report when an issue is discovered. The Commission will factor in the way a company addresses problems and whether the company voluntarily informed the Commission, in fashioning an appropriate resolution in an enforcement action. With the enactment of the SEC Whistleblower Program and the publicity that the awards granted through this program have already received, it is obvious that the likelihood that corporate wrongdoing will be reported to the Commission has greatly increased. Self-reporting is crucial because a company has to assume that a whistleblower from within the company will alert the Commission to perceived wrongdoing.

In what has come to be known as the "Seaboard Report," the Commission set forth a road map of the various factors it will consider in deciding how to respond to a company that self-reports a securities law violation.[95] A significant consideration is whether the company has taken steps to put into place effective internal controls and procedures designed to prevent a recurrence of the misconduct. Having a mechanism in place for a whistleblower to effectively and safely report concerns and issues internally within the company is essential. But it has to be a system that protects the whistleblower's status in the company, and that allows for issues raised to be addressed in a serious and meaningful way. The vast majority of whistleblowers first report within, and hope that the company will investigate and correct the perceived wrongdoing.[96] They care about their job and the company, which is why they come forward with their concerns in the first place. They do not want to be put in a position where they are reporting to the government unless it is the only way to correct the problem. If companies implement meaningful systems for whistleblowers to report issues, and ensure that they will not be retaliated against, whistleblowers will be less likely to go outside of the company. Reporting systems should be user friendly and well publicized, and include the following: a way to report anonymously if desired by the whistleblower; mechanisms for giving feedback to the whistleblower and others in the company regarding action taken to address reported issues; a reward system for employees who speak up about concerns and problems; and zero tolerance for retaliatory actions against a whistleblower. Whistleblowers who report internally should be embraced and celebrated by the company, not shunned and ostracized. The company needs to send a loud, clear message from the top down that it is a good corporate citizen, and it has to act like one.

The Commission will meet with a company that wishes to self-report and work with it to achieve an appropriate resolution. A company risks far more serious consequences if it fails to self-report securities law violations. The success of the Commission's Enforcement Cooperation Program,[97] which utilizes cooperation agreements, deferred prosecution agreements and non-prosecution agreements in situations where individuals or companies have exhibited full, complete and truthful cooperation, illustrates the benefits to companies of self-reporting.[98]

IV. Conclusion

As was made clear in our CLE programs, and as further highlighted in the takeaway points discussed above, the Federal False Claims Act and the SEC Whistleblower Program are important weapons in the federal government's arsenal for fighting fraud and corruption. The vast majority of whistleblowers who report on their employer company do not wish to "blow the whistle," but only do so as a last resort because their concerns fall on deaf ears, and they are often marginalized or fired for reporting what they perceive to be misconduct. The monetary compensation provided to successful whistleblowers is a powerful and necessary incentive for them to report fraud and wrongdoing to the government, but companies can protect themselves against whistleblower-initiated actions. By providing meaningful opportunities for concerned employees to first report issues internally and responding to those concerns in a supportive and meaningful way, companies can show that they are truly good corporate citizens, that they value employees who speak up about problems, and that they will correct behavior that violates the law. This will benefit all affected parties—the company, its employees, the government, and the public.

Endnotes

1. The Committee on Civil Prosecution is focused on the dynamic and increasingly important legal practice area involving the civil prosecution of commercial fraud. For more information regarding the Committee, *see* https://www.nysba.org/ComFedCivilProsecution.aspx.
2. The first CLE course, *Blowing the Whistle on Commercial Fraud*, was presented on May 5, 2013 at the Section's Spring Meeting in Saratoga Springs; the second CLE course, *Blowing the Whistle on Fraud: Litigating Federal and New York False Claims Act and SEC Whistleblower Cases*, was given on December 9, 2013 in New York City.
3. Faculty members represented a broad array of perspectives, including private counsel (both plaintiff and defendant) and the government (including representatives from the United States Attorney's Office for the Southern District of New York, the United States Attorney's Office for the Eastern District of New York, the New York State Office of the Attorney General, and the United States Securities and Exchange Commission).
4. This article is limited to those portions of the CLE programs that covered the federal whistleblower enforcement, namely, the Federal False Claims Act and the SEC Whistleblower Program. It does not address the portions of the CLE programs that covered state whistleblower enforcement through the New York False Claims Act.
5. 31 U.S.C. §§ 3729-33 (2009).
6. *Qui tam* is short for the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to "who as well as for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).
7. The FCA provides that in cases where the government elects to intervene or join the action as lead prosecutor, the whistleblower

award will generally fall within the range of 15-25% of the amount recovered by the government. 31 U.S.C. § 3730(d)(1). Where the government declines to intervene and the relator is nonetheless successful in recovering money for the government, the whistleblower award will generally fall within the range of 25-30% of the recovery. 31 U.S.C. § 3730(d)(2).

8. *See* 31 U.S.C. § 1329(a)(1). An important exception is the explicit exclusion of tax fraud. The FCA provides that it "does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." 31 U.S.C. § 3729(d).

9. U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview, October 1, 1987–September 30, 2013*, at 2 (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (last visited Feb. 28, 2014) [hereinafter Dep't of Justice *Fraud Statistics-Overview*].

10. *Id.*

11. *Id.*

12. *Id.* It is notable that, as significant as the federal civil FCA recovery statistics are, they only tell part of the story because they do not include criminal fines and recoveries under state false claims acts. For instance, according to one source,

> In fiscal year 2012, federal and state False Claims Act cases returned over $9 billion back to the government. This sum consists of criminal fines as well as several large state False Claims Act settlements, including over $300 million recovered by the State of California in a single Medicaid HMO case.

See FY 2012 Is Record Year for FCA Recoveries, TAXPAYERS AGAINST FRAUD, Oct. 10, 2012, *available at* http://www.taf.org/blog/fy-2012-record-year-fca-recoveries (last visited Feb. 28, 2014).

13. Press Release, U.S. Dep't of Justice, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html (last visited Feb. 28, 2014).

14. *See* 31 U.S.C. § 3729(a)(1). The FCA liability provisions that are not typically invoked are 31 U.S.C. § 3729(a)(1)(D), (E), (F).

15. 31 U.S.C. § 3729(a)(1)(A).

16. 31 U.S.C. § 3729(a)(1)(B).

17. 31 U.S.C. § 3729(a)(1)(C).

18. 31 U.S.C. § 3729(a)(1)(G).

19. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(9) (2014).

20. 31 U.S.C. § 3730(d)(1), (2).

21. *See* 31 U.S.C. § 3729(a).

22. 31 U.S.C. § 3729(b)(1)(A).

23. 31 U.S.C. § 3730(b)(2).

24. *See id.*

25. The initial seal period is "at least 60 days." 31 U.S.C. § 3730(b)(2). This period may be extended by court order upon a showing of good cause. 31 U.S.C. § 3730(b)(3). Depending on the nature of the case, the seal period may be repeatedly extended. It is not uncommon for the seal period to last several years.

26. 31 U.S.C. § 3730(b)(2), (4).

27. 31 U.S.C. § 3730(c)(3).

28. 31 U.S.C. § 3730(e)(4).

29. 31 U.S.C. § 3730(b)(5).

30. 31 U.S.C. § 3730(d)(4).

31. If the relator is found to have "planned and initiated" the FCA violation, the Court may reduce the relator's share of the recovery. If the relator is convicted of criminal conduct in connection with the FCA violation, the relator shall be dismissed from the case and shall not receive a portion of the recovery. 31 U.S.C. § 3730(d)(3).

32. Dep't of Justice *Fraud Statistics-Overview, supra* note 9, at 2.

33. *See* 31 U.S.C. § 3730(b)(2), (4).

34. The statute provides that,

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b).

35. Pub. L. No. 80-772, § 3287, 62 Stat. 828 (1948) (codified as amended at 18 U.S.C. § 3287 (2009)) (This law was based on a temporary suspension of limitations act adopted in 1942). The Act was amended for the first time in 2008. *See* Pub. L. No. 110-329, § 8117, 122 Stat. 3647 (2008).

36. 18 U.S.C. § 3287.

37. *See United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 180-81 (4th Cir. 2013) (WSLA suspends the statute of limitations in FCA cases); *United States v. Wells Fargo Bank, N.A.*, No. 12 Civ. 7527 (JMF), 2013 U.S. Dist. LEXIS 136539, at 20-21 (S.D.N.Y. Sept. 24, 2013) (WSLA applies to fraud unrelated to the war effort); *United States ex rel. Paulos v. Stryker Corp.*, No. 11-0041-CV-W-ODS, 2013 U.S. Dist. LEXIS 82294, at *50-51 (W.D. Mo. June 12, 2013) (WSLA tolls FCA statute of limitations); *United States v. BNP Paribas SA*, 884 F. Supp. 2d 589, 603 (S.D. Tex. 2012)(WSLA applies to civil FCA regardless of whether claims had to do with war); *but see, United States ex rel. Bergman v. Abbot Labs*, No. 09-4264, 2014 U.S. Dist. LEXIS 12333, at *56-57 (E.D. Pa. Jan. 29, 2014)(WSLA does not apply in a non-intervened (declined) FCA action); *United States ex rel. Emanuele v. Medicor Assocs.*, No. 10-245 Erie, 2013 U.S. Dist. LEXIS 104650, at *19-21 (W.D. Pa. July 26, 2013) (same).

38. *United States ex rel. Carter v. Kellogg Brown & Root Servs., Inc.*, 710 F.3d 171 (4th Cir. 2013), *petition for cert. filed* (U.S. June 24, 2013) (No. 12-1497).

39. *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 134 S. Ct. 375 (2013).

40. FIRREA, 12 U.S.C. §§ 1833a *et seq.*, provides bounties for whistleblowers against financial institutions seeking the disgorgement of fraud-induced gains and the recovery of related losses suffered by the public.

41. Pub. L. No. 111-203, § 922(a), 124 Stat 1841 (2010) (codified at 15 U.S.C. § 78u-6).

42. 15 U.S.C. §§ 78a-78pp.

43. Exchange Act § 21F, 15 U.S.C. § 78u-6.

44. 15 U.S.C. § 78u-6(b)(1). *See also* 17 C.F.R. § 240.21F-4(a), (b).

45. Awards are paid not only based on monetary sanctions associated with SEC enforcement actions, but also on related enforcement actions. 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-3(b). "The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $ 1,000,000." 15 U.S.C. § 78u-6(a)(1). A related action, which includes criminal actions, is "any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action." 15 U.S.C. § 78u-6(a)(5); *see also* 17 C.F.R. § 240.21F-3(b)(1).

46. 15 U.S.C. § 78u-6(b)(1)(A), (B).

47. SEC, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, at 1 (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf (last visited Feb. 28, 2014) [hereinafter SEC *Annual Report*].

48. Securities Whistleblower Incentives and Protections Final Rule, 76 Fed. Reg. 34,300 (June 13, 2011). The SEC's Final Rules are codified at 17 C.F.R. §§ 240.21F-1 through 240.21F-17. A careful examination of these rules should obviously occur prior to filing a whistleblower case with the SEC.

49. SEC *Annual Report*, *supra* note 47, at 5.

50. 17 C.F.R. § 240.21F-9(a)(1), (2).

51. The SEC Office of Market Intelligence is a very sophisticated unit that includes subject matter experts that screen the vast amount of information to which the SEC has access. *See* SEC, *The Securities and Exchange Commission Post-Madoff Reforms* (Apr. 2012), *available at* http://www.sec.gov/spotlight/secpostmadoffreforms.htm; Ben Protess and Axam Ahmed, *With New Firepower, S.E.C. Tracks Bigger Game*, N.Y. TIMES, May 21, 2012, *available at* http://dealbook.nytimes.com/2012/05/21/with-new-firepower-s-e-c-tracks-bigger-game (last visited Feb. 28, 2014); Zachary A. Goldfarb, *SEC is hiring more experts to assess complex financial systems*, WASHINGTON POST, June 15, 2010 ("Although lawyers fill most of the SEC's ranks, the agency has been hiring experts with specialized quantitative skills and those who have worked on Wall Street who are hip to its tricks."), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/14/AR2010061404757.html (last visited Feb. 28, 2014).

52. *See* 17 C.F.R. § 240.21F-8(b) for a description of the type of assistance and cooperation a whistleblower may be asked to provide to the Commission.

53. 17 C.F.R. § 240.21F-6(a)(2).

54. 17 C.F.R. § 240.21F-10(a). The OWB also announces on Twitter each time a new group of NoCAs is posted to its website, and sends e-mail alerts to GovDelivery when its website is updated. GovDelivery is a vendor that provides communications for public sector clients. In addition, whistleblowers may sign up to receive an update via e-mail every time the list of NoCAs on OWB's website is updated. *See* SEC *Annual Report*, *supra* note 47, at 13.

55. 17 C.F.R. § 240.21F-10(b).

56. *See* 17 C.F.R. § 240.21F-10(e)(2), (f).

57. *See* 17 C.F.R. § 240.21F-10(e).

58. *See* 15 U.S.C. § 78u-6(f); 17 C.F.R. § 240.21F-13(a).

59. *See id.*

60. Press Release, SEC, SEC Awards More than $14 Million to Whistleblower (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UmAruPmkqu8 (last visited Feb. 28, 2014)[hereinafter SEC Press Release]. The Commission expects future awards will exceed this amount. Since the inception of the whistleblower program in August 2011, the Commission has granted awards to six whistleblowers. Four whistleblowers have received awards in Fiscal Year 2013. *See* SEC *Annual Report*, *supra* note 47, at 14.

61. 17 C.F.R. § 240.21F-3(a)(1).

62. 17 C.F.R. § 240.21F-3(a)(2).

63. This section addresses conduct of an attorney who is representing an issuer before the Commission. It reads as follows:

> (d) Issuer confidences.
>
> ***
>
> (2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2).

64. 17 C.F.R. § 240.21F-4(b)(4)(i).

65. 17 C.F.R. § 240.21F-4(b)(4)(ii). It is advisable for an attorney to seek the advice of ethics counsel before deciding to be a whistleblower. *See* NYCLA Comm. on Prof'l Ethics, Formal Op. 746 (2013), *available at* https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf (last visited Feb. 28, 2014).

66. 17 C.F.R. § 240.21F-4(b)(4)(iii).

67. 17 C.F.R. § 240.21F-4(b)(4)(v).

68. 17 C.F.R. § 240.21F-8(c)(1) (employee of the SEC, DOJ or other government law enforcement entities); 17 C.F.R. § 240.21F-8(c)(2) (employee of foreign government entity); 17 C.F.R. § 240.21F-8(c)(3) (criminally convicted in relation to conduct reported); *see also* 17 C.F.R. § 240.21F-8(c)(7) (knowingly provided false information to the Commission or any authorities in connection with related actions).

69. *See* 17 C.F.R. § 240.21F-9(c). These requirements include the following: (1) you must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information; and (2) before the Commission will pay any award to you, you must disclose your identity to the Commission, and your identity must be verified by the Commission as set forth in 17 C.F.R § 240.21F-10(c).

70. Even in the announcement of the Commission's most recent and biggest award to a whistleblower of $14 million, it did not reveal the identity of the whistleblower or the facts surrounding the case. *See* SEC Press Release, *supra* note 60.

71. 17 C.F.R. § 240.21F-6(a)(2)(i).

72. 15 U.S.C. § 78u-6(h)(1)(A).

73. 17 C.F.R. § 240.21F-2(b)(2).

74. 15 U.S.C. § 78u-6(h)(1)(B)(i).

75. 17 C.F.R. § 240.21F-2(b)(1)(i), (ii).

76. 17 C.F.R. § 240.21F-2(b)(1)(iii).

77. 17 C.F.R. § 240.21F-17(a).

78. 17 C.F.R. § 240.21F-17(b).

79. 15 U.S.C. § 78u-6(h)(1)(A):

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

See also, *Menendez v. Halliburton*, ARB Case No. 12-026, ALJ Case No. 2007-SOX-005, 2013 DOLSOX LEXIS 11, at *52-53 (A.L.J. Mar. 20, 2013) (wherein the A.L.J. found in favor of the whistleblower under Sarbanes-Oxley, and awarded $30,000 compensatory damages, plus attorneys' fees and litigation costs, based upon the employer's failure to protect Menendez's identity as a whistleblower, which led employee to suffer "emotional distress and reputational injury").

80. *See* 18 U.S.C. § 1514A(b)(2)(D) (which requires a complaint to be filed "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation"); 18 U.S.C. § 1514A(b)(1)(A) (which requires a complaint be filed first with the Secretary of Labor); 18 U.S.C. § 1514(b)(1)(B) (which permits the whistleblower to bring "an action at law or equity for de novo review in the appropriate district court" if the Secretary of Labor fails to issue a final determination within 180 days of filing the complaint).

81. 15 U.S.C. § 78u-6(h)(1)(B)(i).

82. *Compare* 15 U.S.C. § 78u-6(h)(1)(B)(iii) *with* 18 U.S.C. § 1514A(b)(2)(D) (which Dodd-Frank extended from 90 days to 180 days).

83. *Compare* 15 U.S.C. § 78u-6(h)(1)(C), *with* 18 U.S.C. § 1514A(c) (which provides for same reinstatement rights, but only back pay with interest, attorneys' fees and litigation costs).

84. 720 F.3d 620 (5th Cir. 2013).

85. *Id.* at 629.

86. SEC *Annual Report*, *supra* note 47, at 6 n.7.

87. *See* Brief for SEC as Amicus Curiae Supporting Appellant, *Liu v. Siemens, A.G.*, No. 13-4385 (2d Cir. Feb. 20, 2014), *available at* http://www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf (last visited Feb. 28, 2014).

88. *See id.* at 18-27.

89. 17 C.F.R. § 240.21F-6(a)(4)(i), (ii).

90. 17 C.F.R. § 240.21F-6(b)(3).

91. 17 C.F.R. § 240.21F-4(b)(7).

92. 17 C.F.R. § 240.21F-4(c)(3).

93. 17 C.F.R. § 240.21F-4(b)(4)(i), (iii).

94. 17 C.F.R. § 240.21F-4(b)(4)(v).

95. SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499 (last visited Feb. 28, 2014).

96. *See* Ethics Resource Center, Inside the Mind of a Whistleblower, at 13 (2012) (stating that, in 2011, only 3% of whistleblowers report externally at first; 18% reported externally in a secondary report), *available at* http://www.ethics.org/files/u5/reportingFinal.pdf (last visited Feb. 28, 2014).

97. *See* http://www.sec.gov/spotlight/enfcoopinitiative.shtml (last visited Feb. 28, 2014).

98. *See*, *e.g.*, Press Release, SEC, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.UxFMH-NdVUR (last visited Feb. 28, 2014); Press Release, SEC, SEC Charges Former Carter's Executive with Fraud and Insider Trading (Dec. 20, 2010) ("The SEC also announced that it has entered a non-prosecution agreement with Carter's under which the Atlanta-based company will not be charged with any violation of the federal securities law relating to Elles's unlawful conduct."), *available at* http://www.sec.gov/news/press/2010/2010-252.htm (last visited Feb. 28, 2014).

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