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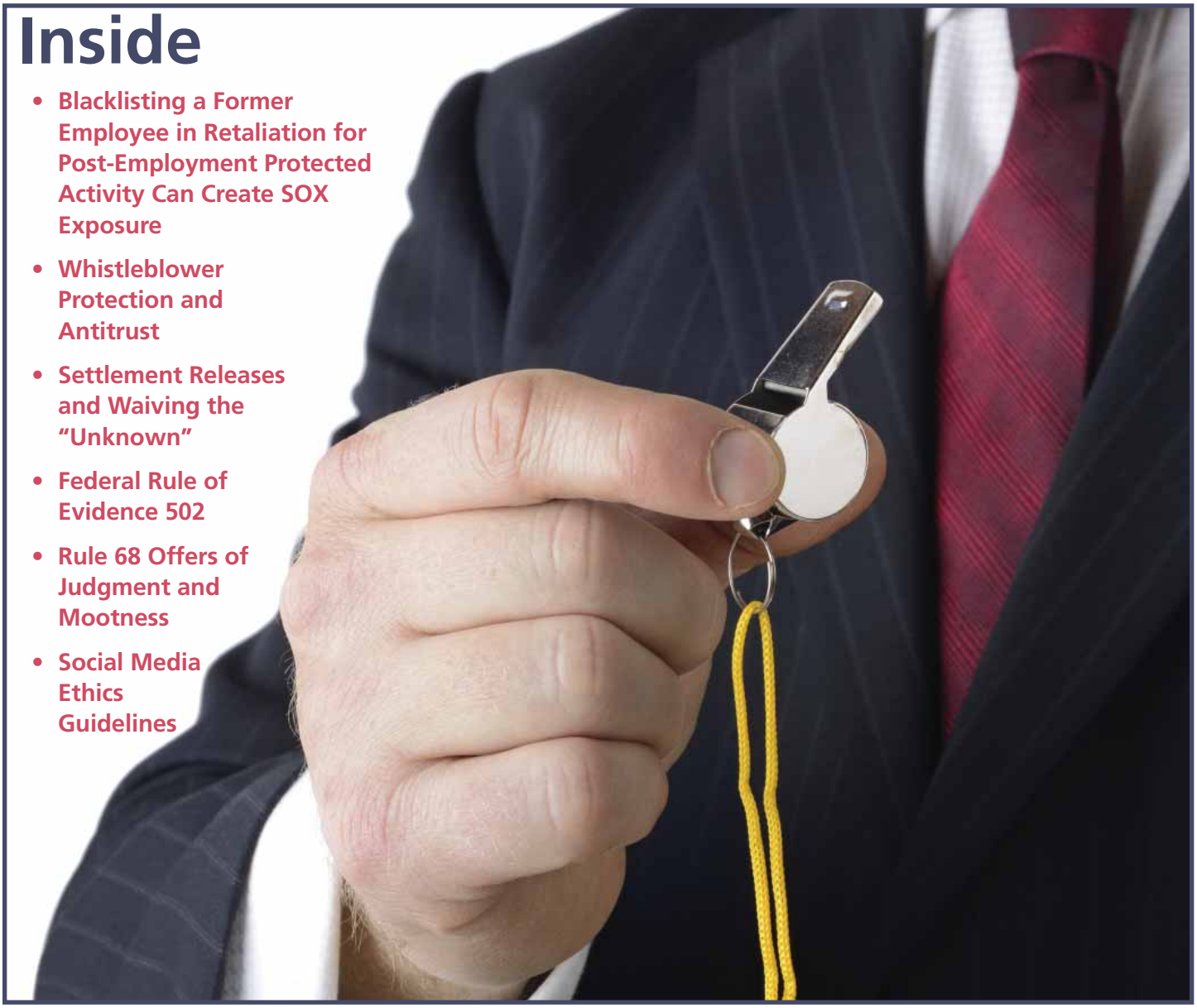

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A Message from the Chair
Gender Inequality in the Courtroom

Gender inequality in the courtroom, namely, the low number of women taking lead roles at trial and in the courtroom, exists. The American Bar Association ("ABA") studied this very issue and recently issued a Report, *First Chairs at Trial: More Women Need Seats at the Table* (2015) ("First Chairs Report").[1] The Report found that, notwithstanding the roughly equal numbers of male/female law graduates, women represented only 27% of the lawyers arguing civil cases,[2] and even less—21%—in criminal cases.[3]

Why? And what can be done?

I recently came across a federal case imposing sanctions on a lawyer for making inappropriate comments to his female adversary. The comments, made during a deposition in the presence of 14 lawyers, were, "you're still warm? You're not getting menopause, I hope."[4] In his opinion, District Judge Besosa noted that "discriminatory comments like this undoubtedly occur on a daily basis in the legal profession and are routinely swept under the rug. But the concealment does not diminish its effect."[5] Citing the First Chairs Report, the court noted that the ABA concluded that such inappropriate or stereotypical remarks directed toward women lawyers is "one of the causes of the marked underrepresentation of women in lead trial attorney roles."[6]

One jury consultant recently observed that the "lawyer as warrior" metaphor leads to gender inequality at the trial table.[7] He argues that ,"[i]f proponents of greater gender equality in the role of lead counsel and trial lawyer want to produce change, they would do well to consider that, in addition to changes in policy, a shift away from the lawyer as warrior metaphor must also occur."[8]

On the other hand, a California trial attorney concluded that the lack of mentoring may be the problem. Shaana A. Rahman, Esq., in her article *Wanted: Women Trial Lawyers*, observed that her "journey in litigation has shown…that what women lack are women mentors and role models—essentially women willing to share their personal stories, challenges and successes and women showing other women how it's done."[9]

I don't know where the answer lies. But what we can do as a Section is endeavor to explore ways to further sensitize the bench and bar, and help effectuate change. Whether through membership drives, leadership roles, mentoring programs, CLEs or "brown bag" sessions, we need to—and will—focus on this issue. Indeed, we have an Ad Hoc Committee of Female Former Section Chairs that is looking at the issue and what we as a Section can do to confront it, convening an inaugural meeting in September.

James M. Wicks

Endnotes

1. Stephanie A. Scharf & Roberta D. Liebenberg, *First Chairs at Trial: More Women Need Seats at the Table*, 14-15 (2015), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf (last visited Aug. 31, 2015) [hereinafter First Chairs Report].
2. *Id.* at 10.
3. *Id.* at 12-13.
4. *Cruz-Aponte v. Caribbean Petroleum Corp.*, No. 09-2092 (FAB), 2015 U.S. Dist. LEXIS 109646, at *33 (D.P.R. Aug. 17, 2015).
5. *Id.* at *38.
6. *Id.* (citing First Chairs Report, *supra* note 1, at 14-15).
7. John G. McCabe, Ph.D., *Women Warriors: More Women Need Seats at Counsel Table* (2015), *available at* http://www.doar.com/wp-content/uploads/2015/07/Women-Warriors.pdf (last visited Aug. 31, 2015).
8. *Id.* at 3.
9. Shaana A. Rahman, Esq., *Wanted: Women Trial Lawyers* (Feb. 2013), *available at* http://plaintiffmagazine.com/Feb13/Rahman_Wanted_Women-trial-lawyers.pdf (last visited Aug. 31, 2015).

Blacklisting a Former Employee in Retaliation for Post-Employment Protected Activity Can Create SOX Exposure: *Kshetrapal v. Dish Network, LLC*

By Peter J. Pizzi

Two financial crises ago, Congress determined to expand whistleblower protections for those who report financial fraud and related misconduct. The result became Section 1514A of the Sarbanes-Oxley Act of 2002 ("SOX"). Recently, the Honorable Paul A. Crotty of the Southern District of New York had occasion to explore the contours of SOX whistleblower protection. In *Kshetrapal v. Dish Network, LLC*,[1] Judge Crotty became the first federal judge to hold that a former employee who engages in post-employment protected activity may bring a whistleblower retaliation claim under the statute.[2] According to Judge Crotty's analysis, SOX protections extend to an individual who discloses evidence of financial wrongdoing by his employer months or years *after* the employer-employee relationship ends and who, thereafter, suffers retaliation.[3]

1. Background

Tarun Kshetrapal was employed by Dish Network LLC ("Dish") from March 2007 through November 2008 as the Associate Director of South Asian Marketing.[4] According to the complaint, in spring 2008, Kshetrapal began to suspect that Dreamakers, a marketing agency retained by Dish, was billing Dish for work that Dreamakers had performed incorrectly or had not performed at all.[5] Kshetrapal shared his suspicions with his supervisors, but they allegedly ignored Kshetrapal's concerns.[6] Unknown to Kshetrapal at the time,[7] his supervisors allegedly were among the Dish executives who approved Dreamakers' fraudulent invoices and granted Dreamakers exclusivity over South Asian programming in exchange for gifts that included a new Mercedes Benz, Rolex watches, thousands of dollars to spend in Atlantic City, spa treatments, Broadway show tickets, limousine rides, airline tickets, luxury hotel accommodations, and discounted gift cards.[8]

Determined to confirm whether his suspicions were correct, Kshetrapal performed his own investigation,[9] but the complaint alleges he was reprimanded for probing into Dreamakers' activities.[10] Thereafter, Kshetrapal refused to sign off on Dreamakers invoices that he believed to be fraudulent.[11] Upon learning about Kshetrapal's actions, Dreamakers' CEO allegedly demanded that a Dish executive fire Kshetrapal.[12] When the executive refused to fire Kshetrapal, Dreamakers' CEO threatened to expose that executive's acceptance of a bribe from Dreamakers.[13] The Dish executive then allegedly reported her acceptance of a "steeply discounted Mercedes" from Dreamakers to Dish's Senior Vice President of Programming, who began an internal investigation into the matter.[14]

Dish's investigation allegedly revealed fraudulent invoicing, corroborating Kshetrapal's findings, and exposed alleged bribery of Dish executives.[15] In October 2008, Dish ended its relationship with Dreamakers and discharged several senior executives involved in the scandal.[16] Despite Kshetrapal's full cooperation with Dish's investigation, the complaint alleges that Kshetrapal was forced to resign "without justification" in November 2008.[17]

Following Dish's termination of its business relationship with Dreamakers, Dreamakers filed a breach of contract claim in December 2008.[18] In response, Dish filed counterclaims against Dreamakers for fraudulent invoicing and bribery.[19] In the course of the litigation, Dish's counsel allegedly sought to represent Kshetrapal repeatedly at his deposition.[20] The complaint alleges Dish's counsel assured Kshetrapal that Dish would not retaliate against him for testifying truthfully at his deposition by interfering with his current employment.[21] Following Dish's assurances, Kshetrapal was deposed on behalf of Dish and testified extensively about the fraudulent invoicing, the bribery, and the complicity of his former supervisors.[22]

Contrary to Dish's assurances,[23] the complaint alleges that Dish's management proceeded to blacklist Kshetrapal.[24] In 2009, Dish discontinued business with SAA VN, LLC ("SAA VN"), a Bollywood music streaming service, upon learning that SAA VN employed Kshetrapal.[25] The following year, according to Kshetrapal's pleadings, Dish pressured Nimbus Communications Limited to rescind an employment offer to Kshetrapal for an executive position by threatening to pull its business[26] and providing a negative reference about Kshetrapal in violation of Dish's neutral reference policy.[27] Thereafter, in 2011, Dish allegedly informed SAA VN that it was unwilling do business with SAA VN because SAA VN continued to employ Kshetrapal, alluding to Kshetrapal's "prior unethical business conduct."[28]

Following Dish's repeated interferences with Kshetrapal's subsequent employment, Kshetrapal filed suit against Dish under Section 1514A of SOX's whistleblower retaliation statute, among other claims.[29]

2. Expansive Whistleblower Protection Under Sarbanes-Oxley

The issue in Kshetrapal's case was whether his post-termination deposition testimony qualified as protected activity under SOX.[30] The analysis hinged on whether

Kshetrapal was an "employee" for purposes of the SOX statute.[31]

a. *Robinson v. Shell Oil Company*

The Supreme Court's ruling in *Robinson v. Shell Oil Company*[32] influenced Judge Crotty's decision to adopt an expansive interpretation of the term "employee" under SOX.[33] In *Robinson*, the Supreme Court considered whether the term "employees," as used in Section 704(a) of Title VII of the Civil Rights Act of 1964, included former employees.[34] Robinson claimed that Shell Oil Co. ("Shell") had discharged him because of his race.[35] Robinson filed a charge with the EEOC, and while the charge was pending, he applied for a position with another company.[36] Robinson claimed that Shell gave a negative reference to the potential employer in retaliation for the pending EEOC charge, and he filed suit under Section 704(a), alleging retaliatory discrimination.[37]

Section 704(a) makes it unlawful "'for an employer to discriminate against any of his employees or applicants for employment'" who have engaged in Title VII protected activity or who have assisted others in doing so.[38] Justice Thomas, writing for a unanimous Court, concluded that the term "employees," as used in Section 704(a), was ambiguous as to whether it included former employees.[39] First, the Court found Section 704(a) lacks a "temporal qualifier" indicating whether the statute protects only individuals "still employed at the time of the retaliation."[40] Second, the Court found Title VII's definition of "employee" also "lacks any temporal qualifier" and could equally refer to current or past employees.[41] Third, the Court found that a number of other Title VII provisions "use the term 'employees' to mean something more inclusive or different from 'current employees.'"[42] For example, the Court noted that one of Title VII's statutory remedies is reinstatement, which necessarily applies to former employees.[43] The Court further found that, while some sections of Title VII use the term "employee" to refer "unambiguously to a current employee," the term does not carry the same meaning in every section or context of Title VII.[44] As a result, the Court concluded the term "employees" as used in Section 704(a) is necessarily ambiguous, and that an inquiry into the broader context of the statute was required to resolve the ambiguity.[45]

The Supreme Court found the inclusion of former employees within Section 704(a)'s scope consistent with the broader context of Title VII and with Section 704(a)'s primary purpose of "maintaining unfettered access" to Title VII's remedial mechanisms.[46] First, the Court noted, several sections of Title VII "plainly contemplate that former employees will make use of the remedial mechanisms of Title VII."[47] Furthermore, the Court found it "far more consistent to include former employees within the scope" of Section 704(a)'s protection because the statute "expressly protects employees from retaliation for filing a charge," and a charge alleging unlawful discharge would "necessarily be brought by a former employee."[48] Second, the Court found that excluding former employees from the scope of Section 704(a) would undermine Title VII's effectiveness "by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."[49] Accordingly, the Supreme Court held that former employees are included within the scope of the term "employees" for purposes of Section 704(a)'s protection.[50]

b. *Kshetrapal v. Dish Network, LLC*

The *Robinson* Court's reasoning guided Judge Crotty's analysis of whether Kshetrapal was an "employee" for purposes of the SOX statute and, therefore, had engaged in protected activity during his post-termination deposition.[51]

Under Section 1514A of the SOX statute, an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act" that an employee performs in reporting corporate fraud.[52] To bring a successful SOX whistleblower retaliation claim, an employee must "'prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; (4) the protected activity was a contributing factor in the unfavorable action.'"[53]

Dish argued that the scope of Kshetrapal's SOX claim was limited to his protected activities while employed.[54] The Court, however, disagreed with Dish's reading of the statute.[55] Looking to "the language and purpose of the SOX statute,"[56] the Court found that Section 1514A extends protection from whistleblower retaliation to former employees.[57] On its face, the provision covers an employee engaged in protected activity during the term of employment.[58] The term "employee," however, is not defined within SOX nor does Section 1514A contain a "temporal qualifier" indicating whether "employee" only refers to current employees.[59] Therefore, like the *Robinson* Court found in analyzing Section 704(a) of Title VII, the *Kshetrapal* Court found the term "employee" ambiguous as used in Section 1514A of SOX.[60] Importantly, as in *Robinson*, the Court noted that reinstatement is one of the remedies set forth in Section 1514A, leading to the inference that "employee" as used in Section 1514 includes former employees.[61]

Finding Section 1514A ambiguous, the Court relied on sources outside the statute for guidance.[62] First, the Court looked to the Department of Labor ("DOL") regulations and administrative decisions to determine whether the term "employee" includes former employees.[63] The Court found that the DOL regulations implementing Section 1514A "define 'employee' to include 'an individual presently *or formerly* working for a covered person.'"[64]

Additionally, the Court relied on a recent Administrative Review Board ("ARB") that held "an employee's post-termination whistleblowing c[ould] constitute protected activity under SOX."[65] The Court noted that, while the proper level deference to DOL regulations and administrative decisions is unclear,[66] courts have afforded *Skidmore* deference to such regulations and administrative decisions.[67]

Next, the Court looked to the legislative purpose of SOX.[68] The Court found that interpreting the term "employee" expansively to include former employees supported SOX's intended purpose of combating "'what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities… but even internally.'"[69] Moreover, the Court found its interpretation of "employee" consistent with a recent Supreme Court decision holding "the term 'employee' should be interpreted expansively in the context of Section 1514A."[70] The Court explained that limiting the term "employee" to current employees "would discourage employees from exposing fraudulent activities of their former employers for fear of retaliation in the form of blacklisting or interference with subsequent employment."[71]

The Court went on to hold that Kshetrapal's post-termination deposition was protected activity under SOX,[72] because a contrary holding would subvert the purpose of SOX to "encourage whistleblowing."[73] For the above reasons, the Court held that SOX whistleblower protection covers former employees, and that a former employee's post-termination deposition testimony is protected activity under SOX.[74]

3. Conclusion

Following the *Kshetrapal* decision, a terminated employee who reports corporate fraud after being discharged may still bring a retaliation claim under SOX. Typically, a whistleblower retaliation claim arises in the context of a former employee challenging her discharge after reporting corporate fraud during the term of her employment. Kshetrapal's case is unique in that his protected activity is his deposition testimony taken *after* his employment, and he is challenging Dish's actions subsequent to that post-employment deposition (i.e. allegedly refusing to do business with Kshetrapal's employer, giving negative references in violation of Dish's neutral reference policy, and interfering with an employment offer).[75] Compared to a typical whistleblower retaliation claim, there is arguably less of a nexus among Kshetrapal's employment by Dish, his protected activity, and Dish's alleged retaliation. Consequently, Judge Crotty's decision is a noteworthy expansion of SOX whistleblower protection in that a former employee disclosing financial irregularities long after the employer-employee relationship has ended is now protected under SOX from retaliation.

Endnotes

1. *Kshetrapal v. Dish Network, LLC*, No. 14-cv-3527 (PAC), 2015 U.S. Dist. LEXIS 24573 (S.D.N.Y. Feb. 27, 2015).
2. *See id.* at *6-13.
3. *See id.*
4. *Id.* at *2.
5. *Id*.
6. *Id.* at *2-3.
7. Compl. at 15, *Kshetrapal v. Dish Network, LLC*, (S.D.N.Y. filed May 16, 2014) (No. 14-cv-3527 (PAC)) [hereinafter Kshetrapal Compl.].
8. *Id*. at 1-2.
9. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *3.
10. *Id*.; *see also* Kshetrapal Compl., *supra* note 7, at 14.
11. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *3.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id.* at *3-4; Kshetrapal Compl., *supra* note 7, at 16.
17. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4; Kshetrapal Compl., *supra* note 7, at 16.
18. *Id*.
19. *Id*.
20. Kshetrapal Compl., *supra* note 7, at 17.
21. *Id*.
22. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4.
23. Kshetrapal Compl., *supra* note 7, at 17.
24. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *4-6.
25. *Id*. at *4-5; Kshetrapal Compl., *supra* note 7, at 18.
26. Kshetrapal Compl., *supra* note 7, at 19.
27. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *5; Kshetrapal Compl., *supra* note 7, at 20.
28. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *5; Kshetrapal Compl., *supra* note 7, at 21.
29. Kshetrapal Compl., *supra* note 7, at 23-25; *see also Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
30. *See Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
31. *See id*.
32. 519 U.S. 337 (1997).
33. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *9 n.3.
34. *Robinson*, 519 U.S. at 339.
35. *Id*.
36. *Id*.
37. *Id*. at 339-40.
38. *Id*. at 339 (quoting 42 U.S.C § 2000e-3 (1972)).
39. *Id*. at 341.
40. *Id*.
41. *Id*. at 342.
42. *Id*.
43. *Id*.
44. *Id*. at 343.
45. *Id*. at 343-44.
46. *See id*. at 345-46.

47. *Id*. at 345.
48. *Id*. (internal quotations omitted).
49. *Id*. at 346.
50. *Id*.
51. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-13.
52. 18 U.S.C. §1514A(a) (2010); *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6.
53. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *6-7 (quoting *Bechtel v. Admin. Review Bd*., 710 F.3d 443, 447 (2d Cir. 2013)).
54. *Kshetrapal*, 2015 U.S. Dist. LEXIS 24573, at *7.
55. *Id*.
56. *Id*.
57. *See id*. at *12.
58. *See id*. at *7-8.
59. *Id*. at *8.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*. (quoting 29 C.F.R. 1980.101).
65. *Id*. (citing *Levi v. Anheuser Busch Inbev*, 2014 DOLSOX LEXIS 42, at *5 (ARB July 24, 2014)).
66. *Id*. at *8 n.2 (citing *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1186-87 (2014) (Sotomayor, J. dissenting)).
67. *Id*. (citing *Lawson*, 134 S. Ct. at 1174).
68. *Id*. at *9.
69. *Id*. (quoting *Bechtel v. Admin. Review Bd*., 710 F.3d 443, 446 (2d Cir. 2013)).
70. *Id*. at *9 n.3 (citing *Lawson*, 134 S. Ct. at 1176 (holding Section 1514A's whistleblower protection extends to the employees of private contractors and subcontractors)).
71. *Id*. at *12-13.
72. *Id*. at *12.
73. *Id*. at *13 (quoting *Lawson*, 134 S. Ct. at 1170).
74. *See id* at *12-13.
75. *See id*. at *4-6.

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Whistle While You Work—For a Cartelist: Whistleblower Protection and Antitrust

1. Introduction

In early 2013, Senators Patrick Leahy, D-Vermont, and Chuck Grassley, R-Iowa, introduced a piece of legislation in the Senate called the Criminal Antitrust Anti-Retaliation Act (CAARA), which sought to provide anti-retaliatory protection for antitrust whistleblowers who reported violations of criminal cartel activity.[1] CAARA would, for the first time, allow an employee who is the subject of retaliation to file a complaint in federal court for reinstatement, back pay, and damages to cover litigation costs and attorney fees.[2] However, the bill would not provide antitrust whistleblowers with a reward or bounty.[3] While the Senate unanimously passed the bill in late 2013, it lingered in the House of Representatives and died with the close of the 113th Congress.[4] Yet, whistleblower rights have expanded in other areas of law, and federal law enforcers have made recent public remarks touting the benefits of whistleblower rewards. As a result, there has been renewed debate over whether a whistleblower program is needed in the antitrust context, and what that program should look like.

We discuss here the history of whistleblower statutes, and provide an overview of whistleblower programs utilized by the Internal Revenue Service ("IRS") and Securities and Exchange Commission ("SEC"). Additionally, we will discuss varying views on whether a whistleblower statute is necessary to protect those who report antitrust law violations.

2. The Historical Underpinnings of Whistleblower Statutes

Whistleblower statutes generally have two main components: (1) a *qui tam* provision, which allows a private citizen to bring suit on behalf of the government and claim a portion of any penalty imposed;[5] and (2) an anti-retaliatory provision, which provides a civil remedy for those who experience retaliation after blowing the whistle on illegal activity.[6] While today these provisions often work hand-in-hand to encourage private citizens to report illegal behavior, their historical origins are different.

a. History of *Qui Tam* Actions

Qui tam provisions date to fourteenth-century England.[7] At the time, the nation lacked any organized inspector or police force.[8] Thus, the government chose to rely on private citizens to assist in protecting safety and public order, as monarchs like King Edward III enacted statutes allowing those who reported violations to collect a steep bounty.[9] *Qui tam* provisions became so well entrenched in English law that by the 1500s courts began to award *qui tam* damages even where statutes did not expressly mandate them. Although use of such provisions ebbed and flowed, by the nineteenth century William Blackstone deemed *qui tam* actions "a consistent part of British legislative policy."[10]

In the United States, *qui tam* actions existed as early as the First Continental Congress in the late 1700s. "Of the fourteen statutes imposing penalties enacted by the First Congress, between ten and twelve authorized *qui tam* suits."[11] Even *McCulloch v. Maryland*,[12] the Supreme Court decision that helped define congressional power in the first decades of the new nation, was a *qui tam* action, brought by an individual suing for himself and the state of Maryland.

i. The False Claims Act

The best known and most developed of the early *qui tam* statutes was the False Claims Act ("FCA"), enacted at the height of the Civil War.[13] The FCA's history not only highlights the policy concerns at play in the use of q*ui tam* actions, but also paves the way for the whistleblower statutes of the last twenty years.

By 1863, the Union Army was not doing well, despite significantly outnumbering the Confederate Army.[14] One significant obstacle was the pervasive fraud and profiteering practiced by government contractors.[15] Purported weapons shipments were found to contain nothing but sawdust once the boxes were opened.[16] Soldiers' boots fell apart in less than a week, and their tents were not properly waterproofed.[17] The same horses and mules were sold to the cavalry multiple times.[18] Not only did the Union lack any agency to investigate these crimes, these crimes were often perpetrated by prominent citizens, who could rely on their political connections to escape punishment.[19]

Thus, in January, 1863, Senator Henry Wilson of Massachusetts (later Vice President to Ulysses S. Grant) introduced Senate Bill No. 467, which was designed to prevent and punish fraud on the U.S. government.[20] The bill provided that any person who knowingly submitted false claims to the government would be liable for double the government's damages plus a penalty of $2,000 for each false claim.[21] The bill also included a significant reward for those who came forward to report fraud—50% of the recovery.[22] As Senator Jacob Howard noted, the provision was based "upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."[23] While the FCA's supporters recognized that those bringing *qui tam* suits might not be the most savory of characters, they were willing

to set aside those concerns in favor of the larger goal of preventing fraud.[24]

In March 1863, the FCA was enacted into law and was noteworthy, in part, because of the limited role it provided to the government in *qui tam* actions.[25] As originally conceived, the individual bringing the action, called the relator, prosecuted the case from beginning to end.[26] The United States had no right to intervene, or to otherwise preempt the action, though it could block the withdrawal or discontinuance of the case.[27] As one commentator has written, "[i]t was a terrific plan that started well."[28]

ii. Amendments to the False Claims Act

In 1943, the FCA was substantially amended to give the government significantly more power to pursue and direct *qui tam* suits.[29] The amendments further provided that if the government possessed any knowledge of the fraud when the action was filed, the *qui tam* action could not survive.[30] In addition, at the time of filing, the relator had to present all evidence to the government, which had the first option to prosecute.[31] The amendments also eliminated any guaranteed reward, leaving that to the court's discretion.[32]

The 1943 amendments were spurred by the U.S. Attorney General at the time, Francis Biddle. Biddle denounced the use of the FCA to file so-called "parasitic lawsuits," where individuals would lift facts from existing criminal cases to file civil *qui tam* actions of their own.[33] The amendments were effective at eliminating such suits, but they also significantly discouraged meritorious *qui tam* actions.[34] While Biddle claimed that the U.S. Department of Justice ("DOJ") had the necessary resources and drive to pursue FCA cases effectively, this proved to be incorrect.[35] For example, with the massive military buildup of the 1980s, newspapers were awash with stories of government contractors who cheated the government by charging $660 for a single ashtray installation, or $7,600 for a coffee pot.[36] Yet, the DOJ lagged in bringing *qui tam* suits.[37]

The FCA was amended again in 1986. Among other changes, the 1986 amendments eliminated the "prior government knowledge" bar to *qui tam* suits, providing instead that a relator who is an "original source" with "direct and independent" relevant knowledge had standing to bring suit.[38] The 1986 amendments also gave relators a larger role in litigation that was taken over by the government, and established minimum percentages for rewards.[39] Finally, the 1986 amendments provided the first private right of action for those retaliated against because of their participation in an FCA case.[40]

The FCA has been amended several times since 1986, and each set of amendments seeks to revive the competing concerns about the role of *qui tam* actions.[41] Some remain suspicious of whistleblower motives for coming forward, and believe that the DOJ is best positioned to prosecute fraud against the government.[42] Others recognize that the DOJ may lack the resources or motivation to pursue fraudulent actions that nonetheless are in the public interest.[43] Which side wins out in a given decade appears to depend largely on what the public perceives to be at stake.

b. History of Anti-Retaliatory Provisions

Anti-retaliatory provisions have their roots in the labor relations statutes of the early 20th century. Before that time, employees were almost entirely "at-will"—dischargeable at any time and for any reason. Workers found relief not in the courts, but in the legislature, which passed statutes making it easier for workers to form unions. Moreover, the Clayton Antitrust Act of 1914 exempted labor unions from federal antitrust laws,[44] and prohibited federal courts from issuing injunctions that restrained labor unions.[45] The Railway Labor Act of 1926 and Wagner Act of 1935 further strengthened workers' ability to engage in union activities and to bargain collectively.[46] By 1940, the Supreme Court recognized that Congress could use national policy concerns to restrict the right of employers to discharge at-will employees.

The passage of the labor relations statutes highlighted not only the possibility of anti-retaliatory provisions, but also their necessity. For instance, the Wagner Act created the National Labor Relations Board ("NLRB") to implement the Act's provisions,[47] and the NLRB quickly discovered that, to succeed in enforcement proceedings, employee help was vital. In turn, employees would participate only if they knew their jobs would be protected. This trend continued into the 1960s and 1970s, as federal regulation expanded. The newly enacted Civil Rights Act of 1964,[48] Occupational Safety and Health Act,[49] and Consumer Protection Act,[50] among others, all required employee participation to ensure their effective enforcement. Thus, Congress included provisions prohibiting businesses from retaliating against participating employees.[51] For the first time, a significant portion of the American private sector workforce had protection against employer retaliation (albeit limited to acts in furtherance of enforcement proceedings).[52]

Thereafter, Congress began to include not only administrative remedies for retaliation, but also a right for employees to bring private actions to recover for retaliation. For instance, the 1986 amendments to the FCA include a private cause of action, allowing the relator to be awarded "all relief necessary to make the employee whole," including reinstatement, back pay, two times the amount of back pay, litigation costs, and attorney fees.[53]

In more recent times, regulatory authorities, including the IRS and SEC, have successfully used whistleblower provisions to enforce various federal and state laws.[54]

3. Whistleblower Programs in Other Federal Agencies

Because federal agencies have limited resources, public tips have greatly enhanced their ability to detect and prosecute statutory violations. Indeed, the heads of both the IRS and SEC have highlighted how important whistleblower programs have been in detecting fraud and other violations of law. For example, Sean McKessy, the Chief of the SEC's Office of the Whistleblower, has stated that because the SEC "cannot be everywhere," the whistleblower program will "help [the SEC] to more quickly identify and pursue frauds that [it] might not have otherwise found on [its] own."[55] Similarly, IRS Commissioner John Koskinen has said that the "information received from whistleblowers has the potential to assist the IRS in detecting tax compliance issues, which in turn helps ensure the integrity and fairness of our tax system."[56]

We summarize the whistleblower programs administered by the IRS and the SEC.

a. IRS Whistleblower Program

For the past 140 years, the IRS Commissioner has had the authority to "pay such sums as he deems necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[57] The Taxpayer Bill of Rights of 1996 expanded the IRS's ability to pay awards, permitting it to award informants who help "detect[] underpayments of tax."[58] The IRS also "has separate authority to pay informant expenses from appropriated funds available for confidential criminal investigation[s]."[59]

Awards under this program were discretionary and governed by IRS policy statements. For example, IRS policy allowed for awards of 1, 10, or 15 percent, based on the nature of information provided.[60] The IRS could deny claims if (1) the whistleblower was a participant in the scheme; (2) the information was of no value; (3) the IRS already had the information or the information was publicly available; or (4) there was no collection of taxes or penalties from which the IRS could pay an award.[61]

With the enactment of the Tax Relief and Health Care Act of 2006, the IRS's whistleblower program expanded.[62] The legislation created an IRS Whistleblower Office, which was charged with analyzing information submitted and assigning it to another IRS division for further investigation.[63] The 2006 Act also created a new subsection (b) to Section 7623 of the Internal Revenue Code, enumerating the conditions under which the IRS may make an award to a whistleblower.[64] Specifically, Section 7623(b) provides that the IRS may award "at least 15 percent but not more than 30 percent of the collected proceeds…resulting from the action…or from any settlement in response to such action."[65] The section further sets forth specific requirements to quality for an award, but if a whistleblower cannot satisfy them, the IRS retains its pre-2006 authority to issue a discretionary award.[66]

Recently, the IRS published a Notice of Proposed Rulemaking in the Federal Register, setting forth guidelines for submitting whistleblower information, and for determining awards. Under the proposed procedure, whistleblowers "must submit to the IRS specific and credible information that the individual believes will lead to collected proceeds from persons whom the individual believes have failed to comply with the internal revenue laws."[67] This "information" must identify the individual or entity that violated the law and include any documents available to substantiate the claim.[68]

To collect an award, whistleblowers are required to submit, under penalty of perjury, Form 211, "*Application for Award for Original Information*," which requests information such as the date of the claim; the name of the claimant; and "[a]n explanation of how the information on which the claim is based came to the attention and into the possession of the claimant[.]"[69] If a claimant fails to do so, the Whistleblower Office, at its sole discretion, may provide a non-complying claimant an opportunity to perfect the claim for an award.[70]

The success of the IRS whistleblower program cannot be overstated. In Fiscal Year 2013 alone, the IRS whistleblower program led to the recovery of over $367 million in underpayments.[71] During that same period, the IRS paid 122 awards to whistleblowers totaling over $53 million.[72] Indeed, in 2012, Bradley Birkenfeld received $104 million for helping expose a $20 billion offshore tax evasion scheme.[73] This award—the largest in the history of the IRS whistleblower program—was given even though Mr. Birkenfeld was himself convicted and imprisoned for more than two years in connection with his participation in the very scheme he revealed to the DOJ and IRS.[74]

However, a significant drawback to the IRS whistleblower program is the lack of specific protection for whistleblowers against job-related retaliation.[75] The IRS Fiscal Year 2010 and Fiscal Year 2013 reports on its whistleblower program both describe the lack of an express anti-retaliation provision as "an issue[] of interest," and recommend a legislative remedy.[76]

Recognizing the retaliation risk, the IRS will generally not confirm or deny the existence of a whistleblower.[77] However, the IRS may reveal the identity of a whistleblower who is "an essential witness in a judicial proceeding[,]" or if ordered to do so by a court.[78] Moreover, because targets of IRS enforcement actions are permitted to challenge IRS findings, civil discovery can be used to identify potential sources underlying the IRS's determinations, including informants.[79]

To protect their anonymity, whistleblowers have sought protective orders. The Tax Court has held that issuing a protective order to preserve a whistleblower's

identity requires balancing "not only petitioner's legitimate privacy interests as a confidential informant, but also the nature and severity of the specific harm asserted to arise from disclosing petitioner's identity" with the "potential harm against the relevant social interests."[80]

The Tax Court typically grants requests to proceed anonymously when the whistleblower has shown that he or she will suffer specific, significant job-related retaliation or be subject to physical harm.[81] However, Tax Court judges have emphasized that anonymity will not be automatically granted upon a claim of employment discrimination.[82] As a result, absent an explicit anti-retaliation statute, tax whistleblowers remain at risk of a potentially adverse decision on a Tax Court petition seeking to preserve their anonymity. This, in turn, exposes whistleblowers to retaliation for which they have little recourse under federal law.

b. SEC Whistleblower Program

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to address systemic weaknesses within the financial services industry that led to the collapse of several long-standing firms, like Lehman Brothers and Bear Stearns.[83] Dodd-Frank added Section 21F to the Securities Exchange Act of 1934, thus requiring the SEC to develop its own whistleblower program.[84] Under this whistleblower program, if an informant voluntarily provides original information that results in a SEC enforcement action, the SEC may award the informant between 10 and 30 percent of the amount the SEC collects (provided the total amount collected exceeds $1 million).[85]

Dodd-Frank also created anti-retaliation protections for whistleblowers. Under Section 21F(h), an employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate" against an employee who provides information to the SEC, testifies or otherwise assists with the SEC's investigation or administrative action, or makes required disclosures under Sarbanes-Oxley.[86] Additionally, Section 21F(h) provides a private right of action to all employees who are subjected to retaliatory acts.[87] This right of action is not limited to employees of publicly traded companies and their subsidiaries, but also protects employees of "foreign subsidiaries and affiliates of U.S. public companies."[88] Under Section 21F(h), substantial remedies are available to a whistleblower including (1) reinstatement of seniority; (2) double back pay; and (3) litigation costs and attorney and expert witness fees.[89]

To qualify for these whistleblower protections, Dodd-Frank and SEC rulemaking require that whistleblowers "possess a reasonable belief that the information" provided relates to a possible securities violation, and that they submit information in compliance with all applicable rules.[90] "Reasonable belief" looks to whether the whistleblower held "a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess."[91] This standard is meant to avoid granting whistleblower protection to individuals who make frivolous submissions.[92]

To qualify for an award under the SEC program, an individual must voluntarily provide the SEC "original information" about a possible violation of the federal securities laws that leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million.[93] Original information must be based on independent knowledge or analysis.[94] This means that the informant's information cannot already be known to the SEC or have been "exclusively derived" from publicly available sources.[95]

Importantly, the SEC has made clear through its rulemaking that submissions need not qualify for an award in order to trigger the anti-retaliation protections.[96] At least two federal courts have held that Section 21F(h)'s private right of action applies to an employee who makes disclosures required or protected by law even if that employee did not provide the disclosed information to the SEC.[97]

Since Dodd-Frank's enactment, the SEC has issued substantial awards to individual whistleblowers, including an award of over $30 million to one whistleblower in September 2014.[98] That award remains the largest in the SEC's history.[99]

In contrast to the IRS's program, the SEC's whistleblower program appears more robust because of its statutory prohibitions against retaliation. Dodd-Frank's anti-retaliation provisions have generated dozens of lawsuits by private plaintiffs seeking redress for alleged job-related retaliation.[100] Those advocating for whistleblower protections in antitrust law cite the SEC's success stories.

4. Whistleblowers in Antitrust

The antitrust laws do not provide protection for whistleblowers who report cartel activity. Historically, the DOJ has relied, instead, on its leniency program, applicable to both companies and individuals, to detect criminal antitrust violations.[101] Designed to destabilize cartels, the Antitrust Division's leniency program publicly announces to price-fixers (and other criminal antitrust violators) the self-reporting path that, if followed, will immunize them against all criminal consequences, despite having committed a federal felony. The program, unique among federal law enforcement agencies, is widely recognized to have exposed many of the cartels that the DOJ has prosecuted in recent years.

Nevertheless, as many antitrust pundits have pointed out, while the leniency program may help corporate executives escape criminal punishment, it does nothing to shield whistleblowers from their employers. Furthermore, many believe that in addition to anti-retaliatory provisions, antitrust laws should also provide bounty awards

to those who report violations. The belief is that a civil remedy for retaliation, coupled with a bounty provision, will create greater incentives for whistleblowers to come forward and thereby enhance cartel detection and deterrence. The DOJ, on the other hand, has expressed serious concerns about bounty awards.

a. The Cautionary Tale of Martin McNulty

Once upon a time, Martin McNulty was an executive in the packaged-ice industry.[102] In late 2004, McNulty learned that his employer, Arctic Glacier International Inc., had an agreement with other ice producers to allocate the southeastern Michigan ice market.[103] According to McNulty, when he refused to participate in the scheme, the company fired him.[104] McNulty went on to aid the FBI in its criminal investigation.[105] In 2010, Arctic Glacier and three of its executives pled guilty to violating the Sherman Act, and Arctic Glacier agreed to pay a $9 million fine.[106] But, after 14 years as a packaged-ice executive, McNulty claims he was "blackballed" from the industry, and after years of not being able to find work, his house went into foreclosure.[107]

When all was said and done, McNulty calculated that whistleblowing cost him $6.2 million.[108] At Arctic Glacier's sentencing, McNulty argued that the court should award him that amount as restitution under the Crime Victims' Rights Act ("CVRA").[109] However, the district court, and later the Sixth Circuit, disagreed.[110] Simply, McNulty was not a crime victim under the CVRA. The court noted that McNulty's alleged difficulties arose from his refusal to take part in the conspiracy.[111] "If proven, these would indeed be harms to McNulty, but they are not criminal in nature, nor is there any evidence that they are normally associated with the crime of antitrust conspiracy."[112] Thus, McNulty was left with little recourse. His predicament highlights what some believe is an obvious gap in the DOJ's leniency program.

b. ACPERA and the GAO Study

The DOJ has called its leniency program its "most effective" investigative tool in detecting criminal cartels.[113] Under the program, a successful leniency applicant can avoid criminal prosecution, criminal fines, and prison sentences for its executives if it is the first to report an antitrust violation.[114] Additionally, in 2004, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), to further incentivize self-reporting by eliminating treble damages and joint and several liability for the leniency applicant if it provides "satisfactory cooperation" to civil plaintiffs.[115]

On June 9, 2010, President Obama signed legislation extending ACPERA for another ten years.[116] While this new legislation modified some provisions of the original Act, Congress delayed acting on two proposed additions to ACPERA—a whistleblower reward provision and a whistleblower protection provision.[117] Instead, Congress commissioned the Government Accountability Office ("GAO") to study and report back on the appropriateness of adding these two provisions.[118]

In July of 2011, the GAO issued its report recommending that Congress consider amending ACPERA to add anti-retaliatory protection for those reporting criminal antitrust violations.[119] The GAO noted that potential whistleblowers may be reluctant to report criminal wrongdoing because, under the current law, whistleblowers who report criminal antitrust violations lack a civil remedy if they experience retaliation.[120] The DOJ's leniency program affords protection from federal criminal prosecution for a company (and its officers, directors, and employees) and for an individual if the company or individual is the first to report a criminal antitrust violation and provide cooperation to the DOJ.[121] But that dispensation from prosecution does not protect a reporting individual from retaliation by his or her employer, or by other cartel participants.[122] Outside of overt discrimination, at-will employees have little recourse when they suffer retaliation—i.e., the Martin McNultys of the world.[123] Thus, the GAO proffered that by adding a civil remedy for those who are subjected to retaliation, employees may be encouraged to report criminal antitrust violations.[124] However, the report was split on whether including bounty provisions would aid in greater cartel detection and deterrence.[125]

Proponents of a bounty provision argue that such incentives would "motivate more whistleblowers to report criminal cartel activity to DOJ which, in turn, could result in greater cartel detection" and destabilization.[126] Proponents further believe that a reward is necessary to compensate potential informants for the substantial risk that they run.[127] However, not everyone is on board with a bounty program.

c. DOJ's Unreceptive Response

While the DOJ has not taken an official position on CAARA, it has stated that it does not support a bounty program. Indeed, the DOJ has expressed concern that whistleblower rewards could hinder its current enforcement program by jeopardizing witness credibility, and generating false claims that do not result in prosecutions but require tremendous DOJ resources to vet.[128] Ultimately, the DOJ maintains a strong predisposition toward its leniency program, and generally disfavors anything that might upset the status quo.

The DOJ has expressed that its biggest concern with a bounty program is that it weakens a whistleblower as a trial witness because a paid whistleblower may not be regarded as a credible witness by the jury.[129] Jurors may not believe a witness who stands to benefit financially from a successful enforcement action against those he implicated.[130] Further, the fact that the DOJ may be less likely to prove its case because of whistleblower credibility issues could affect the DOJ's leverage in obtaining plea

agreements and deter companies from settling with the DOJ.[131]

Additionally, the DOJ expressed concern that a whistleblower reward could result in many false claims that do not lead to criminal prosecution.[132] A bounty program creates an incentive for increased false reporting. When someone comes in and alleges a global conspiracy involving many companies around the world, it takes tremendous DOJ resources to vet those claims.[133] Accordingly, whistleblower tips pertaining to criminal cartel activity would require substantial investigation to substantiate (or refute) the claims.[134] Thus, false claims could drain DOJ resources.

Moreover, because cartel activity is secretive, typically only conspiracy insiders "have sufficient knowledge to be of assistance in a criminal investigation[,]" and the DOJ has maintained that the "existing leniency program already provides incentives for wrongdoers to self-report" by offering them "get-out-of-jail" cards.[135] Accordingly, the leniency program is successful because it is those who potentially face punishment who are most likely to know about cartel activity.[136]

Remarkably, the Antitrust Division's response to whistleblower bounties is in stark contrast to the remarks of U.S. Attorney General Eric Holder, who recently advocated for increased whistleblower awards in financial fraud cases.[137] Specifically, Holder encouraged Congress to consider modifications to the Financial Institutions Reform, Recovery, and Enforcement Act, which would increase incentives for individual cooperation, including raising the $1.6 million cap on awards for individuals who come forward to report criminal activity.[138] Holder stated, "[t]his could significantly improve the Justice Department's ability to gather evidence of wrongdoing while complex financial crimes are still in progress—making it easier to complete investigations and to stop misconduct before it becomes so widespread that it foments the next crisis."[139] Manhattan U.S. Attorney Preet Bharara echoed Holder's remarks following a recent speech calling for reform in the New York State Legislature.[140] Bharara called whistleblower bounties "useful tools for rooting out public corruption[.]"[141]

While many believe that Holder's and Bharara's comments should also apply in the antitrust context, the Antitrust Division seems inclined to disagree. According to the Antitrust Division, the nature of antitrust cases makes the leniency program an already unique and highly effective detection tool.[142] Indeed, the program is particularly successful in the antitrust context because there are many players involved in a conspiracy and any one of them can turn in the others.[143] In other criminal areas, such as tax or securities fraud, where often only a single company is involved, a whistleblower is necessary to report a violation. Thus, the success enjoyed by the IRS and SEC, aided by bounty provisions, may not transfer as smoothly to the antitrust context.

5. Conclusion

Today, the prevalence of anti-retaliatory provisions testifies to a growing appreciation of whistleblowers by the public at large. In addition to serving as an effective participant in the government's enforcement of public order, whistleblowers appeal to those skeptical of government efficacy or distrustful of its motives. Whistleblowers can root out abuses of rights and bring them to light. With more and more private citizens demonstrating their ability to find creative solutions to solving social ills come renewed efforts to protect them.[144]

It remains to be seen whether such provisions would find success in antitrust cases. Certainly, the tale of Martin McNulty supports the argument for anti-retaliatory protection for antitrust whistleblowers. However, the Antitrust Division's cool response to bounty provisions makes it unlikely that we will see such measures in antitrust law in the near future unless the Division's position changes. While such provisions have found success with the IRS and SEC, the nature of antitrust conspiracies, and the well-recognized success of the DOJ's existing leniency program, give reason to question whether the additional benefits that bounty provisions might bring in the antitrust context are worth the risk.

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Endnotes

1. Criminal Antitrust Anti-Retaliation Act, S.42, 113th Cong. § 216 (2013), *available at* https://www.govtrack.us/congress/bills/113/s42/text.
2. *See id.* at § 216(b), (c).
3. *See generally id.* at § 216.
4. *See generally* https://www.govtrack.us/congress/bills/113/s42.
5. The term "*qui tam*" is a shortened version of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who brings the action for the king as well as for himself." *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 n.1 (1989) (citing 3 William Blackstone, Commentaries on the Laws of England 160 (1768)).
6. *See, e.g.*, Criminal Antitrust Anti-Retaliation Act, S.42, 113th Cong. § 216 (2013), *available at* https://www.govtrack.us/congress/bills/113/s42/text (last visited Aug. 15, 2015).
7. Dan D. Pitzer, Note, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 Tex. Int'l L.J. 415, 417 (1972); *see also Note, The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972), *available at* http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2715&context=law_lawreview (last visited Aug. 15, 2015).
8. Pitzer, *supra* note 7, at 417-18; *The History and Development of Qui Tam*, *supra* note 7, at 86.

9. Pitzer, *supra* note 7, at 417-418; *The History and Development of Qui Tam*, *supra* note 7 at 87.
10. *See* James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* 48-50 (6th ed. 2012 & Supp. 2014).
11. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 (C.D. Cal. 1989).
12. 17 U.S. 316 (1819).
13. False Claims Act, 31 U.S.C. §§ 3729 *et seq.*
14. James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N.U. L. Rev. 35, 35 (1991).
15. *Id.*
16. *Id.; see also* Kent D. Strader, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed in False Claims Act Cases?*, 62 U. Cin. L. Rev. 713, 729 n.90 (1993) (citing 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman)).
17. Helmer & Neff, *supra* note 14, at 36 n.8; Strader, *supra* note 16, at 729, n.90.
18. Strader, *supra* note 16, at 729 n.90 (citing 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman)).
19. Helmer & Neff, *supra* note 14, at 35.
20. *A Bill To Prevent and Punish Frauds Upon the Government of the United States*, S. 467, 37th Cong. (1863), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsb&fileName=037/llsb037.db&recNum=1532 (last visited Aug. 1, 2015).
21. *Id.*
22. *Id*.
23. Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863), *available at* http://www.memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=063/llcg063.db&recNum=45 (last visited Aug. 1, 2015).
24. Helmer, *supra* note 10, at 55-56.
25. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729-3733 (1982)).
26. Helmer, *supra* note 10, at 58.
27. *Id*.
28. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 230 (2012).
29. *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943) (codified as amended at 31 U.S.C. §§ 3729-3733 (1982)).
30. *Id.* at (C); *see also* Helmer & Neff, *supra* note 14, at 38-40.
31. *Id.*
32. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, at (E) (1943) (codified as amended at 31 U.S.C. §§ 3729-3733 (1982)); Helmer & Neff, *supra* note 14, at 38-40.
33. Helmer, *supra* note 10, at 64-65.
34. *Id.*
35. *Id.*
36. *Id*.
37. *Qui tam* provisions also fell out of favor in the United Kingdom in the middle of the twentieth century. In response to public criticism, the Common Informers Act 1951 effectively abolished the right of private citizens to file *qui tam* actions. Pitzer, *supra* note 7, at 419 (citing Common Informers Act, 14 & 15 Geo. 6, c. 39, § 1 (1951)).
38. False Claims Amendments Act of 1986, 100 Stat. 3153, § 3 (1986) (amending 31 U.S.C. § 3730(e)(4)); Helmer, *supra* note 10, at 68-71.
39. *Id.* (amending 31 U.S.C. § 3730(d)).
40. *Id.* at § 4; Helmer, *supra* note 10, at 68-71.
41. *See, e.g.*, Major Fraud Act of 1988, 102 Stat. 4631, § 9 (1988) (amending 31 U.S.C. § 3730(d)); Fraud Enforcement and Recovery Act of 2009, 123 Stat. 1617, § 4 (2009) (amending 31 U.S.C. §§ 3729, 3730(h), 3731(b), 3732, 3733); Act of March 23, 2010, 124 Stat. 901 (2010) (amending 31 U.S.C. § 3730(e)(4)).
42. Some have questioned whether legislation allowing private citizens, instead of the DOJ, to pursue such suits violates the separation of powers doctrine. *See* Robin Page West, Advising the Qui Tam Whistleblower 67-68 (2d ed. 2009) (discussing constitutional challenges to the FCA).
43. *See* Helmer, *supra* note 10, at 64-65.
44. Act of Oct. 15, 1914, ch. 323, 38 Stat. 732, § 6 (1914) (codified at 15 U.S.C. § 17).
45. *Id.* at § 20 (codified at 29 U.S.C. § 52).
46. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified at 45 U.S.C. § 151 *et seq.*); Wagner Act of 1935, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151 *et seq.*).
47. Wagner Act of 1935, 49 Stat. 449, § 3.
48. Civil Rights Act of 1964, 78 Stat. 241 (1964).
49. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1970).
50. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (2010).
51. *See, e.g.*, Civil Rights Act of 1964, 78 Stat. 241, § 704; Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5567(a).
52. Daniel P. Westman & Nancy M. Modesitt, Bloomberg BNA, Whistleblowing: The Law of Retaliatory Discharge 5-8 (2d ed. 2014).
53. False Claims Act, 31 U.S.C. § 3730(h).
54. Internal Revenue Code, 26 U.S.C. § 7623(b); Securities and Exchange Act of 1934, 15 U.S.C. § 78u-6 (2010).
55. Sean McKessy, Speech by SEC Staff: Remarks at Georgetown University (Aug. 11, 2011), *available at* http://www.sec.gov/news/speech/2011/spch081111sxm.htm (last visited Aug. 1, 2015).
56. John Koskinen, Statement on IRS Whistleblower Program (Aug. 2014), *available at* http://www.irs.gov/pub/whistleblower/Koskinen%20whistleblower%20statement%20-%20version%20082014%20(2).pdf (last visited Aug. 1, 2015).
57. Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 2 (2014), *available at* http://www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf (last visited Aug. 1, 2015).
58. *Id.* (citing Taxpayer Bill of Rights 2, 110 Stat. 1473, § 1209 (July 30, 1996) (codified at 26 U.S.C. § 7623(a)).
59. Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 2 n.2.
60. *Id.* at 2.
61. *Id.*
62. *Id.* at 3 (citing Tax Relief and Health Care Act of 2006, 120 Stat. 2958, § 406 (2006) (codified at 26 U.S.C. § 7623(b)).
63. Tax Relief and Health Care Act of 2006, 120 Stat. 2958, § 406(b) (2006).
64. *Id*. at § 406(a).
65. I.R.C. § 7623(b)(1) (2006).
66. *See id.* at § 7623(b)(2). To qualify for an award under Section 7623(b), the information must relate to: (1) "a taxpayer, and individual taxpayers only, one whose gross income exceeds

$200,000 for least one of the tax years in question" and (2) "a tax noncompliance matter in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000." Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 3 (citing I.R.C. § 7623(b)(5)). I.R.C. § 7623(a) preserves the IRS's pre-statute discretionary authority.

67. I.R.S. Bulletin 2013-3, REG-141066-09, § 301.7623-1(c)(1) (Jan. 14, 2013), *available at* http://www.irs.gov/irb/2013-03_IRB/ar10.html (last visited Aug. 1, 2015). This rulemaking was made final in I.R.S. Bulletin 2014-36 (Sept. 2, 2014).

68. I.R.S. Bulletin 2013-3, REG-141066-09, § 301.7623-1(c)(1).

69. *Id.* at § 301.7623-1(c)(2), (3).

70. *Id.* at § 301.7623-1(c)(4).

71. *Id.* at Table 6.

72. *Id.*

73. Laura Saunders & Robin Sidel, *Whistleblower Gets $104 Million: Now a Felon, Former Banker Told U.S. About Tax-Evasion Tactics by UBS and Its Wealthy Clients*, Wall St. J., Sept. 11, 2012, *available at* http://www.wsj.com/articles/SB10000872396390444017504577645412614237708 (last visited Aug. 1, 2015).

74. *See United States v. Birkenfeld*, No. 08-cr-60099 (S.D. Fla.); Eamon Javers, *Why this Swiss bank whistleblower can't leave US*, CNBC (Dec. 14, 2014), *available at* http://www.cnbc.com/id/102272941# (last visited Aug. 1, 2015).

75. *Whistleblower 14106-10W v. Comm'r,* 137 T.C. 183, 202 (2011).

76. Internal Revenue Service, Fiscal Year 2010 Report to Congress on the Use of Section 7623, at 7-8; Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 12 (2011), *available at* http://www.irs.gov/pub/whistleblower/annual_report_to_congress_fy_2010.pdf (last visited Aug. 1, 2015).

    Specifically, the IRS has expressed concern that "an adverse ruling on a discovery request could open the door to fishing expeditions to identify whistleblower involvement and targeted requests to determine whether particular individuals made whistleblower submissions." Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 8; Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 12.

77. *See* 6 Administration, I.R.M. § 25.2.2.12 (Aug. 7, 2015) ("To the extent that the IRS Whistleblower Office determines that an individual is a `whistleblower' under IRC section 7623, such individual shall be deemed to be a confidential whistleblower whose identity shall be protected in accordance with IRC 6103(h)(4)."); I.R.S. Bulletin 2008-4, § 3.06 (Jan. 14, 2008), *available at* http://www.irs.gov/irb/2008-02_IRB/ar13.html#d0e1115 (last visited Aug. 10, 2015) (IRS "will protect the identity of the claimant to the fullest extent permitted by law.").

78. Internal Revenue Service, Fiscal Year 2013 Report to Congress on the Use of Section 7623, at 8.

79. *Id.*

80. *Whistleblower 14106-10W*, 137 T.C. at 203 (citing *Sealing Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190-91 (2d Cir. 2008)).

81. *See, e.g., Whistleblower 10949-13W v. Comm'r.*, T.C. Memo. 2014-94, at *5 (May 20, 2014) (potential for physical harm justifies proceeding anonymously when whistleblower's targets were allegedly tied to terrorist organizations, and they had already used armed men to raid whistleblower's offices and had threatened his life).

82. *Whistleblower 14106-10W*, 137 T.C. at 208-09 (Halpern, J., concurring) (emphasis added):

    > I have concurred in the result in this case because I think that we should give whistleblowers contemplating a section 7623(b)(4) action fair notice that *we will not automatically grant anonymity upon a claim of possible employment discrimination*. Were we to decide this case as I would, dissatisfied whistleblowers with a fear of employment discrimination would, before filing a petition with the Court, weigh the expected dollar return from commencing a section 7623(b)(4) action against the expected cost (measured in dollars) of the disadvantages associated with the public disclosure of information that ordinarily becomes part of the case file and the public record in a Tax Court case…. *Until (and unless) Congress acts, I believe that is the best we can offer*.

83. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1739 (2010).

84. *Id.* at § 922 (codified at 15 U.S.C. § 78u-6 (2010)). Dodd-Frank also created a whistleblower program for the Commodity Futures Trading Commission ("CFTC"). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1739, § 748 (2010) (codified at 7 U.S.C. § 1 *et seq.*). In May 2014, the CFTC issued its first whistleblower award of approximately $240,000 to an individual "for providing valuable information about violations of the Commodity Exchange Act." Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Issues First Whistleblower Award, May 20, 2014, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6933-14 (last visited Aug. 15, 2015).

85. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(b)(1).

86. *Id.* at (h)(1)(A)(i)-(iii).

87. *Id.* at (h)(2)(B)(i).

88. Jordan A. Thomas, SEC Whistleblower Program Handbook at 3-4 *available at* file:///C:/Users/tmb/Downloads/SEC+Whistleblower+Program+Handbook+(for+web).pdf (last visited Aug. 15, 2015) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1739, § 929A (codified as amended at 18 U.S.C. § 1514A).

89. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(h)(1)(C)(i)-(iii).

90. Securities and Exchange Commission, Securities Exchange Act of 1934, 17 C.R.R. § 240.21F-2 (2011).

91. Implementation of Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 34-34545, at 16 (Aug. 12, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf (last visited Aug. 15, 2015).

92. *Id.*

93. *See* 17 C.F.R. § 240.21F-3(a).

94. *Id.* at § 240.21F-4(b)(1)(i).

95. *Id.* at § 240.21F-4(b).

96. *See* 17 C.F.R. § 240.21F-2(b)(iii) ("The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.").

97. *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 U.S. Dist. LEXIS 47713, at *9-19 (S.D.N.Y. May 4, 2011); *Peters v. LifeLock, Inc.*, No. 14-cv-00576, slip op. at 6-13 (D. Ariz. Sept. 19, 2014).

98. Press Release, Securities Exchange Commission, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VQHxDvx4py0 (last visited Aug. 15, 2015).

99. *See id.*

100. *See, e.g.*, *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42 (D. Mass. 2013); *Murray v. UBS Secs., LLC*, No. 12 Civ. 5914 (JMF), 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012).

101. *See generally* U.S. Dep't of Justice, Antitrust Division, *Leniency Program* (1993), *available at* http://www.justice.gov/atr/public/criminal/leniency.html (last visited Aug. 15, 2015).

102. *McNulty v. Reddy Ice Inc., et al.*, 2:08-cv-13178 (PDB) (RSW), 2009 U.S. Dist. LEXIS 45298, at *5 (E.D. Mich. May 29, 2009).

103. *Id*. at *6-8.

104. *Id*. at *8-9.

105. *Id*. at *9.

106. *See* Plea Agreement, *United States v. Arctic Glacier Int'l Inc.*, No. 1:09-cr-00149-HJW, at 8 (S.D. Ohio Oct. 13, 2009), *available at* http://www.justice.gov/file/487086/download (last visited Aug. 15, 2015).

107. Transcript of Sentencing Hearing Proceedings at 32-34, *United States v. Arctic Glacier Int'l Inc.*, No. 1:09-cr-00149-HJW (S.D. Ohio Feb. 18, 2010).

108. *Id*.

109. *Id*.; *see also* 18 U.S.C. § 3771 (2015).

110. *See In re McNulty v. Reddy Ice Holdings, Inc.*, No. 08-13178, 2010 U.S. Dist. LEXIS 5310 (E.D. Mich. Jan. 25, 2010), *aff'd*, 597 F.3d 344 (6th Cir. 2010).

111. *In re McNulty*, 597 F.3d at 347.

112. *In re McNulty*, 597 F.3d at 352.

113. *See* Scott D. Hammond et al., *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, U.S. Dep't of Justice, Nov. 9, 2008, at 27, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Aug. 15, 2015).

114. *See* Scott D. Hammond, *Detecting and Deterring Cartel Activity through an Effective Leniency Program*, U.S. Dep't of Justice, Int'l Workshop on Cartels, Nov. 21-22, 2000, at 2, 3, *available at* http://www.justice.gov/atr/public/speeches/9928.pdf (last visited Aug. 15, 2015).

115. 118 Stat. 661, § 213 (2004) (codified at 15 U.S.C. § 1 note), as amended by Act of June 9, 2010, 124 Stat. 1275 (2010).

116. Act of June 9, 2010, 124 Stat. 1275, § 1 (2010).

117. *Id*. at § 5.

118. *Id*.

119. Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection, U.S. Gov't Accountability Office GAO-11-619, at 50 (July 2011), *available at* http://www.gao.gov/assets/330/321794.pdf (last visited Aug. 15, 2015) [hereinafter GAO Report].

120. *Id*.

121. *See* U.S. Dep't of Justice, Antitrust Division, *Corporate Leniency Policy* (1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf (last visited Aug. 15, 2015).

122. *Id*.

123. According to a recent report published by the compliance software firm, NAVEX Global, the volume of employee retaliation reports has risen over the past five years. *See* NAVEX Global, *Ethics & Compliance Hotline Benchmark Report*, at 6 (2015), *available at* http://www.navexglobal.com/resources/whitepapers/2015-Ethics-and-Compliance-Hotline-Benchmark-Report (last visited Aug. 15, 2015). The report indicates that instances of retaliation increased from 4,594 in 2013 to 5,189 in 2014. *Id* at 22. Moreover, case closure times have also continued to climb, indicating that companies may be devoting enough resources to compliance issues. *Id*. at 6.

124. GAO Report, *supra* note 119, at 45-50.

125. *Id*. at 36-45. Although not mentioned by the GAO, a whistleblower bill introduced in 1912 was never enacted. This measure proposed an antitrust amendment that would have authorized the DOJ "to offer and pay rewards to the person or persons who shall first furnish to the Government information which shall lead to the detection of violations of the [Sherman Act]," and would have made the intimidation or assault of such "informers" and their families a punishable offense. H.R. 20194, 62d Cong., 2d Sess. (1912). The history of the bill, drafted at least in part by a group known as the "Antitrust League," is recounted in *Hearings on H.R. 20194 Before the House Comm. on the Judiciary*, 62d Cong., 2d Sess. (April 16, 1912).

126. GAO Report, *supra* note 119, at 36.

127. *Id*. at 50.

128. *Id*. at 36.

129. *Id*. at 38-39.

130. *Id*.

131. *Id*. at 39.

132. *Id*. at 40-41.

133. *See id*. at 44-45.

134. *Id*.

135. *Id*. at 41.

136. *Id*.

137. Attorney General Eric Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), *available at* http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law (last visited Aug. 15, 2015).

138. *Id*.

139. *Id*. ("Realistically, staying ahead of these developments requires incentivizing individuals from within the industry to come forward and cooperate with ongoing investigations.").

140. Ed Beeson, *Bharara Says Whistleblower Awards May Aid Corruption Fight*, Law360, March 6, 2015, http://www.law360.com/articles/628617/bharara-says-whistleblower-awards-may-aid-corruption-fight (last visited Aug. 15, 2015).

141. *Id*.

142. Audio recording: Anti-Retaliation: Coming to an Investigation Near You, held by the Am. Bar Ass'n (Apr. 16, 2014).

143. *Id*.

144. Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge* 10-11 (2d ed. 2014).

Settlement Releases and Waiving the "Unknown"

By Virginia Trunkes

1. Introduction

Litigators who settle disputes encounter some of the broadest, over-inclusive language which exists in standard contracts. Language such as "all and/or any…," "arising out of or in any way related to the obligations…," or the classic," from the beginning of the world…," continues to endure in today's sophisticated business settlement agreements. These are some phrases comprising the standard "release" which exculpates an adversary from any further claims, usually in exchange for some form of consideration.

Then there is the quintessential "whatsoever, known or unknown" and "or for any other reason whatsoever…." These two phrases comprise the standard release language, but take the release one step further by encompassing claims beyond which the releasor is currently cognizant or even can envision. Lawyers understand these terms to mean "anything remotely having to do with the adversary and the circumstances relating in any way to the dispute—including anything about which you were unaware." In other words, even if your client's adversary has betrayed, deceived and double-crossed your client in ways in which she could not imagine, so long as there is an arguable connection with the subject matter of the original dispute, she is releasing this reprobate from any further claims, set-offs and the like.

To your lay-person client this may sound counter-intuitive: clearly there must be an exception for actions taken on the sly, and which your client could not have predicted? The California Legislature shares this view. It enacted Section 1542 of the Civil Code, which specifies that "[a] General Release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."[1]

The New York State Legislature has stood firm (or at least silent), however, as to provisions waiving the "unknown." This past spring, in *Long v. O'Neill*,[2] the Appellate Division, First Department, confirmed that these provisions are still enforceable.

2. Rendering Any Other Result a Grave Injustice

A cause of action that is the subject of a release may be dismissed under CPLR 3211(a)(5).[3] Consequently, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release."[4] The deference which courts give to releases has resulted in the rule that a release "should never be converted into a starting point for…litigation except under circumstances and under rules which would render any other result a *grave injustice*."[5]

What type of a result constitutes a "grave injustice" is perplexing, however. The Court of Appeals has stated that a release may be invalidated under any of the traditional bases for setting aside written agreements, i.e., duress, illegality, mutual mistake or fraud.[6] The most commonly litigated basis for voiding a release, particularly in business transactions, is alleged fraud. Yet, a claim of fraud does not automatically state a legally sufficient cause of action to set aside a release.

Even where a settling party satisfies the elements of fraudulent inducement, that claim may be covered by the terms of the release. A "release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made."[7] Where the release's language is clear, courts give effect to the intent of the parties as indicated by the language they used.[8]

Whether the release's language clearly demonstrated that the settling party intended to waive an unknown claim was the contested issue in *Long v. O'Neill*.[9]

3. The Plight of Mr. Long

In *Long*, the plaintiff was a financial planner who procured investors for an investment fund (the "Fund") of which defendants O'Neill and Knoll were directors.[10] Plaintiff's compensation was to be a portion of the performance fee that the Fund paid a small company of which O'Neill and Knoll were the sole members—a subadvisor of an investment manager which also provided services to the Fund.[11]

Subsequently, plaintiff became a director of the Fund, after which the Fund became embroiled in two lawsuits with the investment manager.[12] Plaintiff aggressively pursued the Fund's rights against the investment manager.[13] For this, defendants orally told plaintiff that he would be compensated for his efforts, including that he would receive one-third of the subadvisor's performance fee.[14]

Ultimately, the Fund settled its litigation with the investment manager, and plaintiff, defendants, the subadvisor and the Fund entered into a settlement agreement.[15] The parties agreed to discontinue the lawsuits, that the investment advisor would be terminated by the Fund and that certain payments among the parties would be made.[16] The parties also agreed to liquidate the Fund and distribute its assets, and the subadvisor received $1,155,903.21.[17]

a. The Dispositive Settlement Language

"The recitals in the settlement agreement stated that disputes had arisen among the parties 'relating to the management of the Fund and its investments' and that the settlement agreement was to resolve the disputes, including all claims brought in the lawsuits."[18] Within the settlement agreement was "a release, which provided that the agreement was made in 'full and final settlement of *all matters arising out of or in connection with* the facts, matters, claims, actions and allegations' made in the lawsuits."[19]

> Further, the release provided that each party released "each other Party" from: "*all and/or any* actions, claims, rights, demands, suits, charges, complaints, obligations, damages, costs (including attorney's fees and costs actually incurred), expenses, liabilities, losses, debts, set-offs, promises, contracts, agreements and controversies of any nature whatsoever…*whether known or not now known*…*arising from or resulting from or in connection with* any act or omission, event, transaction, occurrence, agreement, contract or relationship *concerning*_ [the Fund], its investments, business or affairs (*including without limitation* the matters alleged in the [lawsuits]."[20]

b. Defendants Blew Off Plaintiff

Defendants did not give plaintiff one-third of the $1,155,903.21 settlement performance fee paid to the subadvisor ($385,301) as promised.[21] Thus, plaintiff commenced this lawsuit based on the oral agreement.[22] Defendants moved for dismissal, asserting that "the release barred plaintiff's claim for payment."[23] In opposition, plaintiff asserted that because the settlement agreement was between two groups "(the Fund, its directors, and the subadvisor on one side, and the investment manager on the other), the settlement agreement did not contemplate releasing claims between parties on the same side, such as between him and defendants."[24] Plaintiff further contended "that the release could not bar his claim because that claim had not yet ripened at the time of the settlement, and releases could only bar claims that were asserted or that could have been asserted at the time of the release."[25]

c. The Really, Really Broad Scope of a Release

The IAS court dismissed the complaint on the ground that the release barred plaintiff's claim.[26] "[T]he court observed that the meaning and coverage of a release 'necessarily depends, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given.'"[27] "[A]lthough the recital in the settlement agreement stated that it was executed between two opposing sides, it defined 'party' to include plaintiff and defendants[.]"[28] As such, the court concluded that the release was meant to apply to more than the settlement of the lawsuits involving the investment manager.[29] "According to the court, the settlement agreement's inclusion of extensive lists of the entities [which] the release covered, as well as the broad sweeping language of the release, indicated that the parties "intended to leave no loose ends" regarding the Fund's affairs."[30] "Moreover, the court stated, the settlement agreement included detailed instructions for liquidation of the Fund and the disposition of its assets; therefore, had the parties intended to compensate plaintiff for his efforts in negotiating the liquidation, they should have so stated."[31]

The Appellate Division affirmed, stating:

> Plaintiff fairly and knowingly signed the release, and its terms now bind him. Indeed, plaintiff himself states that he played a significant role in helping all the parties come to terms to resolve disputes and enter into the settlement agreement; he cannot now be heard to say that he did not intend to release what the contract language says he is releasing.[32]

The Appellate Division reasoned that the provision stating "that the agreement was made in full settlement 'of all matters arising out of or in connection with the facts, matters, claims, actions and allegations' made in the lawsuits" was "not 'reasonably susceptible of more than one interpretation[,]'" particularly because "the settlement agreement provided for liquidation of the Fund and winding up of its business, and thus, the end of the business relationships regarding the Fund."[33]

As for "plaintiff's argument that he believed his claims did not exist when he executed the settlement agreement," the Court explained, "this argument would not change the outcome, as the release disposed of even unripe and contingent claims."[34] "According to the language of the agreement, the release broadly barred 'all and/or any' claims 'arising from' or 'resulting from' or 'in connection with' 'any act [etc.] concerning [the Fund].'"[35] The Court cited to prior decisions where it "bar[red] fraud claims relating to the subject matter where the signatories to the agreement did not specifically refer to, or even know about, those fraud claims before executing their release…[,] even when the releasors were subjectively unaware of the precise claims they [we]re releasing."[36]

With respect to plaintiff's claim "that the settlement agreement did not contemplate releasing claims between parties on the same side," the Court stated that "the language in the release simply state[d] that 'each Party… irrevocably and fully releases and forever discharges each other Party.'"[37] The Court emphasized,

> Had the parties wanted to release only specific individuals or entities, the agreement provided the language by which the parties could have done so. Thus, the release here at issue makes clear that each individual party released each other individual party regardless of the position in which those parties stood at the time they signed the release.[38]

Accordingly, plaintiff did not have any claim to the $385,301 he sought.

4. Practical Reasons Supporting the Courts' Strict Enforcement of Releases

To some, Mr. Long's outcome may seem unfair. Yet, several policy reasons justify the sweeping reach the courts have given to releases. Perhaps the most understandable rationale is that if a party who releases a fraud claim were easily able to later challenge that release as fraudulently induced, "no party could ever settle a fraud claim with any finality."[39] Additionally, the enforcement of a release's terms to cover anything reasonably related to the underlying subject matter prevents cunning "gotchas." That is, the rule requiring that a party with "the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation,…make use of those means,…rejects the claims of plaintiffs who have been so lax in protecting themselves that they cannot fairly ask for the law's protection."[40]

A less obvious result occurs in cases of fiduciaries. With the strict duties inherent in their role it may seem perverse to permit a fiduciary to escape liability due to a principal's release of unknown claims. No matter, inasmuch as "[a] sophisticated principal is able to release its fiduciary from claims."[41] Otherwise, "the implication would be that a fiduciary can never obtain a valid release without first making a full confession of its sins to the releasor, regardless of the releasor's sophistication and the arm's length nature of the negotiations from which the release emerged. This is not the law."[42]

A release arising from a fiduciary relationship will thus likely be upheld if it was executed after the fiduciary relationship ended.[43] Usually this is the case as "[i]t is well settled that a fiduciary relationship ceases once the parties thereto become adversaries."[44] In the limited situations where the courts find that the acts complained of occurred during the existence of the fiduciary relationship, the burden of disproving the fraud, duress or other act which could void the release will be placed on the fiduciary.[45]

5. "Prophylactic Measures"

As this area of the law has developed, the courts have suggested some prophylactic measures to avoid the fate of those like Mr. Long. The most fundamental is to "insist[] on access to…internal books and records…."[46] It is also fairly basic to exclude from a general release claims which one "does not know or suspect to exist in his favor at the time of executing the release."[47]

Alternatively, or where there is some factual information available to the settling party but it cannot verify it, the settling party should insist that the release barring future claims "be conditioned on the truth of the financial information provided by defendants" (whether directly or through public filings).[48]

If provided with conflicting factual information, then as a practical matter, it is wise to make specific inquiries. In fact, the receipt of questionable data or representations imposes a "heightened degree of diligence," without which one "cannot reasonably rely on such representations without making additional inquiry to determine their accuracy."[49]

6. Conclusion

Recently, the Court of Appeals reversed the Appellate Division in a case where the transacting plaintiff neither inserted a "prophytlactic provision" in the subject agreement nor performed extensive due diligence.[50] In determining that the plaintiff was not entitled to summary judgment on its fraud claim, the Court emphasized, "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law…."[51] In that action, the issue of what the parties agreed to cannot be decided without a trial.[52] That outcome reinforces the conclusion that it is better to deal with the unknown at the outset rather than allow for even more uncertainty down the road—or worse, unwittingly but unequivocally waive a valid, unknown claim.

Endnotes

1. Cal. Civ. Code § 1542 (1872). Alas, Section 1542 is commonly waived in settlement agreements.
2. 126 A.D.3d 404, 5 N.Y.S.3d 42 (1st Dep't 2015).
3. *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 98, 824 N.Y.S.2d 210, 214 (1st Dep't 2006).
4. *Centro Empresarial Cempresa S.A. v. Am. Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 8 (2011).
5. *Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 513 (1969) (emphasis added).
6. *Id*.
7. *Centro Empresarial Cempresa S.A.*, 17 N.Y.3d at 276 (quotation marks omitted).
8. *Rocanova v. Equitable Life Assurance Soc'y*, 83 N.Y.2d 603, 616, 612 N.Y.S.2d 339, 344 (1994).
9. *See* 126 A.D.3d at 406-07.
10. *Id.* at 404-05.
11. *Id.*
12. *Id.* at 405.
13. *Id.*
14. *Id.*

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 406.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 406-07.
27. *Id.* at 406 (quoting *Cahill v. Regan*, 5 N.Y.2d 292, 299, 184 N.Y.S.2d 348, 354 (1959)).
28. *Long*, 126 A.D.3d at 407.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 407-08.
35. *Id.* at 408.
36. *Id.* (citing *Mergler v. Crystal Properties Assoc., Ltd.*, 179 A.D.2d 177, 180, 583 N.Y.S.2d 229, 232 (1st Dep't 1992)) (internal citations omitted).
37. *Long*, 126 A.D.3d at 408.
38. *Id.*
39. *Centro Empresarial Cempresa S.A.*, 17 N.Y.3d at 276-77.
40. *DDJ Mgmt., LLC v. Rhone Group L.L.C.*, 15 N.Y.3d at 147, 154, 905 N.Y.S.2d 118, 122 (2010).
41. *Centro Empresarial Cempresa S.A.*, 17 N.Y.3d at 278.
42. *See Centro Empresarial Cempresa S.A. v. Am. Móvil, S.A.B. de C.V.*, 76 A.D.3d 310, 319, 901 N.Y.S.2d 618, 625 (1st Dep't 2010), *aff'd*, 17 N.Y.3d 269, 929 N.Y.S.2d 3 (2011).
43. *See Mergler*, 179 A.D.2d at 181.
44. *EBC I, Inc. v. Goldman Sachs & Co.*, 91 A.D.3d 211, 215, 936 N.Y.S.2d 92, 95 (1st Dep't 2011), *aff'd*, 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005).
45. *See, e.g., Greene v. Greene*, 56 N.Y.2d 86, 92-93, 451 N.Y.S.2d 46, 49-50 (1982); *Radin v. Opperman*, 64 A.D.2d 820, 820, 407 N.Y.S.2d 303, 305 (4th Dep't 1978).
46. *Centro Empresarial Cempresa S.A.*, 76 A.D.3d at 320.
47. *GoSmile, Inc. v. Levine*, 81 A.D.3d 77, 83, 915 N.Y.S.2d 521, 525 (1st Dep't 2010).
48. *Id.* at 82-83; *see also Graham Packaging Co., L.P. v. Owens-Ill., Inc.*, 67 A.D.3d 465, 465, 892 N.Y.S.2d 1, 1 (1st Dep't 2009) (affirming the dismissal of defendants' counterclaim for fraudulent concealment where they failed to, *inter alia*, insert "a prophylactic provision in the settlement agreement to limit their exposure"); *Permasteelisa, S.p.A. v. Lincolnshire Mgmt., Inc.*, 16 A.D.3d 352, 352, 793 N.Y.S.2d 16, 17 (1st Dep't 2005) (affirming dismissal of plaintiff's cause of action for fraud where, *inter alia*, it failed to insert "a prophylactic provision in the purchase agreement to ensure against the possibility of misrepresentation").
49. *Centro Empresarial Cempresa S.A.*, 17 N.Y.3d at 279 (quotation marks omitted).
50. *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 10 N.Y.S.3d 486 (May 7, 2015).
51. *Id.* at 1045.
52. *See, generally, id.*

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Federal Rule of Evidence 502

By Gregory J. Skiff

Many practitioners continue to overlook the ethical obligations imposed by Rule 502 of the Federal Rules of Evidence ("Rule 502"), a rule designed to assist in preserving attorney-client privilege and attorney work-product protection when documents are produced during discovery. By disregarding Rule 502, attorneys put themselves at a disadvantage in litigation, and may be in breach of their ethical duties to protect client confidences.[1] Specifically, the Model Rules of Professional Conduct ("RPC") Rule 1.6(c) requires a lawyer to use "reasonable efforts" to protect against the disclosure or use of client confidences.[2] Rule 502 establishes procedures that a lawyer can use to discharge this duty, and the failure to utilize them might be an ethical violation that could lead to liability for malpractice.

1. Rule 502

According to the Advisory Committee Notes, Rule 502 has two major purposes: (1) to resolve disputes pertaining to the effects of disclosing communications or information protected by attorney-client privilege or as work-product, specifically addressing inadvertent disclosure and subject-matter waiver; and (2) to respond to the rising costs of participating in discovery and protecting disclosure of privileged documents, where any disclosure could operate as a subject matter waiver, potentially waiving privilege for many other undisclosed documents.[3] Rule 502 provides a series of rules concerning the effect of inadvertent disclosure of privileged information during the course of litigation.[4]

Rule 502(a) addresses subject matter waiver and the circumstances that warrant a waiver of attorney-client privilege or work-product protection of undisclosed information.[5] Subject matter waiver of undisclosed information is meant to be reserved for situations where a party intentionally submits "protected information into the litigation in a selective, misleading and unfair manner."[6] When a party discloses such information in a federal proceeding, the party has also waived the privilege as to undisclosed communications and information (in federal or state proceedings) if: "(1) the waiver is intentional; (2) the disclosed and undisclosed communication or information concern the same subject-matter; and" (3) in the interest of fairness, the disclosed and undisclosed information should be considered together.[7]

Rule 502(b) addresses what constitutes "inadvertent disclosure," and what conduct could save a party from waiving attorney-client privilege or work-product protection.[8] Such a disclosure in a federal proceeding will not operate as a waiver (in federal or state proceedings) if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error[.]"[9] While Rule 502(b) does not require the producing party to conduct a post-disclosure review, the producing party must follow up on any obvious indication that protected information has been disclosed.[10]

Rule 502(c) addresses the effect of disclosures made in state court.[11] When such a disclosure is made in a state proceeding and is not subject to a state-court order concerning waiver, the disclosure will not operate as a waiver in a federal proceeding if (1) the disclosure would not have been a waiver under Rule 502 in a federal proceeding, or (2) the disclosure "is not a waiver under the law of the state where the disclosure occurred."[12]

Rule 502(d) provides that a federal court order may protect parties from waiving attorney-client privilege or work-product protection.[13] That protection will protect such disclosure from other federal or state proceedings and need not be based on an agreement between the parties.[14] An order under Rule 502(d) has the potential of saving significant discovery costs by explicitly addressing the protections being maintained, regardless of the disclosure.[15] If such an order is in effect, the disclosure will not act as a waiver in both federal and state proceedings.[16]

Rule 502(e) provides that an agreement between parties regarding the effect of disclosure will only be binding on those parties to the agreement (unless incorporated into a court order).[17] For optimal protection, a party should seek an order pursuant to Rule 502(d).

Rule 502(f) sets forth that Rule 502 applies to all state and federal court proceedings.[18]

Rule 502, when utilized, resolves much uncertainty concerning the effect of inadvertent disclosure of protected information. In addition, the rule explicitly provides different levels of protection for party stipulations and court orders that address inadvertent disclosure of attorney-client communications and attorney work-product. Attorneys should familiarize themselves with Rule 502 in order to maximize protection for their clients.

While attorneys continue to ignore Rule 502, the courts have not. *Swift Spindrift, Ltd. v. Alvada Ins., Inc.*[19] demonstrates the type of ignorance to Rule 502 that is commonplace today. That case involved an insurance coverage dispute arising out of a detained cargo ship.[20] During discovery, plaintiff disclosed various attorney-client privileged documents.[21] One such communication advised plaintiff that its insurance policy did not provide coverage for the underlying situation.[22] Defendant moved to compel the production of other attorney-client communications listed in plaintiff's privilege log, arguing that plaintiff had made a subject matter waiver by producing similar communications.[23] The parties argued over the scope of the potential waiver without ever referring to Rule 502.

In reiterating the importance of Rule 502, the Court pointed out the wide-sweeping unfamiliarity among practicing attorneys with respect to its existence and application:

> Despite its obvious application, neither party has mentioned [Rule 502], which governs the disclosure of privileged information to a litigation adversary in the course of a "Federal proceeding." Perhaps this omission should not be a surprise since remarkably few lawyers seem to be aware of the Rule's existence despite its enactment nearly five years ago. That is unfortunate because Rule 502 was specifically designed to avoid vexatious and time-consuming privilege disputes such as this one.[24]

Fortunately for the plaintiff, the Court went on to deny that part of defendant's motion, which sought to compel undisclosed documents based on subject matter waiver.[25]

Attorneys who utilize the benefits of Rule 502 obtain a clear level of protection memorialized by a court order. In those cases, the court need not go beyond the court order to determine whether a party has waived a privilege.[26]

While it appears that courts are willing to protect privileged information even where attorneys have failed to consider Rule 502, attorneys should not carelessly disregard its importance. Litigating over the issue of waiver is much easier and cheaper with a Rule 502(d) order in place. Attorneys are ethically obligated to protect their clients' privileged information. By not pursuing a Rule 502(d) order prior to disclosing documents, attorneys are failing to provide their clients with the upmost protection.

2. Potential Ethical Considerations

Absent a court order pursuant to Rule 502(d) that explicitly protects disclosure of documents that ought to be protected by attorney-client privilege or as attorney work-product, the unwitting litigant may find herself unnecessarily engulfed in motion practice over the issue of inadvertent disclosure under Rule 502(b). Since an order under Rule 502(d) effectively eliminates the possibility of a dispute, and since such a dispute can prove to be a lengthy and costly endeavor, one would be hard-pressed to justify *not* seeking an order under Rule 502(d) at the outset of discovery.

Although there is very little case law on whether Rule 502 considerations raise issues of malpractice, some federal judges have publicly stated that failure to, at a minimum, consider a Rule 502(d) order is in-and-of-itself malpractice. Speaking at a public conference in 2013, Judge Andrew Peck, United States Magistrate Judge for the United States District Court for the Southern District of New York, stated his view on "a fairly straight takeaway on 502(d)."[27] "In my opinion," he said, "it is malpractice to not seek a 502(d) order from the court before you seek documents. That doesn't mean you shouldn't carefully review your material for privileged documents before production, but why not have that insurance policy?"[28] Just last year, the American Bar Association published an article reporting that a panel of federal judges believed that an attorney's failure to consider Rule 502 constitutes malpractice and an ethical violation.[29]

The *Guidelines for Cases Involving Electronically Stored Information*, issued by the United States District Court, District of Kansas, specifically require that attorneys familiarize themselves with Rule 502.[30] Judge Paul W. Grimm, then-Chief United States Magistrate Judge for the United States District Court for the District of Maryland, wrote a lengthy article explaining the importance of Rule 502.[31]

One need not go far to find Model Rules of Professional Conduct that are implicated by Rule 502. Specifically, RPC Rule 1.6(c) provides, "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[32] New York's version of RPC Rule 1.6(c) is slightly narrower, but still imposes a duty of "reasonable care" to protect client confidences.[33] Implicating an attorney's duty of confidentiality, it would appear that requesting an order under Rule 502(d) is a reasonable effort that can and should be taken to avoid inadvertent disclosures.

RPC Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[34] Accordingly, a failure to at least familiarize oneself with Rule 502 and to use it, where appropriate, implicates an attorney's duty of competence.

Balancing the obligations under RPC 1.1 and 1.6(c) against an attorney's obligations under RPC 3.3, "Candor Toward the Tribunal," and RPC 3.4, "Fairness to Opposing Party and Counsel," obtaining an order under Rule 502 emerges as a straightforward effortless means for complying with one's ethical obligations. The inverse, however—that is, to fail to obtain an order under Rule 502—certainly raises questions as to whether an attorney has indeed complied with *all* of her ethical obligations.

Avail yourself to the protections of Rule 502(d), and be glad you did.

Endnotes

1. Model Rules of Prof'l Conduct, R. 1.6 (1983).
2. *Id*. at R. 1.6(c).
3. Fed. R. Evid. 502 Advisory Committee Notes (2008).
4. *See* Fed. R. Evid. 502.
5. *See* Fed. R. Evid. 502(a).
6. Fed. R. Evid. 502(a) Advisory Committee Notes (2008).
7. Fed. R. Evid. 502(a).
8. *See* Fed. R. Evid. 502(b).
9. Fed. R. Evid. 502(b).

10. Fed. R. Evid. 502(b) Advisory Committee Notes (2008).
11. *See* Fed. R. Evid. 502(c).
12. *Id.*
13. *See* Fed. R. Evid. 502(d).
14. Fed. R. Evid. 502(d) Advisory Committee Notes (2008).
15. *Id.*
16. Fed. R. Evid. 502(d).
17. *See* Fed. R. Evid. 502(e).
18. *See* Fed. R. Evid. 502(f).
19. No. 09 Civ. 9342 (AJN)(FM), 2013 U.S. Dist. LEXIS 104296 (S.D.N.Y. July 24, 2013).
20. *Id.* at *2.
21. *Id.* at *4-6.
22. *Id.* at *5.
23. *Id.* at *8.
24. *Id.* at *12 (internal citations omitted); *see also*, *e.g.*, *Seyler v. TSystems N. Am., Inc.*, 771 F. Supp. 2d 284, 287-88 (S.D.N.Y. 2011) (with no Rule 502 order in place, the parties were forced to litigate the issue of subject-matter waiver).
25. *See Swift Spindrift, Ltd*, 2013 U.S. Dist. LEXIS 104296, at *19.
26. *See*, *e.g.*, *Brookfield Assets Mgmt., Inc. v. AIG Fin. Prods. Corp.*, No. 09 Civ. 8285 (PGG)(FM), 2013 U.S. Dist. LEXIS 29543, at *2-3 (S.D.N.Y. Jan. 7, 2013) (court held a protective order to have a sufficient "claw back" provision protecting the defendant from waiving any privilege in any proceeding in any court); *U.S. v. Daugerdas*, No. S3 09 CR 581 (WHP), 2012 U.S. Dist. LEXIS 3134, at *6 (S.D.N.Y. Jan. 11, 2012) (court held certain communications to be protected by a court order, even in a related arbitration); *see also Zivali v. AT&T Mobility LLC*, No. 08 Civ. 10310 (JSR), 2010 U.S. Dist. LEXIS 130467, at *5-6 (S.D.N.Y. Dec. 6, 2010) (court held inapplicable Rule 502(b) because there was a protective order in place under Rule 502(d)).
27. Evan Koblentz, *View from the Bench: Judges on EDiscovery at LegalTech Day Two*, Law Tech. News, Jan. 31, 2013.
28. *Id.* Annexed hereto is a copy of a sample Rule 502(d) Order offered for use on Judge Peck's homepage, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=928 (last visited July 1, 2015).
29. *See* Jeffrey G. Close, *FRE 502, "Inadvertence" in Privilege Waiver, and Avoiding Malpractice*, A.B.A. Sec. Pretrial Practice & Disc., May 22, 2013, *available at* http://apps.americanbar.org/litigation/committees/pretrial/email/spring2013/spring2013-0513-fre-502-inadvertence-privilege-waiver-avoiding-malpractice.html (last visited July 28, 2015).
30. *See* The United States District Court for the District of Kansas, Guidelines for Cases Involving Electronically Stored Information [ESI] (2013), at 8, *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited July 28, 2015).
31. *See* Hon. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 Rich. J.L. & Tech 8 (2011).
32. Model Rules of Prof'l Conduct, R. 1.6(c).
33. NY Rules of Prof'l Conduct, 22 NYCRR § 1200.0, Rule 1.6(c) (2009) ("A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.").
34. Model Rules of Prof'l Conduct, R. 1.1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RULE 502(d) ORDER

ANDREW J. PECK, United States Magistrate Judge:

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

SO ORDERED.

Dated: New York, New York
[DATE]

Andrew J. Peck
United States Magistrate Judge

Copies **by ECF** to: All Counsel
Judge _____

Rule 68 Offers of Judgment and Mootness, Especially for Collective or Class Actions

This report addresses a split in the federal circuits on the question of whether an unaccepted offer of judgment under Rule 68 of the Federal Rules of Civil Procedure[1] for as much or more than the offeree could legally recover renders the action moot and requires its dismissal. Faced with a plaintiff's rejection of a defendant's offer of complete relief,[2] the Second and Sixth Circuits have nonetheless entered judgment in the plaintiff's favor in the amount of the offer and accordingly dismissed the action as moot.[3] In contrast, the Seventh Circuit has held that a court may dismiss an action without providing an offeree any remedy where the offeree refuses to accept a Rule 68 offer for complete relief.[4] In *dicta*, the Third Circuit has stated its agreement with the Seventh Circuit's approach.[5] The Ninth Circuit, on the other hand, has held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."[6] In *Symczyk*, the Supreme Court acknowledged that the circuit courts were split on this issue but declined to resolve the question, finding that the issue was not properly presented for review.[7]

The question of what a district court should do in the face of an unaccepted offer of judgment for complete relief gains particular significance in class actions under Federal Rule of Civil Procedure 23 and collective actions such as those brought under the Fair Labor Standards Act (the "FLSA"). Where an offer under Rule 68 leads to the involuntary dismissal of such claims, a judicial determination of an issue common to potential plaintiffs who would otherwise lack the financial resources to prosecute their claims may be preempted. By "picking off" potential class or collective action representatives one by one, a defendant could potentially preclude judicial review and redress of a widespread injury.

This report first examines the case law on whether a failure to accept a Rule 68 offer affording complete relief moots the case. While the courts are split, and the text of Rule 68 does not specifically provide or even suggest that an unaccepted offer should moot the case, the Section recommends that the Rule be amended to allow the entry of a judgment for the full amount of an offer that provides complete relief but is not accepted.

The report also examines the case law and arguments regarding the tension between a Rule 68 offer of complete relief to an individual representative in a class or collective action and the termination of the action as a result of such an offer. However, no recommendation is made to change or retain current Rule 68 in this area.

1. The *Symczyk* Decision

In *Symczyk*, the plaintiff brought a collective action under the FLSA on behalf of herself and others "similarly situated."[8] After she allowed an offer of judgment under Rule 68 to lapse, the district court, finding that no other individuals had joined her suit and that the relief offered by the defendant under Rule 68, if accepted, would have fully satisfied her claim, concluded that the suit was moot and dismissed plaintiff's claim for lack of subject matter jurisdiction.[9]

The Third Circuit reversed, holding that, while the plaintiff's individual claim was moot, allowing defendants before certification to "pick off" named plaintiffs with "Rule 68 offers would frustrate the goals of collective actions."[10] The matter was therefore remanded to the district court for the plaintiff to seek "conditional certification," which, if successful, would relate back to the commencement of the action and permit the case to go forward.[11]

In the Supreme Court, the defendant argued that the Third Circuit's order remanding the case to the district court should be reversed and that, because the plaintiff's claim was moot, the entire action should be dismissed. The plaintiff argued that the district and circuit courts erred when each held the defendant's unaccepted offer of judgment mooted the plaintiff's FLSA claim, because the Rule 68 offer lapsed without an entry of judgment.[12] The United States, as *amicus curiae*, argued in support of the plaintiff's position that the defendant's unaccepted Rule 68 offer did not moot the FLSA claim.[13]

In a 5-4 decision by Justice Thomas (joined by Justices Roberts, Scalia, Kennedy, and Alito), the Supreme Court acknowledged that the Courts of Appeals were split as to whether an unaccepted Rule 68 offer that fully satisfies a plaintiff's claim necessarily renders the claim moot.[14] The Court declined to decide that issue, however, on the ground that the plaintiff failed to raise it in her opposition to the petition for certiorari and had also conceded at the district and circuit court levels that an unaccepted offer for full relief mooted an offeree's claim.[15] The Court therefore assumed, without deciding, that the plaintiff's individual claim was rendered moot by the defendant's Rule 68 offer.[16]

The remainder of the Court's opinion focused on whether the plaintiff's collective-action allegations were sufficient to render the action justiciable notwithstanding the mootness of her individual claim.[17] The Court held that they were not, reasoning that collective actions under the FLSA and analogous statutes are fundamentally dif-

ferent from Rule 23 class actions.[18] The majority's reasoning rejected three arguments by Symczyk.

First, the Court rejected Symczyk's argument that she had a sufficient personal stake in the collective action, other than her individual claim, by virtue of her status as a potential representative of other similarly situated employees.[19] According to the Court, at the time her claim became moot, there was no certification decision to which the claim could relate back because Symczyk had not moved for "conditional certification."[20] Even if she had moved for conditional certification, the Court drew a distinction between Rule 23 class actions and "conditional certification" under FLSA.[21] Under Rule 23, a putative class acquires independent legal status upon the district court's grant of class certification.[22] By contrast, under the FLSA, a grant of conditional certification only permits similarly situated employees to opt into the litigation by filing written consent with the court.[23] Thus, the Court held, in FLSA collective action cases, a grant of conditional certification could not render justiciable the named plaintiff's claim if that claim had been rendered moot by an offer for a complete remedy.[24]

Second, the Court rejected Symczyk's argument that, even if her claim were moot, the action would survive under a line of authority holding that those class action claims which are "inherently transitory" are not necessarily rendered moot upon the termination of a named plaintiff's claim.[25] The Court explained that the "inherently transitory" analysis was developed to address situations involving a plaintiff's interest in a suit concerning fleeting conduct, where the plaintiff's stake did not last long enough to enable litigation to run its course.[26] In contrast, the Court concluded that using Rule 68 to "pick off" a named plaintiff before the collective action process was complete addressed a defendant's strategy but not the duration of the defendant's conduct.[27] Because nothing prevented similarly situated plaintiffs from continuing their suit, claims subject to Rule 68 offers cannot be described as "inherently transitory."[28]

Third, having assumed without deciding that the unaccepted offer mooted the plaintiff's claim, the Court rejected Symczyk's argument that the action should survive because the purposes served by the FLSA's collective-action provisions would be frustrated by a defendant's use of Rule 68 to "pick off" named plaintiffs.[29] In support of her argument, Symczyk relied on *Deposit Guaranty National Bank v. Roper*, where the Court held that named plaintiffs possessed a continuing economic interest in their case following denial of class certification and entry of judgment in their favor due to a Rule 68 offer because a successful appeal would enable the plaintiffs to shift the burden of a portion of their attorney's fees and costs on to successful class litigants.[30] But Symczyk had conceded that the Rule 68 offer afforded her complete relief, and she never asserted that she possessed a continuing economic interest in the case.[31] Therefore, *Roper* was inapplicable.[32]

2. The *Symczyk* Dissent

Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) dissented. The dissent focused heavily on principles of equity, fairness, and basic contract law, reasoning that an unaccepted Rule 68 offer operated like any other rejected settlement offer—the plaintiff rejecting a Rule 68 offer retained an interest in the case; an unaccepted offer of judgment could never moot a claim. Justice Kagan made the following points:

> "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. [A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." …[A]n unaccepted offer of judgment cannot moot a case [because, w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.… Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn."[33]

Chastising the majority for avoiding the central issue by finding a waiver, the dissent underscored that the Court's own precedent would allow the issue to be considered even though a cross-petition for review had not been filed.[34] The dissent further explained that the text of Rule 68 contemplates that a court will enter judgment only when a plaintiff *accepts* an offer, and that an unaccepted offer will have no other consequence but to shift costs if the plaintiff ultimately secures a result less favorable than that offered.[35] "The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent."[36] Thus, the dissent reasoned, because the plaintiff's rejection of the Rule 68 offer had no legal impact, neither the individual case nor the potential collective action was mooted.[37]

3. The Split in the Circuits on Mootness

As noted above, the Courts of Appeal are split on whether a Rule 68 offer for maximum relief to a plaintiff moots the plaintiff's claim and, if so, whether a plaintiff who allows such an offer to lapse should receive judgment anyway, should receive no relief, or should be allowed to continue her suit.

The Second and Sixth Circuits hold that, where a plaintiff allows a Rule 68 offer for maximum relief to

lapse, the district court should enter judgment for the amount offered to the plaintiff (i.e., at least the maximum relief obtainable by the plaintiff) and dismiss the action as moot. In *McCauley v. Trans Union L.L.C.*, the Second Circuit held that the district court erred by dismissing the case, leaving the plaintiff with no recovery, where the plaintiff rejected an offer sufficient to afford him all that he could have obtained in the action, even though the offer did not meet the technical requirements of Rule 68.[38] In reversing the district court, the Second Circuit directed that a default judgment be entered against the defendant for the amount offered.[39] The Court of Appeals noted that the plaintiff's interest in having a day in court was not sufficient to satisfy the case or controversy requirement; neither was the defendant's unwillingness to admit liability,[40] citing the Seventh Circuit's decision in *Chathas v. Local 134 IBEW*.[41] The Second Circuit ruled that a plaintiff could not force a defendant to admit a legal violation since a defendant could always default and avoid a binding admission.[42] The Second Circuit relied on *Chathas* in entering a default judgment against the defendant for the amount of the offer, thus balancing the interests of all parties.[43]

Likewise, in *O'Brien v. Ed Donnelly Enters, Inc.*, the Sixth Circuit held that a Rule 68 offer for maximum relief mooted the plaintiff's claim, but that judgment must be entered in the plaintiff's favor before the action could be dismissed.[44] The Eighth Circuit cited *O'Brien* favorably in *Hartis v. Chi. Title Ins. Co*.[45]

The Seventh Circuit, on the other hand, has held that, where certification of a class action properly was denied, the plaintiff's refusal to accept an offer for more than what could be obtained mooted the case and required dismissal.[46] The plaintiff took nothing.[47] The Third Circuit has stated its agreement with the Seventh Circuit's approach but, to our knowledge, has not had occasion to apply the rule directly.[48]

The Ninth Circuit has rejected both of these approaches. Instead, it has adopted the reasoning expressed by Justice Kagan in her *Symczyk* dissent, holding that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."[49] The Ninth Circuit also cited *dictum* in *McCauley*, reasoning that the Second Circuit's entry of judgment on the Rule 68 offer necessarily rejected the idea that the claim was moot.[50]

The Eleventh Circuit recently adopted the Ninth Circuit approach in *Stein v. Buccaneers Ltd. P'ship*, when it considered whether an unaccepted Rule 68 offer for maximum relief to the named plaintiffs in a purported class could moot a class action when the offer was made prior to certification.[51] The *Stein* court held that the class claim could *not* be mooted based on alternative holdings.[52] First, adopting the reasoning of Justice Kagan's dissent, the court held that an unaccepted Rule 68 offer cannot render an individual's claim moot.[53] Second, even if the offer did moot the individual's claim, it would not moot the purported class's claim.[54]

4. Discussion of Mootness

We agree with the dissent of Justices Kagan, Ginsburg, Breyer, and Sotomayor in *Symczyk*, and believe that the approaches adopted by the Seventh, Sixth, and Second Circuits to Rule 68 offers are not supported by the current version of the Rule. In addition, the Seventh Circuit's approach outlined in *Greisz*—under which the claim of an offeree who rejects a settlement offer for maximum relief is dismissed as moot without any relief being granted—is fundamentally unfair.

Under Rule 68(b), an offer made under Rule 68(a) that goes unaccepted by the offeree after 14 days "is considered withdrawn."[55] Rule 68(d) articulates only one consequence of failing to accept a Rule 68(a) offer: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."[56] The language of the Rule does not allow for or suggest that a court may dismiss the offeree's claim after an offer goes unaccepted.

Nor is there any support in the mootness doctrine for the Seventh Circuit's approach, under which the action is dismissed—with no relief to the offeree—if a Rule 68 offer of full relief is not accepted. As Justice Kagan noted in her *Symczyk* dissent, the Supreme Court has held that a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[57] But when an offeree allows a Rule 68 offer to go unaccepted such that it is automatically withdrawn under Rule 68(b), under the current language of the Rule nothing in the litigation should change; the offeree retains the same stake in the outcome of the case as before the offer was made, and the court may grant the same relief as was always available to the offeree. There is nothing about the current formulation of Rule 68 that should render the controversy moot.

The rule established by the Second and Sixth Circuits is more consistent with traditional mootness principles. In the Second Circuit, if a defendant makes a settlement offer for maximum relief, the "typically proper disposition…is for the district court to enter judgment against the defendant for the proffered amount and to direct payment to the plaintiff consistent with the offer."[58] Once a default judgment is entered and the plaintiff is awarded all relief that could be achieved in the litigation, the case may be dismissed as moot. Thus, the Second Circuit's approach recognizes that the plaintiff must be granted full relief in order to render the dispute moot.

As a practical matter, the Sixth Circuit's approach is consistent with the Second Circuit's. Under the Sixth Circuit's rule, a Rule 68 offer of judgment that satisfies the plaintiff's entire demand moots the case, but where the

offer is not accepted, the court must enter judgment on it anyway for the full amount of the offer and dismiss the case.[59]

The approach of the Second and Sixth Circuits is a pragmatic solution, but it does not find support in the language of Rule 68. As currently drafted, Rule 68 provides no authority for a court to enter judgment against a defendant absent an offer by the defendant to take a default judgment against itself.[60] Also, we know of no basis within a court's inherent authority to enter a default judgment against a defendant based on the *plaintiff's* rejection of a Rule 68 offer.

For these reasons, Rule 68 should be amended to provide a district court with the authority to enter judgment in a plaintiff's favor and dismiss the action where the plaintiff has rejected a Rule 68 offer for all the relief that the plaintiff could legally recover. Specifically, a new subparagraph (e) should be added to Rule 68:

> (e) Where, under subparagraph (a) of this Rule, a party makes an offer of judgment that would afford the offeree all relief that the offeree could recover under applicable law (including costs and attorney's fees, if available), and the offeree does not accept such offer, the district court may direct the clerk to enter final judgment in the offeree's favor for the full amount of the offer. In such a case, issues regarding costs and attorney's fees shall be decided in accordance with the procedures set forth in Rule 54.

Until such an amendment is adopted, a defendant seeking a dismissal should consider accompanying its Rule 68 offer of complete relief with an offer to have a default judgment entered against it, which may provide a basis for a court to dismiss an action when complete relief has been rejected.

5. Special Issues Arising in Class and Collective Actions

The analysis is somewhat more complicated in the context of class actions. As the Third Circuit in *Weiss v. Regal Collections* noted:

> Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlements, create conflicts of interests for named plaintiffs, and encourage premature class certification motions. *See Gibson v. Aman Collection Serv.*, 2001 U.S. Dist. LEXIS 10669, at *8 (S.D. Ind. July 23, 2001) (recognizing conflict of interest posed by Rule 68 offer to lead plaintiff); *Gay v. Waiters' and Dairy Lunchmen's Union*, 86 F.R.D. 500, 502-03 (N.D. Cal. 1980). Justice Brennan also discussed the conflict of interests facing named representatives presented with a Rule 68 offer in *Marek v. Chesny*, 473 U.S. 1, 35 n.49, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985) (Brennan, J., dissenting).
>
> No express statement limits the application of Fed. R. Civ. P. 68 in class actions. Proposed amendments to make Rule 68 inapplicable to class actions were suggested in 1983 and 1984, and they were rejected both times. The proposals read in part: "this rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." *See* 98 F.R.D. at 363; 102 F.R.D. at 433. In support of the proposals, the Advisory Committee wrote: "An offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability [for costs and expenses] that could not be recouped from unnamed class members…. [This] could lead to a conflict of interest between the named representatives and other members of the class." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F.R.D. at 436. *See also* Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 52 (1985) (discussing rule changes and rationale for rejecting changes).
>
> The leading treatises recognize the tension between these two procedural rules. *See, e.g.,* 12 Charles Alan Wright & Arthur R. Miller, Fed. Practice and Procedure § 3001.1, at 76 (2d ed. 1997) ("There is much force to the contention that, as a matter of policy [Rule 68] should not be employed in class actions."); 13 James William Moore et. al., Moore's Federal Practice P 68.03[3], at 68-15 (3d ed. 2004) ("policy and practicality considerations make application of the offer of judgment rule to class and derivative actions questionable."); 5 Newberg on Class Actions § 15.36, at 115 (4th ed.) ("By denying the mandatory imposition of Rule 68 in class actions, class representatives will not be forced to abandon their litigation posture each time they are threatened with the possibility of incurring substantial costs for the sake of absent class members.").[61]

In *Marek v. Chesny*, an individual action, not a class action, the Supreme Court held that the term "costs" in

Rule 68 includes attorney's fees if a suit is brought under a statute that defines "costs" to include attorney's fees.[62] While the central holding of *Marek* did not involve class actions directly, Justice Brennan's dissent noted that the expansion of costs to include attorney's fees might create a conflict for a named class representative who received a Rule 68 offer. The plaintiff's interest in pursuing the class action might be impaired by the fear that, if she rejected the Rule 68 offer, she might have to pay the legal fees the defendant incurred after the offer that could not be recouped from unnamed class members.[63]

The courts have crafted rules in the class action context to prevent the conflicts identified by Justice Brennan in *Marek* when Rule 68 offers are made. For example, defendants cannot prevent an appeal from a denial of class certification by offering relief to a named plaintiff.[64] Otherwise, an action could be delayed indefinitely by buying off each putative class representative in succession.

However, the tension between Rule 68 and the class procedures prescribed under Rule 23 becomes apparent when an offer of judgment occurs before a request for certification is made or resolved. In such a situation, some circuits have held that a plaintiff may move to certify a class, absent undue delay, and avoid mootness, even after being offered complete relief. Circuits in this camp include the Third;[65] the Fifth;[66] the Ninth;[67] and the Tenth.[68]

The Seventh Circuit rejected an invitation to follow this line of cases and to overrule its holding in *Greisz* and related cases. In *Damasco v. Clearwire Corp*., the Seventh Circuit addressed the policy arguments against mooting an individual claim by use of a Rule 68 offer in the class setting.[69] In adhering to its view that mootness mandated the dismissal of a case when the individual claimant, prior to moving for class certification, received an offer for as much or more than could legally be obtained, the Seventh Circuit first discussed its prior authority.

In *Holstein v. City of Chicago*, the plaintiff had not moved for class certification prior to the expiration of the offer, and the claim was therefore mooted and dismissed under Rule 12(b)(6).[70] In *Greisz*, the Seventh Circuit held the offer to the named plaintiff did not moot a class action *unless* it came before certification was sought.[71] In *Gates v. City of Chicago*, the Court of Appeals held that a plaintiff could not move for class certification *after* receiving an offer for complete relief.[72] This decision put the Seventh Circuit squarely at odds with other Circuit Courts permitting a plaintiff a reasonable period of time to move for certification before the claim would be dismissed as moot.

In so doing, the Seventh Circuit considered and rejected the policy considerations advanced for a change in its approach:

> We believe that the exception created by [the Third, Fifth, Ninth, and Tenth Circuits] is unnecessary. To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.
>
> ***
>
> A simple solution to the buy-off problem that Damasco identifies is available, and it does not require us to forge a new rule that runs afoul of Article III: Class-action plaintiffs can move to certify the class at the same time that they file their complaint. The pendency of that motion protects a putative class from attempts to buy off the named plaintiffs. See Primax, 324 F.3d at 546-47. Damasco argues that this solution would provoke plaintiffs to move for certification prematurely, before they have fully developed or discovered the facts necessary to obtain certification. *See* 5 Moore's Federal Practice § 23.64[1][b], at 350 (3d ed. 2011). But this objection is unpersuasive. If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation. In a variety of other contexts, we have allowed plaintiffs to request stays after filing suit in order to allow them to complete essential activities. *See* Fed. R. Civ. P. 56(d) (allowing stays to complete discovery before summary judgment); *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002) (allowing stays in habeas petitions to permit exhaustion without risk of time bar); *Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (allowing stays in prisoner-rights suits to permit exhaustion without risk of statute-of-limitation bar). Moreover, this procedure comports with Federal Rule of Civil Procedure 23(c)(1)(A), which permits district courts to wait until "an early practicable time" before ruling on a motion to certify a class. We remind district courts that they must engage in a "rigorous analysis"—sometimes probing behind the pleadings—before ruling on certification. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). Although discovery may in some cases be unnecessary to resolve class issues, *see* 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 7.8, at 25 (4th ed. 2002), in other cases a

> court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class, *see Pitts*, 653 F.3d at 1093 n.5; *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1311 (11th Cir. 2008); *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 996-97 (5th Cir. 1984).[73]

Collective actions under the FLSA present potentially similar concerns, although jurisprudential distinctions exist between class actions and collective actions that can affect the impact of a Rule 68 offer. Indeed, "Rule 23 actions are fundamentally different from collective actions under the FLSA."[74] For example:

> [A] putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court.
>
> ***
>
> Whatever significance "conditional certification" may have in [FLSA] proceedings, it is not tantamount to class certification under Rule 23.[75]

6. Two Approaches to the Tension Between Rule 68 and Class or Collective Actions

Arguments can be made that Rule 68 should be amended to account for inequities that may arise in class and collective actions when defendants attempt to moot representative plaintiffs' claims prior to class or collective action certification. Arguments can also be made that no amendment of Rule 68 is necessary because the early issuance of Rule 68 offers encourages resolution of lawsuits with marginal merit, serves an important pruning function in the federal courts, and properly balances the purposes underlying Rule 68 with those of Rule 23 and the collective action procedure.

a. Arguments Favoring Amendment of Rule 68

Application of Rule 68 offers to individual representatives prior to certification can lead to unfair and impractical results. The monetary value of each putative class or collective action member's claim is generally small relative to the monetary value of the claims of the putative class or collective group as a whole. Yet an offer for complete relief made to putative representatives of a class or in a collective action prior to certification (whether accepted or not) threatens to preclude judicial review of legal issues common to putative class members if the offer would moot the case. Thus, a party defending the claim can, for a relatively small price, obtain an unfair and procedurally asymmetric strategic advantage if courts apply Justice Thomas' assumption in *Symczyk* and deem the mootness doctrine to apply to unaccepted Rule 68 offers.[76]

Litigations involving class and collective actions ought to be recognized as falling outside of the procedural paradigm contemplated by Rule 68 until plaintiffs are afforded a reasonable period of time to seek certification of the class or collective action.[77] Because Rule 68 imposes costs upon an offeree who obtains a judgment that is not more favorable than the one offered, the Rule, if applied in the class or collective action context prior to certification, pits the interests of a putative class representative against those of the putative class.[78] This should be avoided.

In light of the foregoing, Rule 68 should be amended to provide for a bright-line prohibition against a Rule 68 offer to a representative of a putative class prior to a district court's ruling on a motion to certify a class action, provided a motion to certify a class is made within a reasonable period of time. Following certification, the power of the "pick-off play" will be weakened, because one can reasonably expect that class lawyers should be able to enlist additional class representatives if the initial representatives either accept the offer or are dismissed.

b. Arguments Opposing Amendments of Rule 68

The reasoning of *Symczyk* leaves no doubt that, to the extent a rejected Rule 68 offer moots an individual's claim, the presence of collective-action allegations does not affect the mootness analysis.[79] Indeed, this rule would apply before or after certification of the collective action, at least until additional individuals opt in to join the action. Moreover, while the Supreme Court in *Symczyk* distinguished collective actions from class actions for purposes of its analysis,[80] the better reasoning for class actions is exemplified by the Seventh Circuit's approach in *Damasco*: if no motion for class certification is pending and no class has been certified, a Rule 68 offer of judgment that provides a named plaintiff with complete relief properly moots the action.[81]

Dismissing a class action on mootness grounds before class certification, or of a collective action before other individuals opt in to formally join the action, has no impact on the claims of individuals other than the named plaintiff. As the Supreme Court explained in *Symczyk*:

> While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in *respondent's* suit, such putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to

> have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.[82]

The same holds true in class actions prior to certification of the class.

This furthers the goal of obtaining the speedy resolution of cases, especially where cases involve small claims of questionable merit. Otherwise, the costs of litigation, especially given the necessity of engaging in often extensive discovery to assess the propriety of certification, can compel defendants to pay unjustified sums to resolve worthless or even frivolous claims. Defensible actions can become too expensive to oppose. The Seventh Circuit noted these concerns in *Greisz*:

> The class action is a valuable economizing device, especially when there is a multiplicity of small claims, but it is also pregnant with well-documented possibilities for abuse. The smaller the individual claim, the less incentive the claimant has to police the class lawyer's conduct, and the greater the danger, therefore, that the lawyer will pursue the suit for his own benefit rather than for the benefit of the class. The lawyer for a plaintiff class has not only an impaired incentive to be the faithful agent of his (nominal) principal, but also the potential to do great harm both to the defendant because of the cost of defending against a class action and to the members of the class because of the preclusive effect of a judgment for the defendant on the rights of those class members who have not opted out of the class action.[83]

The current balance of the tensions between Rule 68 and Rule 23 is the correct one. Accordingly, no amendment to Rule 68 should be made to provide special treatment with respect to class actions.

Moreover, collective actions under the FLSA should be accorded no different treatment than individual actions. Collective actions do not have absent class members, as is the case in class actions; instead, a potential member of the collective becomes part of the action only by affirmatively opting to join the case and becoming a party. Thus, when the claims of a named plaintiff in a collective action are mooted, whether by a Rule 68 offer of judgment or otherwise, the suit properly should be dismissed.

In light of the foregoing, Rule 68 should not be amended to exclude, or accord special treatment to, class actions or collective actions.

Endnotes

1. Fed. R. Civ. P. 68 (2009). Offer of Judgment

   (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

   (b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

   (c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

   (d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

2. Where a cause of action will permit a plaintiff to recover attorney's fees and costs, the term "complete relief" includes those items.
3. *See McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009). Editor's Note: Since the Executive Committee's approval of this Report, the Second Circuit has weighed in further on this issue, which is addressed in the Addendum hereto.
4. *See Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). Editor's Note: Since the Executive Committee's approval of this Report, the Seventh Circuit has weighed in further on this issue, which is addressed in the Addendum hereto.
5. *See Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (citing *Rand* for the proposition that "[a]n offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation"); *see also Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011) (same), *rev'd on other grounds*, ___U.S. ___, 133 S. Ct. 1523 (2013) [hereinafter *Symczyk*].
6. *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954-55 (9th Cir. 2013); *see also Gomez v. Campbell-Ewald Co.*, 786 F.3d 871, 875-76 (9th Cir. 2014), *cert. granted*, ___ U.S. ___, 135 S. Ct. 2311 (2015).
7. *Symczyk*, *supra* note 5, at 1528-29. Editor's Note: Since the Executive Committee's approval of this Report, the Supreme Court granted certiorari to address the issues presented in this Report, which is addressed in the Addendum hereto. *See Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 135 S. Ct. 2311 (2015).
8. *Id.* at 1527.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1528.
13. *Id.*
14. *Id.*
15. *Id.* at 1529.
16. *Id.*
17. *Id.*

18. *Id.*

19. *Id.* at 1530.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (holding that a certified class action is not rendered moot when the named plaintiff's claim becomes moot); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980) (extending *Sosna* to denials of class certification where the named plaintiff's individual claim remained viable at the time of the denial)).

25. *Symczyk*, *supra* note 5, at 1530-31.

26. *Id.* at 1531.

27. *Id.*

28. *Id.*

29. *Id.* at 1531-32.

30. 445 U.S. 326, 332-34 (1980) [hereinafter *Roper*].

31. *Symczyk*, *supra* note 5, at 1532.

32. The Court specifically noted that it need not address the continuing viability of *Roper* given that it was distinguishable on its facts from the case at bar. *Symczyk*, *supra* note 5, at 1532 n.5.

33. *Id.* at 1533-34 (Kagan, J, dissenting) (quoting *Chafin v. Chafin*, 568 U.S. ___, 133 S. Ct. 1017, 1023 (2012); FED. R. CIV. P. 68(b)).

34. *Symczyk*, *supra* note 5, at 1534-35.

35. *Id.* at 1536.

36. *Id.*

37. *Id.* at 1537.

38. *McCauley*, 402 F.3d at 342. The Second Court succinctly expressed its reasoning as follows:

> When Trans Union acknowledged that it owes McCauley $240, but offered the money with the requirement that the settlement be confidential, Trans Union made a conditional offer that McCauley was not obliged to take. Because judgment was then entered in Trans Union's favor, Trans Union was relieved of the obligation to pay the $240 it admittedly owes, and McCauley, by his refusal of a conditional settlement offer, wound up with nothing. We therefore cannot conclude that the rejected settlement offer, by itself, moots the case so as to warrant entry of judgment in favor of Trans Union.

Id.; *but see* Editor's Note, *supra* note 3.

39. *Id.*; *see also Cabala v. Crowley*, 736 F.3d 226, 231 (2d Cir. 2013) (holding case not moot where purported Rule 68 offer did not include required offer of judgment); *Doyle v. Midland Credit Mgmt.*, 722 F.3d 78, 81 (2d Cir. 2013) (dismissing case as moot even if offer did not comply with technical requirements of Rule 68); *but see* Editor's Note, *supra* note 3.

40. *McCauley*, 402 F.3d at 342; *but see* Editor's Note, *supra* note 3.

41. 233 F.3d 508, 512 (7th Cir. 2000).

42. *McCauley*, 402 F.3d at 342.

43. *Id.*; *but see* Editor's Note, *supra* note 3. It is beyond the scope of this report to examine whether a default judgment would have either a *res judicata* or collateral estoppel effect.

44. 575 F.3d 567, 574-75 (6th Cir. 2009).

45. 694 F.3d 935, 949 (8th Cir. 2012).

46. *Greisz*, 176 F.3d at 1016; *but see* Editor's Note, *supra* note 4.

47. *Id.*

48. *See Weiss*, 385 F.3d at 340 (quoting *Rand* for the proposition that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.").

49. *Diaz*, 732 F.3d at 954-55. This holding may conflict with the Ninth Circuit's prior decision in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (stating that, *if* class certification is denied, then Rule 68 offer to putative class representative *might* moot case).

50. *Diaz*, 732 F.3d at 952-53; *see also Gomez v. Campbell-Ewald Co.*, 786 F.3d 871, 875-76 (9th Cir. 2014), *cert. granted*, ___ U.S. ___, 135 S. Ct. 2311 (2015) (discussed in the addendum). In *Bais Yaakov of Spring Valley v. ACT, Inc.*, the District of Massachusetts also followed *Diaz* and Justice Kagan's dissent. 987 F. Supp. 2d 124 (D. Mass. 2013), *aff'd*, No. 14-1789, 2015 U.S. App. LEXIS 14718 (1st Cir. Aug. 21, 2015). Likewise, the District of New Hampshire, "strongly persuaded by Justice Kagan's dissent" and those cases adopting its reasoning, denied a defendant's motion to dismiss after the plaintiff rejected a Rule 68 offer for the maximum available relief. *Boucher v. Rioux*, No. 14-CV-141-LM, 2014 U.S. Dist. LEXIS 124917, at *17-18 (D. N.H. Sept. 8, 2014).

51. 772 F.3d 698 (11th Cir. 2014).

52. *Id.* at 709.

53. *Id.* at 703.

54. *Id.* at 709.

55. FED. R. CIV. P. 68(b).

56. FED. R. CIV. P. 68(d).

57. *Symczyk, supra* note 5, at 1533 (Kagan J., dissenting) (quoting *Chafin*, 133 S. Ct. at 1019) (internal quotation marks omitted)); *see also Knox v. Service Employees Intern. Union, Local 1000*, __ U.S. __, 132 S. Ct. 2277, 2287 (2012) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984) (internal quotation marks omitted)).

58. *Cabala*, 736 F.3d at 228; *see also McCauley,* 402 F.3d at 342 (holding that rejected Rule 68 offer did not moot case, but directing district court to enter default judgment in plaintiff's favor); *but see* Editor's Note, *supra* note 3.

59. *See O'Brien*, 575 F.3d at 574-75.

60. *McCauley* is not helpful in this analysis because, "[a]t oral argument, both parties *agreed* that entry of a default judgment would satisfactorily resolve this case." 402 F.3d at 342 (emphasis added).

61. 385 F.3d 337, 344 n.12 (3d Cir. 2004).

62. 473 U.S. 1, 3-12 (1985).

63. *Id.* at 33 n.49.

64. *Roper*, *supra* note 30, at 339; *see also Symczuk*, *supra* note 5, at 1530 (citing *Sosna*, 419 U.S. at 399; *United States Parole Comm'n*, 445 U.S. at 404 n.11).

65. *Weiss,* 385 F.3d at 348.

66. *Sandoz v. Cingular Wireless LLC,* 553 F.3d 913, 920-21 (5th Cir. 2008).

67. *Diaz,* 732 F.3d at 952 (citing *Pitts v. Terrible Herbst, Inc.*, 653 1081, 1091-92 (9th Cir. 2011)).

68. *Lucero v. Bureau of Collection Recovery Inc.*, 639 F.3d 1239, 1249-50 (10th Cir. 2011). We are unaware of any Second Circuit decision addressing this issue. *See Jones-Bartley v. McCabe, Weisberg & Conway, P.C.*, 59 F. Supp. 3d 617 (S.D.N.Y. Nov. 6, 2014):

> But, neither the Supreme Court nor the Second Circuit has ruled on whether class claims should be dismissed…when a Rule 68 offer of judgment for full relief is made…*prior* to the filing of a motion for class certification, or on the effect [on class claims] of a Rule 68 offer made prior to resolution of a Rule 23…certification motion (internal quotation marks omitted).

69. 662 F.3d 891, 895 (7th Cir. 2011), *overruled by Chapman v. First Index, Inc.*, Nos. 14-2773 & 14-2775, 2015 U.S. App. LEXIS 13767, at *8 (7th Cir. Aug. 6, 2015) (*see* Editor's Note, *supra* note 4). *Damasco* arose in the context of an offer of settlement being made in Illinois state court prior to removal to federal court and prior to a request for class certification. 662 F.3d at 893. However, the act of removal had no bearing on the Court of Appeals' decision.

70. 29 F.3d 1145, 1149 (7th Cir. 1994); *but see* Editor's Note, *supra* note 4.

71. 176 F.3d at 1015; *but see* Editor's Note, *supra* note 4.

72. 623 F.3d 389, 413 (7th Cir. 2010); *but see* Editor's Note, *supra* note 4.

73. *Damasco*, 662 F.3d at 896-97; *but see* Editor's Note, *supra* note 4.

74. *Symczyk, supra* note 5, at 1529 (citation omitted); *see also Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875-76 (9th Cir. 2014).

75. *Symczyk*, *supra* note 5, at 1530, 1532.

76. *See Symczyk, supra* note 5, at 1529 ("We, therefore, assume, without deciding, that petitioners' Rule 68 offer mooted respondent's individual claim.").

77. *See Stein*, 772 F.3d at 709 (holding that Rule 68 offer to named plaintiff prior to class certification motion could not moot purported class claim); *Davies v. Riddle & Assocs., P.C.*, 579 F. Supp. 2d 692, 697 (E.D. Pa. 2008) (recognizing conflict of interest that arises between putative class representative and putative class when offer of judgment is made prior to class certification); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 110 (S.D.N.Y. 2001) (holding Rule 68 offer providing full relief under Fair Debt Collection Practices Act cannot render action moot where offer is made prior to decision on class certification); *see also Martin v. Mabus*, 734 F. Supp. 1216, 1222 (S.D. Miss. 1990) (where the Southern District of Mississippi construed Rule 68 offers to be inapplicable to all stages of a class action on the ground that Rule 23 requires court approval of class settlements).

78. *See, e.g., Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 503 (N.D. Cal. 1980) ("Where the class representative's potential liability for costs is substantial compared to his personal stake in a successful outcome, an inherent conflict of interest is created by the mandatory operation of Rule 68."); *see also Weiss,* 385 F.3d at 344 n.12 (recognizing conflict of interest presented by Rule 68 offers in class action context).

79. *Symcyzk*, *supra* note 5, at 1529 ("[T]he mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.").

80. *Id.* at 1530.

81. 662 F.3d at 896.

82. *Id.* at 1531.

83. 176 F.3d at 1013.

May 6, 2015 **New York State Bar Association**

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Addendum

Since the Executive Committee approved the report entitled "Rule 68 Offers of Judgment and Mootness, Especially for Collective or Class Actions" (the "Initial Rule 68 Report"), important developments have occurred that are likely to result in greater certainty regarding whether Rule 68 offers of judgment may be employed by defendants to moot the claims of individual plaintiffs who purport to assert claims on behalf of a class or collective action.

On May 14, 2015, the Second Circuit ruled in *Tanasi v. New Alliance Bank* that "under the law of our Circuit, an unaccepted Rule 68 offer alone does not render a plaintiff's individual claims moot before the entry of judgment against the defendants."[1] In the court below, Judge William M. Skretny denied the defendants' motion to dismiss the action based upon plaintiff's rejection of a Rule 68 offer, finding that although the plaintiff's individual claims were mooted by the unaccepted offer of judgment, his putative class claims were not.[2]

The Second Circuit affirmed, but on alternative grounds. Acknowledging that "our prior case law has not always been entirely clear on this subject,"[3] the court sought "to clarify and reiterate that it remains the established law of this Circuit that a 'rejected settlement offer [under Rule 68], by itself, [cannot render] moot[] [a] case.'"[4] Thus, the court did not reach the question of whether the existence of putative class action claims would "provide an independent basis for Article III justiciability."[5] The First Circuit, however, did reach this question recently, holding that "a rejected and withdrawn offer of settlement of the named plaintiff's individual claims in a putative class action made before the named plaintiff moved to certify a class did not divest the court of subject matter jurisdiction by mooting the named plaintiff's claims."[6]

On August 6, 2015, the Seventh Circuit overruled its prior precedent, including *Damasco v. Clearwire Corp.*,[7] which was cited in the Initial Rule 68 Report, to hold that an unaccepted offer under Rule 68 did not moot an individual claim.[8] The Seventh Circuit adhered to the dissent of Justice Kagan in *Genesis Healthcare Corp. v. Symczyk*,[9] and pushed it a step farther by reasoning that if an offer could moot a claim by promising to give the plaintiff all that could be won in litigation, the case would be moot upon making the offer, thus preventing any relief to be awarded at all.[10]

In addition, on May 18, 2015, the Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*,[11] to address the questions:

> 1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.
>
> 2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

In *Campbell-Ewald Co.*, the Ninth Circuit ruled that neither the plaintiff's individual claims nor class claims he asserted were rendered moot by an unaccepted offer of judgment.[12] The U.S. Chamber and the Business roundtable filed a brief as *amici curiae* in support of the petition for certiorari.

Endnotes

1. 786 F.3d 195, 197 (2d Cir. 2015).
2. *Id.* at 196.
3. *Id.* at 199.
4. *Id.* at 200.
5. *Id.* at 197.
6. *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 U.S. App. LEXIS 14718, at *1 (1st Cir. Aug. 21, 2015).
7. 662 F.3d 891, 895 (7th Cir. 2011).
8. S*ee Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015). The court did not technically rule on whether the offer would moot a class action prior to class certification as the court affirmed the district court's decision to deny a proposed reformulation of the class four years after the lawsuit had begun.
9. 133 S. Ct. 1523, 1532-37 (2013).
10. *See Chapman* 796 F.3d at 787 ("As soon as the offer was made, the case would have gone up in smoke, and the court would have lost the power to enter the decree.").
11. 135 S. Ct. 2311 (2015).
12. 768 F.3d 871, 874-75 (9th Cir. 2014).

Social Media Ethics Guidelines

of the Commercial and Federal Litigation Section of the New York State Bar Association Updated June 9, 2015

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

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LAW SCHOOL INTERN

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Introduction

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association, which authored these social media ethics guidelines in 2014 to assist lawyers in understand-

ing the ethical challenges of social media, is updating them to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new sections on lawyers' competence,[1] the retention of social media by lawyers, client confidences, the tracking of client social media, communications by lawyers with judges, and lawyers' use of LinkedIn.

These Guidelines are guiding principles and are not "best practices." The world of social media is a nascent area that is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Moreover, there can be no single set of "best practices" where there are multiple ethics codes throughout the United States that govern lawyers' conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer's permitted use of social media may differ due to varying jurisdictions' different social mores, population bases and historical approaches to their own ethics rules and opinions.

These Guidelines are predicated upon the New York Rules of Professional Conduct ("NYRPC")[2] and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction's ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities. In New York State, ethics opinions are issued not just by the New York State Bar Association, but also by local bar associations located throughout the State.[3]

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states' ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. It is not always readily apparent whether a lawyer's social media communications may constitute regulated "attorney advertising." Similarly, privileged or confidential information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers also must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, especially if such posts are subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.

1. Attorney Competence

Guideline No. 1: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.

NYRPC 1.1(a) and (b).

Comment: NYRPC 1.1(a) provides "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As Guideline No. 1 recognizes—and the Guidelines discuss throughout—a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)[4] states:

> As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and

> conditions, including privacy features—which change frequently—prior to using such a network.[5]

A lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media. "[A lawyer must] understand the functionality of any social media service she intends to use for…research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site."[6]

Indeed, the comment to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).[7]

As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." While a lawyer may not delegate his obligation to be competent, he or she may rely, as appropriate, on professionals in the field of electronic discovery and social media to assist in obtaining such competence.

2. Attorney Advertising

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules.[8] Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.[9]

NYRPC 1.0, 7.1, 7.3.

Comment: In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[10] According to NYCLA, Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[11]

NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:

> If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." *See* RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[12] An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[13]

An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.[14]

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, consideration should be given to only posting tweets that would not be categorized as attorney advertising.[15]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication" and specifies another retention scheme for websites.[16] Rule 1.0(c) of the NYPRC defines "computer-accessed communication" as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto."[17] Thus, social media posts that are deemed "advertisements" are "computer-accessed communications, and their retention is required only for one year."[18]

In accordance with NYSBA, Op. 1009, to the extent that a social media post is found to be a "solicitation," it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited "real-time or interactive" communications. That would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving "real-time" or "live" responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially "live" or real-time tools.

Guideline No. 2.B: Prohibited Use of the Term "Specialists" on Social Media

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[19]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile. To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[20]

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. With respect to skills or practice areas on a lawyer's profile under a heading such as "Experience" or "Skills," such information does not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[21] Also, a lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings including "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[22]

Guideline No. 2.C: Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page

A lawyer who maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media network, account, blog or profile.[23]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she must ask that person to remove it.[24]

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer's obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer's social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

Guideline No. 2.D: Attorney Endorsements

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls[25] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[26] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[27] It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

3. Furnishing of Legal Advice Through Social Media

Guideline No. 3.A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

Comment: An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Guideline No. 3.B: Public Solicitation Is Prohibited Through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications,[28] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[29] business from the public through such means.[30] If a potential client[31] initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter,[32] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client—although the ethics rules would otherwise apply to such communications.

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

Comment: Answering general questions[33] on the Internet is analogous to writing for any publication on a legal topic.[34] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[35] In responding to questions,[36] a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.[37] A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[38] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[39] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real time communication.[40]

Guideline No. 3.C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation...". Rule 1.0(n), Terminology. The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."[41] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved.[42] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[43] Casual communications may be deleted without impacting ethical rules.[44]

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[45]
>
> A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

4. Review and Use of Evidence From Social Media

Guideline No. 4.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person's social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.[46] "Public" means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. In New York, such automatic messages, as noted below, sent to a juror by a lawyer or her agent that notified the juror of the identity of who viewed her profile may constitute an ethical violation.[47] Conversely, the ABA opined that such a "passive review" of a juror's social media does not constitute an ethical violation.[48] The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Drawing upon the ethical opinions addressing issues concerning social media communications with jurors, when an attorney views the social media site of a represented witness or a represented opposing party, he

or she should be aware of which networks[49] might automatically notify the owner of that account of his or her viewing, as this could be viewed an improper communication with someone who is represented by counsel.

Guideline No. 4.B: Contacting an Unrepresented Party to View a Restricted Social Media Website

A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile.[50] However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.[51] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using "deception."[52]

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account.[53] In New York, the lawyer is **not** required to disclose the reasons for making the "friend" request.[54]

The New Hampshire Bar Association, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[55] In Massachusetts, "it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to "friend" her without disclosing that the requester is the lawyer for a potential plaintiff."[56] The San Diego Bar requires disclosure of the lawyer's "affiliation and the purpose for the request."[57] The Philadelphia Bar Association notes that the failure to disclose that the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[58]

In Oregon, there is an opinion that if the person being sought out on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[59]

Guideline No. 4.C: Viewing a Represented Party's Restricted Social Media Website

A lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by the person's counsel.

NYRPC 4.1, 4.2.

Comment: It is significant to note that, unlike an unrepresented individual, the ethics rules are different when the person being contacted in order to obtain private social media content is "represented" by a lawyer, and such a communication is categorically prohibited.

Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's nonpublic personal information is permissible."[60]

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person that the lawyer has a "right" to view, such as a professional group where both the lawyer and represented person are members or as a result of being a "friend" of a "friend" of such represented person.

Guideline No. 4.D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a person's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[61] and could, as well, apply to the lawyer's client.[62]

5. Communicating With Clients

Guideline No. 5.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings.[63] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations.[64] Unless an appropriate record of the social media information or data

is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[65] or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[66] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[67] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has commenced, as long as social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[68]

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a "live" posting is simply made "unlive."

Guideline No. 5.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[69]

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer may review what a client plans to publish on a social media website in advance of publication[70] and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.[71]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[72] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[73] *See also* NYRPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

Guideline No. 5.D. A Lawyer's Use of Client-Provided Social Media Information

A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain private information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[74] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[75]

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"

> a lawyer may cause a client to communicate with a represented person…and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the

represented person's counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or "friending" a represented person and obtaining private information from that represented person's social media site.

New Hampshire opines that a lawyer's client may, for instance, send a "friend" request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[76] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[77]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication…. [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[78]

Guideline No. 5.E: Maintaining Client Confidences and Confidential Information

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media communications and communications made on a lawyer's website or blog must comply with these limitations.[79] This prohibition applies regardless of whether the confidential client information is positive or celebratory, negative or even to something as innocuous as where a client was on a certain day.

Where a lawyer learns that a client has posted a review of her services on a website or on social media, if the lawyer chooses to respond to the client's online review, the lawyer shall not reveal confidential information relating to the representation of the client. This prohibition applies even if the lawyer is attempting to respond to unflattering comments posted by the client.

NYRPC 1.6, 1.9(c).

Comment: A lawyer is prohibited, absent some recognized exemption, from disclosing client confidences and confidential information of a client. Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6,[80] which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary…to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."[81] NYSBA Opinion 1032 applies such self-defense exception to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction" and the self-defense exception does not apply to a "negative web posting."[82] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on websites such as Avvo, Yelp or Martindale Hubbell.[83]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[84] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[85]

6. Researching Jurors and Reporting Juror Misconduct

Guideline No. 6.A: Lawyers May Conduct Social Media Research

A lawyer may research a prospective or sitting juror's public social media profile and posts.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[86]

The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[87] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[88] However, Opinion

466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[89]

Guideline No. 6.B: A Juror's Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) With the juror.[90]

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[91]

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[92] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[93]

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.[94] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct (emphasis added).[95] According to ABA, Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[96]

While ABA, Formal Op. 466 noted that an automatic notice[97] sent to a juror, from a lawyer passively viewing a juror's social media network does not constitute an improper communication, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[98] Moreover, ABA, Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[99]

The American Bar Association's view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage."[100]

A lawyer must take measures to ensure that a lawyer's social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile.[101]

The New York opinions cited above draw a distinction between public and private juror information.[102] They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members or whether access can be obtained, for instance, by being a "friend" of a "friend" of a juror on Facebook.

Guideline No. 6.C: Deceit Shall Not Be Used to View a Juror's Social Media

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to

information about a juror that would otherwise be unavailable."[103]

Guideline No. 6.D: Juror Contact During Trial

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

A lawyer must exercise extreme caution when "passively" monitoring a sitting juror's social media presence. The lawyer needs to be aware of how any social media service operates, especially whether that service would notify the juror of such monitoring or the juror could otherwise become aware of such monitoring or viewing by the lawyer. Further, the lawyer's review of the juror's social media shall not burden or embarrass the juror or burden or delay the proceeding.

These later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[104]

> [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore reemphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[105]

ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct. In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[106] This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror present risks.[107]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[108]

Guideline No. 6.E: Juror Misconduct

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[109]

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[110]

New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."[111] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[112] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[113]

7. Using Social Media to Communicate With a Judicial Officer

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

NYRPC 3.5, 8.2 and 8.4.

Comment: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue.

However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.

A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[114] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[115]

It should be noted that New York Advisory Opinion 08-176 (Jan. 29, 2009) provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[116] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

> [A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) ("the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action.").

APPENDIX

DEFINITIONS

Social Media (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, Snapchat, Yik Yak and Reddit. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

Restricted: Information that is not available to a person viewing a social media account because an existing online relationship between the account holder and the person seeking to view it is lacking (whether directly, *e.g.*, a direct Facebook "friend," or indirectly, *e.g.*, a Facebook "friend of a friend"). Note that content intended to be "restricted" may be "public" through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how the content is made available by the social media network or due to technological change.

Public: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

Friending: The process through which the member of a social media network designates another person as a "friend" in response to a request to access Restricted Information. "Friending" may enable a member's "friends" to view the member's restricted content. "Friending" may also create a publicly viewable identification of the relationship between the two users. "Friending" is the term used by Facebook, but other social media networks use analogous concepts such as "Circles" on Google+ or "Follower" on Twitter or "Connections" on LinkedIn.

Posting or Post: Uploading public or restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, "Tweets" on Twitter).

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person's ability to view specified aspects of a member's account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

Endnotes

1. As of April 2015, fourteen states have included a duty of competence in technology in their ethical codes. http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html (last visited April 26, 2015).
2. https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.
3. A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.
4. Am. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).
5. Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform's features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such a social media platform actually functions.

   Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics ("NYCBA"), Formal Op. 2012-2 (2012).
6. *Id.*
7. ABA MODEL RULES OF PROF. CONDUCT, Rule 1.1, comment 8; *See* N.H. Bar Ass'n, Ethics Corner (June 21, 2013) (lawyers "[have] a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation").
8. *See also* Va. State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011); Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. No. 2012-186 (2012).
9. NYRPC 1.0.(a) defines "Advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."
10. N.Y. County Lawyers' Ass'n ("NYCLA"), Formal Op. 748 (2015).
11. *Id.*
12. NYRPC 7.1(e)(3) provides "[p]rior results do not guarantee a similar outcome."
13. NYCLA, Formal Op. 748.
14. N.Y. State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).
15. NYSBA, Op. 1009.
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* NYSBA, Op. 972 (2013).
20. *See also* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985)).
21. NYCLA, Formal Op. 748.
22. *See* NYRPC Rule 7.4.
23. *See also* Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites (revised Apr. 16, 2013).
24. *See* NYCLA, Formal Op. 748. *See also* Phila. Bar Assn. Prof'l Guidance Comm., Op. 2012-8; Va. State Bar, Quick Facts about Legal Ethics and Social Networking.
25. Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.
26. NYCLA, Formal Op. 748.
27. *See* NYCLA, Formal Op. 748. *See also* Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300; N.C. State Bar Ethics Comm., Formal Op. 8 (2012).
28. "Computer-accessed communication" is defined by NYRPC 1.0(c) as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." Official Comment 9 to NYRPC 7.3 advises: "Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."
29. "Solicitation" means "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client." NYRPC 7.3(b).
30. *See* NYSBA, Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications. *See also* Ill. State Bar Ass'n, Op. 96-10 (1997); Mich. Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Op. Comm., Op. 96-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

   The Phila. Bar Ass'n, however, has opined that, under the Pa. Rules of Prof. Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania's ethics rules. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010).
31. Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. *See* NYCBA, Formal Op. 2015-3 ("An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.").
32. Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. *See* NYSBA, Op. 1009.
33. Where "the inquiring attorney has 'become aware of a potential case, and wants to find plaintiffs,' and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation; *see* Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to "a specific incident involving potential claims for personal injury or wrongful death," *see* Rule 7.3(e)." NYSBA, Op. 1049 (2015).

34. *See* NYSBA, Op. 899.

35. *See id.*

36. *See* NYSBA, Op. 1049 ("We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute 'advertising.' In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as 'advertising' on the 'first page' of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. *See* Rule 7.1(f), (h), (k).").

37. *Id.*

38. *See id.*

39. *See* NYSBA, Op. 1049 ("When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. *See* N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute 'solicitation.'").

40. *Id.*

41. *See* NYCBA, Formal Op. 2008-1 (2008).

42. *Id.*

43. *Id. See also* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (the Pa. Bar Ass'n has opined that, under the Pa. Rules of Prof. Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice.").

44. *Id.*

45. NYSBA, Op. 623 opines that, with respect to documents belonging to the lawyer, a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents."

46. *See* NYSBA, Op. 843 (2010).

47. *See* NYCLA, Formal Op. 743 ; NYCBA, Formal Op. 2012-2.

48. *See* Am. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

49. One network that sends automatic notifications that someone has viewed one's profile is LinkedIn.

50. For example, this may include: (1) sending a "friend" request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.

51. *See also* N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

52. NYCBA, Formal Op. 2010-2 (2010).

53. *Id.*

54. *See id.*

55. N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

56. Mass. Bar Ass'n Comm. on Prof. Ethics, Op. 2014-5 (2014).

57. San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

58. Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

59. Or. State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

60. *Id. See* San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2.

61. *See* NYCBA, Formal Op. 2010-2 (2010).

62. *See also* N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

63. Mark A. Berman, "Counseling a Client to Change Her Privacy Settings on Her Social Media Account," New York Legal Ethics Reporter, Feb. 2015, *available at* http://www.newyorklegalethics.com/counseling-a-client-to-change-her-privacy-settings-on-her-social-media-account/ (last visited Nov. 16, 2015).

64. NYCLA, Formal Op. 745 (2013). *See* Phil. Bar Ass'n. Guidance Comm. Op., 2014-5 (2014).

65. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012).

66. New York has not opined on a lawyer's obligation to produce a website link that a client has utilized, but Phila. Bar Ass'n. Guidance Comm. Op. 2014-5 noted that, with respect to a website link utilized by a client, if it is appropriately requested in discovery, a lawyer "must make reasonable efforts to obtain a link or other [social media] content if the lawyer knows or reasonably believes it has not been produced by the client."

67. NYCLA, Formal Op. 745.

68. N.C. State Bar 2014, Formal Ethics Op. 5 (2014); Phila. Bar Ass'n Guidance Comm., Op. 2014-5 (2014); Fl. Bar Prof. Ethics Comm., Proposed Advisory Opinion 14-1 (Jan. 23, 2015).

69. NYCLA, Formal Op. 745.

70. As social media-related evidence has increased in use in litigation, a lawyer may consider periodically following or checking her client's social media communications, especially in matters where posts on social media would be relevant to her client's claims or defenses. Following a client's social media use could involve connecting with the client by establishing a LinkedIn connection, "following" the client on Twitter, or "friending" her on Facebook. Whether to follow a client's postings should be discussed with the client in advance. Monitoring a client's social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client's posts on existing or future litigation or on their implication for other issues relating to the lawyer's representation of the client

    Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 notes "tracking a client's activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client's legal dispute" and "an attorney can reasonably expect that opposing counsel will monitor a client's social media account."

71. NYCLA, Formal Op. 745.

72. NYRPC 3.1(a).

73. NYRPC 3.1(b)(3).

74. NYCBA, Formal Op. 2002-3 (2002).

75. *Id.*

76. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

77. *Id.*

78. ABA, Formal Op. 11-461 (2011).

79. NYRPC 1.6.

80. Comment 17 to NYRPC Rule 1.6 provides:

    > When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method

of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

81. NYSBA Op. 1032 (2014).
82. NYSBA, Opinion 1032.
83. *See* Michmerhuizen, Susan, "Client reviews: Your Thumbs Down May Come Back Around,"Americanbar.org., Your ABA, September 2014. Web. 3 March 2015.
84. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.
85. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-200.
86. *See* NYCBA, Formal Op. 2012-2 (2012).
87. *See* Am. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.
88. *Id.*
89. *Id.*
90. *See* NYCLA, Formal Op. 743 (2011); NYCBA, Formal Op. 2012-2; *see also* Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 (2013).
91. Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, 85 N.Y. St. B.A.J. 50 (2013).
92. *See* ABA, Formal Op. 14-466.
93. *Id.*
94. *Id.*
95. *See* ABA, Formal Op. 14-466.
96. *Id. See* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 ("[t]here is no ex parte communications if the social networking website independently notifies users when the page has been viewed").
97. For instance, currently, if a lawyer logs into LinkedIn, as it is currently configured, and performs a search and clicks on a link to a LinkedIn profile of a juror, an automatic message may well be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror's profile. In order for that reviewer's profile not to be identified through LinkedIn, that person must change her settings so that she is anonymous or, alternatively, to be fully logged out of her LinkedIn account.
98. *Id.*
99. *Id.*
100. *See* Mark A. Berman, Ignatius A. Grande, and Ronald J. Hedges, *Why American Bar Association Opinion on Jurors and Social Media Falls Short*, New York Law Journal (May 5, 2014).
101. *See* NYCBA, Formal Op. 2012-2 and NYCLA, Formal Op. 743.
102. *See id.*
103. *See id.*
104. Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.
105. *See* NYCBA, Formal Op. 2012-2.
106. *See* Richard Vanderford, "LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial," Law360 (Sept. 27, 2013).
107. *Id.*
108. ABA, Formal Op. 14-466.
109. *See* NYCLA, Op. 743; NYCBA, Op. 2012-2.
110. *See* ABA, Formal Op. 14-466.
111. NYRPC 3.5(d).
112. NYCBA, Op. 2012-2.
113. *Id. See* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 ("a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website").
114. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.
115. NYRPC 3.5(a)(1).
116. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176.

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COMMERCIAL AND FEDERAL LITIGATION SECTION MEETING

Wednesday, January 27, 2016