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Committee Report

Message from the Chair

I have writer's block as I open a blank page to type this message in early January. I could review with you all of our great CLE programs and social events. I might point you to the excellent articles and reports prepared by our members. I could write yet again about the outstanding work of our Task Force on Women Initiatives and I might wager that by the time you read this, the Report (which was adopted by NYSBA in November), will have been adopted by the ABA at its February meeting. I could also preview that the Task Force is hard at work moving forward on planning the implementation of the recommendations contained in "If Not Now, When?" And I could, without hesitation, again commend the outstanding work of the committee that is planning Smooth Moves 2018.

So what to write about? Have you considered the role of your Section in the broader national discourse about how our government is designed to work, the role of the judiciary and importance of protecting the manner and method in which we resolve disputes and administer justice? Many of us have been thinking and talking about this for many months. As your Chair I have been personally conflicted on the topic.

The Section's "Purpose" is to "improve the quality of representation of clients, provide a forum for the improvement of law and procedure and enhance the administration of justice in the areas of commercial and federal litigation." This purpose seems kind of *small* in comparison to the numerous and well-known issues confronting our democracy, the administration of justice and our judiciary. Please do not misunderstand me; what we do within our "purpose" is important to us as practitioners (it pays the bills after all) and our work must continue notwithstanding the big issues that are part of a national discussion within our profession and our communities.

The Association's special edition of the Bar *Journal* entitled "Rule of Law" captured many of the monumental issues affecting our democracy and our judicial system. Thanks to Association President Sharon Stern Gerstman for providing her leadership and to provide this platform to give voice to the concerns of Association members. Kudos to Lesley Rosenthal (former Section Chair) for taking on the role of editor of the special edition, and a shout-out to Mark Alcott (former Section Chair) for his article "Defending Judges, Standing Up for the Rule of Law." If you have not read it, please do so.

So where does the Section fit? As a "corporate body" we must be committed to our "purpose," and in my opinion, we are bound to its contours. Thankfully, the Association is providing leadership on these important issues. While my practice is limited to commercial litigation, I have the means and methods to do what I can to protect our judicial institutions, our judicial system, members of the judicial branch and the "rule of law." I will work to put into action some of the recommendations made in special edition of the Bar *Journal*. I intend to redouble my efforts to make sure that I am always respectful of the lawyers in my cases, that I make clear my respect for our judicial system and for the members of our judiciary. I will make sure that detractors learn from watching what I do as an attorney, that, for example, a motion argument to a judge is *not* an argument *with* a judge and that an appeal is not a personal attack upon a judge but rather the exercise of the right established by the "rules of law" to disagree with a decision. And I will teach through my writings and public statements that once a decision is final, it is the "law" and that I will abide by it regardless of whether I disagree with the outcome. I will continue to participate in the Lawyer in the Classroom program offered by the Onondaga County Bar Association so I can teach high school students about our Constitution and the importance of an independent judiciary.

I am but one voice. But we are a group of nearly 2,000 trial lawyers, plying our craft in the public view. If we each committed to do what we can to defend the "Rule of Law," we can make a difference, while as a Section we stay true to our "purpose."

Mitch Katz

Recent Travel Industry Antitrust Actions

By Thomas A. Dickerson

Recent antitrust class actions involving the travel industry have been brought by or against airlines, in-flight internet providers, hotels, tour buses, ride-sharing companies and online travel sellers and have involved various alleged marketing misconduct such as resale price maintenance, parallel business behavior, misleading and unfair price guarantees, elimination of competitors and unfairly raising prices, substantial market foreclosure and price fixing.

Hop-On, Hop-Off Bus Tours

A popular means of exploring large cities is participating in a "hop-on, hop-off" double-decker bus tour. Here, the focus is on concepts such as relevant market, competitive effects and barriers to entry as they apply to New York City's hop-on, hop-off bus tour market. Specifically, the Court in *United States of America and State of New York v. Twin America, LLC*[1] approved a final judgment (and competitive impact statement) settling an antitrust lawsuit. The lawsuit arose from the joint venture of two hop-on, hop-off tour bus companies whereby they "allegedly controlled all of the most competitively meaningful bus stops on hop-on, hop-off bus tours and increased prices for riders by 10 percent since coming together in 2009. 'By eliminating the competition between them, the largest operators of New York City's iconic double-decker tour buses were able to raise prices and deprive city visitors of the benefits of a free and fair market.'"[2] The settlement provided for a payment of $7.5 million and giving up 50 bus stops in high-profile locations including Times Square and the Empire State Building.

Hotel Room Price Maintenance

In *Online Travel Company Hotel Booking Antitrust Litigation*,[3] plaintiff consumers set forth "three antitrust claims which charge (hotel chains and online travel sellers (OTAs)) with (allegedly) engaging in an industry-wide conspiracy to uniformly adopt resale price maintenance agreements containing most favored nation clauses, in an effort to eliminate price competition among hotel room booking websites." In addition, the complaint alleged that defendants deceptively published "best price" or "lowest price" guarantees on their websites while knowing that "best price" was the same fixed rate offered across all hotel booking websites. In dismissing the antitrust claims the Court held that "the real 'nub' of the complaint...is Defendants' parallel business behavior (which) is not suspicious...generally hotels across the industry may find that controlling minimum resale prices is the 'only feasible' way of effectuating a profitable price discrimination strategy—that is, a strategy to 'sell the same product [i.e., hotel room], costing the same to make and sell, at different prices to different consumers.'" However, as for Defendants' alleged price guarantees (*e.g.*, "OTA Defendant Expedia's best price guarantee: 'Find a cheaper trip within 24 hours of booking and we'll refund the difference—and give you a travel coupon worth $50'"), the Court held that they may have been both misleading and unfair.[4]

Stifling Ridesharing Competition

In *Wallen v. St. Louis Metropolitan Taxicab Commission*[5] (MTC), Uber Technologies, Inc. alleged that the MTC, its commissioners (some of whom are active participants in the very market regulated by the MTC) and a number of taxi companies conspired together to stifle competition from Uber. The complaint stated that "[t]he City and County of St. Louis...does not permit ridesharing companies to operate even though these companies are operating safely and efficiently in every State of the Union (except South Dakota)." It was alleged that the MTC functions as a cartel in part by statute and does so without meaningful supervision by the state." Uber argued that the U.S. Supreme Court has held that where a state has not authorized a body to engage in anti-competitive behavior or where active market participants control a nominally public body like the MIC and no independent government agency or official actively supervises its conduct, that body's conduct is not immune from antitrust liability.[6]

Uber Price Fixing Conspiracy

In *Meyer v. Kalanick*,[7] it was alleged that Mr. Kalanick had orchestrated and facilitated a price fixing conspiracy with Uber drivers to use Uber's pricing algorithm to set the prices charged to Uber riders, thereby restricting price competition among drivers to the detriment of riders. In denying defendants' motion to dismiss the Court noted that "Plaintiff alleges that the drivers have a 'common motive to conspire' because adhering to Uber's pricing algorithm can yield supra-competitive prices...and that if the drivers were acting independently instead of in concert, 'come significant portion' would not agree to follow the Uber pricing algorithm.'" The *Meyer* lawsuit is presently on hold pending the Court of Appeals review of the enforceability of Uber's mandatory arbitration clause in its driver contracts.

Airport Landing Slots

In *U.S. v. United Continental Holdings, Inc. And Delta Air Lines*,[8] the U.S. Department of Justice sought to block a proposed transaction between United and Delta in order

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to preserve competition at Newark Liberty International Airport. The complaint alleged, *inter alia*, that air passengers flying out of Newark pay among the highest fares in the country. United is the monopoly nonstop provider to 139 of the 206 destinations served nonstop from Newark and already controls 902 (or 73 percent) of the 1,233 slots the FAA has allocated to airlines at the airport—over 10 times more slots than the next largest carrier and does not even use all of its slots on a given day thus "depriv[ing] Newark passengers of flight options that would exist if the slots were flown." But United wanted even more slots and was "attempting to acquire 24 slots" from one of its competitors, Delta. The DOJ noted that "when new entrants have acquired slots at Newark, they have forced United to compete on the merits, resulting in measurable benefits to consumers."

Airline Price Fixing

In *Domestic Airline Travel Antitrust Litigation*,[9] the plaintiffs alleged that defendant airlines [American, United, Delta, Southwest] conspired "to, rase, maintain and/or stabilize prices for air transportation services...by... colluding to limit capacity on their respective airlines [referred as to "capacity discipline"] (causing their airfares to rise) substantially compared to those of other domestic air carriers, despite stagnant or decreasing demand and declines in the cost of fuel."

In denying a motion to dismiss the court noted that "Plaintiffs pled parallel conduct on the part of defendants coupled with sufficient evidence to raise the suggestion of a preceding agreement (and collusion) to limit capacity in their respective airlines, as a result the airfares rose during that period."

First Bag Fees

In *Delta/Airtrain Baggage Fee Antitrust Litigation*,[10] it was noted by the court that in December 2008, Defendants AirTran Airways, Inc....and defendant Delta Air Lines, Inc., began charging a fee to passengers for a first checked bag. Plaintiffs (alleged) that this first-bag fee was the product of a price-fixing conspiracy...According to plaintiffs, neither airline could unilaterally impose the fee in an open and competitive market without losing customers to the other, so defendant used their earnings call (and other channels) to communicate and coordinate pricing behavior to ensure that both airlines could impose the fee without losing any market share. Although the court certified the class action on behalf of 28 million customers and sanctioned Delta $7.6 million for having lost or destroyed electronic files, it recently granted summary judgment to defendants noting "that evidence in this case simply does not permit a reasonable fact-finder to infer the existence of a conspiracy, as it does not tend to exclude the possibility that the alleged conspirators acted independently."

In Flight Wi-Fi

In *Stewart v. GoGo, Inc.*,[11] the court noted that GoGo, Inc. is a company that provides broadband access to passengers on commercial aircraft and that plaintiffs alleged that it "has violated, *inter alia*, federal antitrust law because it has an unlawful monopoly in the 'market for in-flight internet access services on domestic commercial airline flights within the continental United States.'" In denying GoGo's motion to dismiss the court noted that plaintiffs maintain that there is a substantial market foreclosure because GoGo and a majority of the airlines providing commercial, domestic air travel have entered into long-term, exclusive contracts, which locked up most of the airlines' fleets. Plaintiffs alleged that GoGo possessed 85 percent of the relevant market share.

Endnotes

1. *United States of America and State of New York v. Twin America, LLC*, Civil Action No. 12-cv-8989 (ALG)(GWG), S.D.N.Y. (Stipulation and Order Regarding Final Judgment signed by Judge Andrew L. Carter, Jr. (3/18/2015; Competitive Impact Statement dated March 16, 2015.
2. *U.S. and N.Y. Settle Antitrust Cases Against Bus Companies*, New York Law Journal, March 18, 2015.
3. *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526 (2014).
4. *Id*. ("It seems plausible that an ordinary consumer would reasonably infer from this advertisement that Expedia is trolling the online market, looking for the lowest price for a particular room in the 24-hour period and publishing that rate for the consumer. Expedia even implies that it is putting in its best effort to find the consumer the best price, promising that if it slips up, the consumer gets a refund and a $50 travel coupon. In reality, Expedia's promise is illusory—it has entered into a contract...that ensures the rate offered in the same 'low' price offered everywhere else online...These allegations, therefore, plausibly show that a reasonable consumer may be misled to believe she was receiving the lowest price available in a competitive market.").
5. *Wallen v. St. Louis Metropolitan Taxcicab Comm'n*, Case No. 4:15-cv-1432, 2016 U.S. Dist. LEXIS 138988 (E.D. Mo. Sept. 30, 2016). *See also* Shepard Goldfein & James Keyte, *Uber Seeks Antitrust Scrutiny of Taxicab Commission*, N.Y. Law Journal, November 10, 2015.
6. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015); *FTC v. Phoebe Health System, Inc.*, 133 S. Ct. 1003 (2013).
7. *Meyer v. Kalanick and Uber Technologies, Inc.*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016), *vacated* 868 F.3d 66.
8. *U.S. v. United Continental Holdings, Inc.*, Case No: 2:15-cv-07992-WHW-CLW (D.N.J.) (filed 11/10/2015).
9. *In re Domestic Airline Travel Antitrust Litigation*, 221 F. Supp. 3d 46 (D.D.C. 2016); *Blumenthal v. American Airlines, Inc.*, Case No: 1:15-v-01056 (D.D.C. (filed 7/6/2015)).
10. *In re Delta/Airtrain Baggage Fee Antitrust Litigation*, 245 F. Supp. 3d 1343 (N.D. Ga. 2017).
11. *Stewart v. GoGo, Inc.*, No. C-12-5164 EMC, 2014 WL 324570 (N.D. Cal. January 29, 2014).

Lost Profit Legal Rules and the Forensic CPA

By Stephen L. Ferraro, CPA/ABV/CFF, MAFF, CVA and Charles S. Amodio, CPA/CFF, MAFF, MBA

As forensic CPAs, we are often requested to build, or rebut, financial models that estimate lost profits. During our work, it is very important that we do not lose sight of the legal principles governing lost profits with the goal of assisting the trier of fact. Recovering lost profits generally requires the plaintiff to successfully address the following legal rules:

I. *The Proximate Cause Rule*: The recovery of damages for lost profits is subject to the general principle that damages must be proximately caused by an event, breach or wrongful act of the defendant. This requirement is expressed in numerous cases and governs the recovery of all compensatory damages.

II. *The Reasonable Certainty Rule*: A second requirement is that the damages must be proven with reasonable certainty. This rule requires that the damages be capable of measurement based upon reliable factors without undue speculation. Again, this legal principle is expressed in several cases and is unquestionable.

III. *The Foreseeability Rule*: There is also a key question presented by cases looking for recovery of damages for lost profits on contract claims. The question is whether those damages were reasonably foreseeable as the expected and likely result of a breach of the contract at the time the contract was made.

These governing legal principles, which have been well established and reinforced by case law, should be woven into arguments and financial models in a manner that shows their applicability to the case at hand. Further discussion and supporting case law for each rule is offered below.

I. The Proximate Cause Rule

As stated, damages for lost profits are recoverable only if the event, breach, or wrongful act was the proximate cause of the loss. *Proximate cause* is an act from which an injury or damage results as a natural, direct, uninterrupted consequence and without which the injury or damage would not have occurred. In other words, there must be a close link between the event, breach, or wrongful act and the resulting damages. Furthermore, to demonstrate proximate cause, the plaintiff must establish both "transaction causation" and "loss causation." *Transaction causation* relies on the concept that "but for" the event, breach or wrongful act, no damages would have been incurred. *Loss causation* requires that the plaintiff prove that their loss is related to the event, breach or wrongful act. The fact that an event occurred or the defendant breached a contract or performed a wrongful act does not alone support damages.

For example, in *Universal Commodities, Inc. v. Weed*, the plaintiff leased a seafood processing plant from the defendant, who was obligated to supply the seafood to be processed.[1] The defendant breached the contract, but the court denied lost profit damages because the plaintiff had been unable to secure financing for the business and would not have had sufficient capital to operate and make a profit, even if defendant had performed as required by the contract.[2]

The fact of damage is required to be proven with reasonable certainty, and it relates to whether the plaintiff can prove that the event or the acts of the defendant caused damage to the plaintiff. Once the fact of damage has been established, the amount of damage can be calculated. The event, or defendant's acts, need not be the sole cause of the plaintiff's lost profits. However, they must be a significant or material factor in the cause of that loss.

Although other factors may also be partially responsible for the plaintiff's lost profits, in some cases it may not be practicable, or possible, to eliminate the effect of all other possible causes of loss. However, it is necessary to show that these other factors have been considered, to the extent possible.

Sufficient evidence must be presented to the trier of fact to allow for a determination to be made as to what portion of the plaintiff's damages may be properly assigned to the event or defendant. As an example, nearly 20 years ago we handled a business interruption loss for a General Motors car dealership. The dealership suffered a devastating fire loss at the same time a union strike had stopped production at 30 GM assembly plants and 100 parts plants across North America. Through national and regional research of other "non-interrupted" GM dealerships, we could assess the probable impact of the strike on the dealership's historical car sales and related departmental profits. We could also adjust our "but for" projections accordingly. The plaintiff should present calculations in a manner that shows how the various factors causing the plaintiff's losses contributed to that loss.

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II. The Reasonable Certainty Rule

The reasonable certainty principle is addressed in many cases and is usually successfully met when damages have been calculated using assumptions that are not speculative. However, the calculated damages may only be an approximation. Courts mostly agree that proving reasonable certainty does not require mathematical precision.

In *Palmer v. Connecticut Railway & Lighting Co.*, the U.S. Supreme Court concluded that certainty as to the amount of the damages goes no further than to require a basis for a reasoned conclusion.[3] The decision goes on to state that certainty in the fact of damages is essential.[4]

In *Ameristar Jet Charter Inc. v. Dodson International Parts,* the issue of reasonable certainty arose.[5] In fact, appeals were made regarding the calculation of lost profit damages in the matter.[6] It was concluded that "the claimant must establish the fact of damages with reasonable certainty, but it is not always possible to establish the amount of damages with the same degree of certainty."[7]

In *Ashland Management v. Janien*, damages are to be "reasonably certain," but do "not require absolute certainty."[8] "Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision."[9] It requires damages to be measured based on known reliable facts and not speculation.[10]

In *DSC Communications v. Next Level Communications,* the court upheld the recovery of lost profits.[11] This decision was based on the fact that the plaintiff's damage expert presented a damage model that included an assumption of future market share, based on data obtained from respected sources in the telecommunications market, and upon a showing that the plaintiff's history of strong performance in the field was indicative of likely success.[12]

However, in *Holt Atherton Ind., Inc. v. Heine*, the defendants sold a bulldozer to the plaintiffs that the defendants subsequently refused to repair because they did not recognize the warranty.[13] The court held that the lost profits were not recoverable because the plaintiffs failed to show that they had enough work to fully utilize the bulldozer.[14]

Reasonable certainty in damages cases is a question of whether the plaintiff has evidence and can value the impact by the probability of success. There is a line between permissible speculations and intolerable guesswork. A damage calculation need not prove that all elements are certain, but such calculations must:

1. Be based on facts and/or the best available evidence to prove damages;
2. Use sound methodologies and indicate consideration of alternative methodologies;
3. Display confidence in the accuracy of estimates and yield reasonable results.

Damages for lost profits are recoverable only if the plaintiff can prove the damages related to lost profits are reasonable and that they have been calculated using reliable factors without undue speculation. The applicable federal or state laws regarding the required degree of certainty should also be addressed.

In summary, the calculation of lost profits does not require precision. An estimate of damages can be made. However, the loss cannot be based on speculation. Lost profits that are deemed speculative, such as those calculated using unreasonable growth rates for business sales or personal income, are not recoverable.

III. The Foreseeability Rule (Contract Damages Only)

Damages for lost profits are recoverable only if they are reasonably foreseeable by the breaching party and at the time of contracting. The reasonably foreseeable rule dates back to the famous English decision *Hadley v. Baxendale* and is still good law today. [15]

In *Hadley*, the Court set out that damages are recoverable only if they were reasonably foreseeable by both parties at the time of the contract and that they arose naturally from the breach.[16]

For example, in *Hampton v. Federal Express Corp.*, the court found that damages resulting from the failure to deliver blood samples of cancer patients in need of bone marrow transplants were not recoverable if the defendant did not have knowledge of the package's contents.[17] In that case, the defendant could not reasonably foresee any injury to patients.[18]

The courts are consistent in giving the trier of fact the responsibility of determining foreseeability. Of the three rules, foreseeability is the legal principle for lost profits in which forensic CPAs have the least involvement. However, that does not mean our work cannot aid the trier of fact in the assessment of foreseeability. Our work that is related to proximate cause and reasonable certainty is intended to provide insight with respect to foreseeability.

As mentioned earlier, through industry research we could show that in addition to the fire, a GM strike represented an "other factor" of causation that was a probable contributor to the loss. The identification of this "other factor" would have made it difficult for the plaintiff to prove foreseeability under the insurance contract. Conversely, if the forensic CPA could identify "other factors" related to the plaintiff's industry, markets, or economy that would have made a positive impact on the business during the loss period, the trier of fact could see how an event, a breach, or wrongful act could have caused a loss and should, therefore, have been foreseeable.

Providing lost profit calculations that meet the reasonable certainty rule may also assist the trier of fact in assessing foreseeability. For example, we recently prepared a lost profits model for plaintiffs that had acquired a business with environmental clean-up issues. The purchase agreement required the sellers to perform the clean-up within a "reasonable" period of time. Only a partial clean-up was ever completed and nearly 10 years after the acquisition date. The plaintiffs had a business plan that included multiple interdependent projects and was allegedly reliant on the seller's environmental clean-up. Therefore, the business plan was not realized. Our lost profits model was built to reflect the plaintiff's business plan and show the financial interdependency of the various planned projects. It was also based on industry and economic research, using conservative assumptions for growth and profitability. A well-constructed financial model, which contemplates both the reasonable certainty and foreseeability rules, will allow the trier of fact to make an educated assessment of each rule.

Conclusion

There are three legal principles governing the recovery of lost profits: proximate cause, reasonable certainty, and foreseeability. Proximate cause evaluates if the event, breach, or wrongful act of the defendant caused the plaintiff's loss. Reasonable certainty is established when the estimated lost profits would have been produced had the event, breach, or wrongful act not occurred. Foreseeability measures whether the defendant party, when entering a contract, would have foreseen or contemplated that the event, breach, or wrongful act would have caused the lost profits claimed by the plaintiff. Each rule is measured separately, yet they are all interrelated. It is important that a forensic CPA not lose sight of these legal principles and the goal of assisting the trier of fact.

Endnotes

1. *Universal Commodities, Inc. v. Weed*, 449 S.W. 2d 106, 109 (1969).
2. *Id*. at 114.
3. *Palmer v. Connecticut Railway & Lighting Co*., 311 U.S. 544, 560 (1941).
4. *Id*. at 562.
5. *Ameristar Jet Charter Inc. v. Dodson International Parts*, 155 S.W. 3d 50, 55 (2005).
6. *Id*. at 54.
7. *Id*. at 56.
8. *Ashland Management v. Janien*, 624 N.E. 2d 1007, 1011 (1993).
9. *Id*.
10. *Id*.
11. *DSC Communications v. Next Level Communications,* 107 F.3d 322, 330 (5th Cir. 1997).
12. *Id*.
13. *Holt Atherton Ind., Inc. v. Heine*, 835 S.W.2d 80, 83 (1992).
14. *Id*. at 86.
15. *Hadley v. Baxendale,* 156 Eng. Rep. 145, 151 (Ex. 1854).
16. *Id*.
17. *Hampton v. Federal Express Corp*., 917 F. 2d 1119, 1125 (8th Cir. 1990).
18. *Id*. at 1126.

Special Proceedings Against Municipalities Jeopardized; Conflict Arises Within Second Department

By Kenneth L. Gartner and Tiffany D. Frigenti

"The statutory right of litigants to commence a special proceeding against a municipality on a 'neutral' court is jeopardized, and a conflict has arisen within the Second Department, due to misanalysis of the statutory scheme."

In New York State, litigants who sue municipalities for, e.g., breach of contract, or personal injury, are generally compelled by the New York Civil Practice Law and Rules (CPLR), Article 5 ("Venue"), to litigate on the municipality's "home court," i.e., in the county in which the municipality is located. Litigants who bring special proceedings—including Article 78 proceedings—are given a somewhat wider ambit of venue choices. They are statutorily permitted to commence their proceedings in any county within the judicial district in which the municipality is located. The statutory right of litigants to commence special proceedings in any county within the judicial district in which the municipality is located is, however, currently jeopardized by a Supreme Court decision, *Northeast Land Development Corporation v. Bertoli*,[1] which countermands this statutory right.[2] *Northeast Land Development* also stands in conflict with a more recent Supreme Court decision, *Salvodan v. City of New York*,[3] under which the right to commence a special proceeding in any county within the judicial district in which a municipal respondent is located would be maintained, in accordance with the statutory language and structure and the traditional understanding of the same.

CPLR 506(a) and (b), provide, respectively, that "a special proceeding may be commenced in any county within the judicial district where the proceeding is triable," and that "[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law." A statute compelling a petitioner to venue a plenary action—rather than a special proceeding—in another county in the judicial district does not overrule CPLR 506, or render the multiple venue selections afforded by CPLR 506 for special proceedings "improper." To the direct opposite, those provisions—by making an "action" "triable" in such a county—are exactly what render another county within the same judicial district proper.[4] As noted in *In Re Knight v. New York State Department of Environmental Conservation*,[5] it is a basic and self-evident proposition that "there are alternative places where [an Article 78] proceeding may be brought, which of course means that there can be more than one proper county for venue purposes."

Northeast Land Development reached the opposite conclusion, finding Town Law § 66(1)—which requires plenary actions against Towns to be tried in the county in which the Town is located—to be a ground for declaring CPLR 506 to have been overridden and nullified.

CPLR 506(a) permits the commencement of a special proceeding "*in any county within the judicial district* where the proceeding is triable" (emphasis added). CPLR 506(b) permits the commencement of a proceeding "against a body or officer" (*i.e.*, an Article 78 proceeding) "*in any county within the judicial district* where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located …." (emphasis added) (with certain inapplicable exceptions omitted).

CPLR 507 (which provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated") and Town Law § 66(1) (which provides that "[t]he place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated"), make the county where a town defendant is located a proper venue, while not rendering improper another county within the same judicial district.

CPLR 506(a) by its express terms permits the "commencement" of a special proceeding "in any county within the judicial district where the proceeding is *triable*" (emphasis added).

It is precisely because a matter would be "triable" within the county within which a town defendant is "located," pursuant to CPLR 507 and Town Law § 66(1), that a special proceeding against it is properly commenced in another county within the same judicial district pursuant to CPLR 506.

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CPLR 506 is the only venue provision to speak of "commencement." CPLR 506(a) permits "commencement" anywhere in a judicial district in which the proceeding is "triable." Every other venue provision speaks only of where an action is to be "tried."

This distinction was made because special proceedings, including Article 78 proceedings, are summary in nature, meant to be disposed of using the rules applicable to motions for summary judgment. *See* CPLR Rule 409(b) ("The court shall make a summary determination . . . . The court may make any orders permitted on a motion for summary judgment"); and CPLR 7804(f) and (g). Where triable issues are raised, they are tried "forthwith," CPLR 410, CPLR 7804(h), just as in CPLR Rule 3212(c). As explained by then-Supreme Court Justice (and later Court of Appeals Judge) Bernard S. Meyer in *In re Levien v. Board of Zoning and Appeals of Incorporated Village of Russell Gardens*,[6] "[a]n Article 78 proceeding is a special proceeding, CPLR 7804(a), intended to be summarily decided 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised,' CPLR 409(b), and to be tried forthwith if a triable issue is raised, CPLR 7804(h)."

A special proceeding does not present the same concerns regarding inconvenience of witnesses, document productions, *et al.*, as are presented in a plenary action, with its often-protracted depositions, discovery, and contemplated trial. *See Whitehurst v. Kavanagh*[7] ("[S]ince there will be summary determination of the article 78 proceeding there is no material witness to be inconvenienced"). Consequently, the usual tender solicitude for the government is unnecessary. The legislature determined that absent those convenience concerns, someone "fighting city hall" is entitled to litigate other than directly on the government's home turf. Keeping the litigation in the judicial district in which the matter arose is enough of a compromise.

The venue provisions that speak of "trial" are venue provisions for plenary actions. They do not override the provision by the legislature for broader parameters for the venue of special proceedings, particularly Article 78 proceedings. To the contrary, they are what establish those parameters. As explained in Siegel, *New York Practice* § 120:[8]

> Governmental defendants usually get the favor of being suable only in their own counties. An action against a . . . town . . . must be brought in the county of the defendant's location. * * * * [But] all these rules apply to plenary actions involving these governmental entities and should not be confused with a special proceeding, such as the Article 78 proceeding that may be brought against a governmental agency or unit. The special proceeding has a special venue provision.

Siegel, *New York Practice* § 565,[9] explains that "[t]he venue of an Article 78 proceeding is prescribed by CPLR 506(b), which permits the proceeding to be brought 'in any county within the judicial district . . . .'"

In *Salvodan v. City of New York*,[10] Justice Kevin Kerrigan, in Supreme Court, Queens County, adopted and endorsed this understanding, holding (with emphasis in original, as placed by Justice Kerrigan):[11]

> Venue under CPLR 501, et. seq., including CPLR 504 concerning cases where the City is a defendant, relates only to the place of *trial* of an *action.* Indeed, CPLR 504 sets forth the rules for the "place of trial of all actions against ... the City of New York", and CPLR 510, the change of venue provision, sets forth the grounds for change of "the place of trial of an action". It thus has no application to motions or special proceedings not involving a trial.

Justice Kerrigan's analysis was exactly in accord with the statutory language and structure. The fact that CPLR 507 and Town Law § 66(1) make plenary actions involving real property, or plenary actions against towns, "triable" in specific counties, does not bar the "commencement" of special proceedings, and particularly Article 78 proceedings, in other counties in the same judicial district, pursuant to CPLR 506(a) and (b). The direct opposite is true: these are the very provisions which define and authorize the extent of the CPLR 506 venue options available to a petitioner.[12]

There is now a conflict within the Second Department as to the understanding of this venue provision, with *Salvodan* adopting the view held by Professor Siegel, consistent with the statutory language and structure, and *Northeast Land Development* overlooking that statutory language and structure in reaching a contrary result.

In addition, even if the plenary action venue provisions did, *arguendo*, conflict with CPLR 506(a)—they do not—CPLR § 506(a) specifically provides that CPLR 506(a) will control "unless otherwise prescribed in subdivision (b) [of CPLR 506] or in the law authorizing the proceeding."

Subdivision (b) provides that "[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty . . . ."

Article 78 of the CPLR—the "law authorizing the proceeding"—does not "prescribe otherwise" than what CPLR 506(a) prescribes, but to the contrary directs that

CPLR 506(b) must be followed. As explained in *In re Riccelli Enterprises, Inc. v. State of New York Workers' Compensation Board*,[13] "[f]or Article 78 claims, § 7804(b) governs venue and incorporates by reference the venue provisions of CPLR § 506(b) regarding special proceedings. (*See* CPLR § 506(b), § 7804(b)) . . . . *All the alternative bases for venue under §506(b) are 'equally proper.'* 8 Weinstein-Korn-Miller, NY Civ Prac, ¶7804-04" (emphasis added). CPLR 7804(b) directs that "[a] proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides."

The authority of CPLR 506(a) and (b) was carefully made unassailable by the legislature, in anticipation of efforts to override the venue choice statutorily granted to the petitioners, so as to force Article 78's to be litigated in a venue in which governmental respondents believe that they have a literal "home court advantage"—their home counties.

In accord with this legislative scheme, in *In re International Summit Equities Corp. v. Van Schoor*,[14] the petitioners commenced an Article 78 proceeding against the members of the Town of Babylon planning board in a dispute over construction at a shopping center in Suffolk County. The petitioners commenced their proceeding in Nassau County. The respondents moved for a change of venue to Suffolk County.

Because the *International Summit Equities* proceeding involved site plan approval for the construction of an additional building at a Suffolk County shopping center (*i.e.*, involved the use and enjoyment of real property), and because the *International Summit Equities* respondents were the members of a Town of Babylon planning board, CPLR 507 and Town Law § 66(1) were applicable.

The motion to change venue in *International Summit Equities* was nevertheless denied by the Supreme Court, Nassau County (Brucia, J.). The Nassau Supreme Court's denial was affirmed by the Appellate Division, Second Department. The Second Department held (with emphasis added by the Appellate Division itself):

> We reject the appellants' contention that the court improvidently exercised its discretion in not transferring venue. While proceedings pursuant to CPLR article 78 preferably should be heard and determined in the county in the judicial district in which the matter sought to be reviewed originated, or where the material events occurred (*see, Matter of Lefkowitz v. Beame,* 52 A.D.2d 925, 383 N.Y.S.2d 86), CPLR 506(b) specifically provides that "a proceeding against a body or officer shall be commenced in *any county within the judicial district* where the respondent made the determination complained of" (CPLR 506[b] [emphasis added]). Since Nassau and Suffolk Counties are both within the tenth judicial district (*see,* N.Y. Const., art. VI, § 6; Judiciary Law § 140), venue within Nassau County was permissible.

In *In re 7 Columbus Avenue Corp. v. Town of Hempstead*,[15] both Town Law § 66(1) and CPLR 507 were again applicable. In *7 Columbus Avenue*, the Town of Hempstead was itself the respondent, making Town Law § 66(1) applicable. The proceeding sought to remove a wall obstructing the right of way on Hempstead real property, making CPLR 507 applicable. The *7 Columbus Avenue* proceeding was commenced in Suffolk County, and the *7 Columbus Avenue* respondents sought to have the proceeding moved from the county within the judicial district selected by the petitioners pursuant to CPLR 506—i.e., Suffolk County—to the county—Nassau County—in which the real property was situated and where the town respondent was located (and where the *7 Columbus Avenue* respondents anticipated a home court advantage).

The Second Department in *7 Columbus Avenue* reversed the Supreme Court, Nassau County's order granting a change of venue from Suffolk County to Nassau County, citing, *inter alia*, *International Summit, supra*.

In *Northeast Land Development,* there is no discussion of CPLR 507; there is no discussion of the legislatively created interplay between [1] CPLR 506(a) and (b) and CPLR 7804(b), on the one hand, and [2] CPLR 507 and Town Law § 66(1), on the other; and there is not even a mention of the Appellate Division determinations in *International Summit Equities* or *7 Columbus Avenue*. All of these independently decisive points were apparently overlooked by *Northeast Land Development*. Yet *Northeast Land Development* has already been followed by at least one additional Supreme Court decision denying special proceeding litigants their statutory venue rights, and ignoring the contrary analysis presented by *Salvodan*. *See Bistrian Land Corp. v. Lynch*.[16] The *Bistrian Land Corp.* decision sought solely to resolve the illusory "conflict" between Town Law § 66(1) and the CPLR venue provisions, while declining to address the structure and language of the statutes, which demonstrate the absence of any such conflict, but, rather, a clear distinction between the venue treatment of plenary actions and special proceedings.[17]

Northeast Land Development observed that although CPLR 506 was enacted, together with the rest of the CPLR, in 1962, long after Town Law § 66(1)'s 1934 enactment, CPLR 506 largely re-stated the language of an earlier Civil Practice Act provision.[18] *Northeast Land Development* concluded that CPLR 506's enactment was a meaningless and mindless legislative act which the court was therefore free to disregard, and did not entitle CPLR 506 to be treated as the "later-enacted" statute which would normatively control over the earlier enacted one.

What *Northeast Land Development* overlooked is that at the exact time that CPLR 506 (and the rest of the CPLR) was enacted, CPLR 504 was also enacted. CPLR 504 effectively supplanted Town Law § 66(1).

CPLR 504 provides—virtually identically to the prior Town Law § 66(1)—that "the place of trial of all actions against . . . towns . . . or any of their officers, boards or departments . . . shall be . . . * * * 2. . . . . the county in which such . . . town . . . is situated."

CPLR 504, like CPLR 507 and Town Law § 66(1), speaks of the "place of trial" of a plenary action, while CPLR 506 expressly permits "commencement" of an Article 78 proceeding in any county within the judicial district in which the matter is "triable." CPLR 504 is therefore no more in conflict with CPLR 506 than is CPLR 507 or was the old Town Law § 66(1), which is to say not at all.

When effectively replacing Town Law § 66(1) with CPLR 504, the legislature also expressly provided that CPLR 504's venue specification for plenary actions involving towns is "*subject to* the provisions of subdivision (b) of section 506" (emphasis added). By even further providing that its provisions would control "[n]otwithstanding the provisions of any charter heretofore granted by the state", the legislature manifested as clearly as it could an intent to override the Town Law if the Town Law were to be construed as inconsistent. As explained in the *Legislative Studies and Reports* to CPLR 504 (emphasis added),[19] "this section consolidated . . . Town Law § 66(1) . . . . *Subject to § 506*, it aims at a uniform rule governing actions against . . . towns . . . or any of their officers, boards, or departments. *It is also designed to override any charter provisions to the contrary*."[20]

The legislature, far from acting meaninglessly and mindlessly when it enacted CPLR 506, as *Northeast Land Development* concluded, conclusively—(1) by the clear textual language ("commencement" versus "triable"), (2) by the overall structure of the venue provisions, and (3) by the coterminous enactment of CPLR 504, with its "subject to" language (similar to the language used in CPLR 506[a] and CPLR 7804[b])—fully harmonized the CPLR 506(a) special proceeding venue provisions with the plenary action venue provisions, and definitively made CPLR 506(b) the provision that, if there were any doubt, controls in an Article 78 proceeding.

In fact, however, there is no conflict between the special proceeding venue provisions of CPLR 506, and the other venue provisions, which all concern plenary actions. The incomplete analysis of *Northeast Land Development* did not and could not overrule the controlling Second Department decisions in *International Summit Equities* and *7 Columbus Avenue*, which *Northeast Land Development* overlooked, nor the statutory scheme and language, as made express by both Professor Siegel and by Justice Kerrigan in *Salvodan*.

Endnotes

1. 2013 WL 8284463 (Sup. Ct., Nassau Co. Jan. 2, 2013).
2. While unpublished decisions have no precedential authority, they can have persuasive value and thus are still capable of affecting the development of the law, particularly in an area, such as this, with limited case law precedent. *Yellow Book of NY, L.P. v. Dimilia*, 188 Misc. 2d 489, 729 N.Y.S.2d 286 (Dist. Ct., Nassau Co. 2001) (Gartner, J.). *Accord, Board of Managers of Soho International Arts Condominium v. City of New York*, 2003 WL 21403333, at n. 20 (S.D.N.Y. June 17, 2003) (Batts, J.); *In re Haghighi*, 178 Wash.2d 435, n. 19 (Sup. Ct., Wash. 2013); *In re Marriage of Bloom*, 2015 WL 1291643, at *8 (Ill. App. Ct. 2d Dist. Mar. 20, 2015). Moreover, where, as here, the decision has been at least unofficially published (in this case on Westlaw), the decision's impact may be elevated. *See Dimilia, supra*, 188 Misc. 2d at 492, 729 N.Y.S.2d at 288; *Bouzzi v. F & J Pine Restaurant, LLC*, 841 F. Supp. 2d 635, 638 (E.D.N.Y. 2012) (Irizarry, J.). *Northeast Land Development* has in fact already been cited and relied upon by another court, stripping the petitioners of their venue selection based upon *Northeast Land Development*'s reasoning. *Bistrian Land Corp. v Lynch*, Index No. 2296/2017 (Sup. Ct., Nassau Co. July 31, 2017). S*ee* footnote 17 and accompanying text, *infra*.
3. 2017 WL 1391124 (Sup. Ct., Queens Co. Apr. 18, 2017).
4. By using the county where an action may be "tried" as the reference point for determination of in which judicial district a special proceeding may be "commenced," the statute necessarily requires that a place where an action may be "tried" be independently identified before the special proceeding venue provision can even be applied.
5. 110 Misc.2d 196, 204, 441 N.Y.S.2d 791, 796 (Sup. Ct., Monroe Co. 1981).
6. 64 Misc.2d 40, 41, 313 N.Y.S.2d 909, 911 (Sup. Ct., Nassau Co. 1970).
7. 167 Misc.2d 86, 88, 636 N.Y.S.2d 591, 593 (Sup. Ct., Albany Co. 1995), *aff'd*, 218 A.D.2d 366, 640 N.Y.S.2d 345 (3d Dep't 1996).
8. (Venue for Governmental Entities) (5th ed.) (Updated January 2017) (footnotes omitted).
9. (Venue of Article 78 Proceeding) (5th ed.) (Updated January 2017).
10. *See* note 4, *supra*.
11. *Id.* at *4.
12. Town Law § 66(1) sites the venue of both "actions" and "proceedings." However, it sites the venue solely of the "place of trial," not the "commencement." Even had Town Law § 66(1) not been superseded by CPLR 504, *see* footnotes 19-21 and the text accompanying, *infra*, Town Law § 66(1)'s limited applicability to the place of "trial" means that the result—that a special proceeding may be "commenced" in any county within the judicial district pursuant to CPLR 506—would not change.
13. 2012 WL 1802558 (Sup. Ct., N.Y. Co. Apr. 30, 2012).
14. 166 A.D.2d 531 (2d Dep't 1990).
15. 85 A.D.3d 1038 (2d Dep't 2011).
16. Index No. 2296/2017 (Sup. Ct., Nassau Co. July 31, 2017).
17. *Id.*
18. Civil Practice Act § 1287.
19. (McKinney's) (emphasis added).
20. *Id.*

The Arbitration from Hell and How the New York Courts Got It Wrong

By Norman Solovay

This is a follow-up to the author's previous article that explained why the Appellate Division, First Department, was wrong in 2012 when it unanimously upheld a New York lower court's vacatur of an arbitrator's award of sanctions against Jack J. Grynberg ("Grynberg") in *Jack J. Grynberg v. BP Exploration Operating Co.*[1] That article, entitled "Step Back in Time: Curtailing Arbitrators' Authority to Award Sanctions," was published in the *New York Law Journal* and related to the vacatur of the arbitrator's award of sanctions against Grynberg (hereinafter, the "Sanctions Issue").[2] This article will explain why the First Department was wrong again in 2015 when it unanimously affirmed a lower court's decision in the same case but on a different issue (hereinafter, the "Signature Bonus Issue").[3]

The Sanctions Issue and the Signature Bonus Issue were only 2 of the 13 issues that were resolved in arbitrations that Grynberg commenced in 2002 against a subsidiary of BP, p.l.c. ("BP") and Statoil ASA ("Statoil") pursuant to the terms of two identical settlement agreements that Grynberg entered into with each of those companies in 1999. Until recently, the court records in this case were not publicly available because they were filed under seal by the New York courts. However, as a result of a September 8, 2016, decision of the U.S. District Court for the District of Columbia (the "DC Case"),[4] all of the relevant documents that were filed under seal are now publicly available on Pacer as Exhibits in the DC Case (DC Court Index No. 1:08-cv-00301). Thus, the whole story of this case, which Grynberg characterized in his Declaration in the DC Case as "The 13-Year Arbitration from Hell," can now be told.

The Factual Background and History of the Signature Bonus Issue

The key player in this marathon arbitration was, and still is, Jack J. Grynberg, a geologist and professional engineer who amassed a multimillion dollar fortune in the oil and gas business.[5] Grynberg, who speaks Russian fluently, developed a relationship with Kazakh President Nursultan Nazarbayev when Grynberg hosted him on a tour of the United States. Grynberg then brokered an agreement between the Republic of Kazakhstan and a consortium of seven international oil and gas companies, one of which was BP, whereby the consortium obtained valuable rights to develop oil and gas reserves in the Kashagan Field in the Caspian Sea area of Kazakhstan. Pursuant to the agreement with the Kazakh government, BP, as well as the other members of the consortium, was required to make payments to the government of Kazakhstan in the nature of an up-front license fee (referred to as "Signature Bonuses") in connection with obtaining those development rights.

In 1993, Grynberg sued BP in the U.S. District Court for the Southern District of New York, claiming that BP breached a 1990 agreement to pay him a carried interest in the profits it would earn as a member of the consortium. That lawsuit was settled in 1996 through a mediation in which Stephen A. Hochman ("Hochman"), a well-known and highly regarded arbitrator and mediator, served as the court-appointed mediator. The substantive terms of the settlement were set forth in a two-page handwritten preliminary settlement agreement (PSA) that provided that the parties would embody those substantive terms in a definitive settlement agreement that was to be based on a similar settlement agreement that Grynberg previously entered into with another member of the consortium. At the request of both parties, Hochman agreed to serve as the sole arbitrator to resolve any and all disputes that may have arisen under the PSA or the definitive settlement agreement pursuant to the following provision in the PSA:

> Any dispute hereunder or as to the terms of the definitive settlement agreement shall be resolved in accordance with NY law by binding arbitration in NYC before Stephen A. Hochman in accordance with the commercial arbitration rules of the American Arbitration Association.[6]

In January 1999, after lengthy negotiations, the parties reached agreement on the terms of a definitive settlement agreement. Because Statoil was the beneficial owner of one-third of BP's one-seventh (i.e., 14.28%) interest in the consortium, there were two identical settlement agreements, one with BP relating to its two-thirds share of their total one-seventh interest in the consortium, and the other with Statoil relating to its one-third interest. Thus, BP owned a 9.52% interest in the consortium, and Statoil owned a 4.76% interest.

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The Signature Bonus Issue arose because the settlement agreements provided that Grynberg was entitled to a 15% carried interest in the net profits that each of BP and Statoil earned from being members of the consortium. The settlement agreements also provided that BP's and Statoil's net profits were to be determined by an independent auditor. The independent auditor confirmed that the Signature Bonuses were paid via a wire transfer from BP's bank account and thus treated them as an expense in the computation of BP's net profits. However, Grynberg argued to the auditor that the Signature Bonus payments should not be treated as costs in calculating his 15% share of BP's net profits (even if those payments represented actual costs that reduced BP's profits) because the wire transfer payments were made to an intermediary and then remitted to Kazakh government officials instead of the government of Kazakhstan, thus constituting bribes that violated the U.S. Foreign Corrupt Practices Act. After the auditor rejected Grynberg's argument, he made the same argument to Hochman, who also rejected it, stating in what was denominated his Final Decision and Award (the "2010 Original Award") that:

> If it were not for those Signature Bonus payments (whether they were legal or illegal), BP, as well as Statoil and the other members of the Consortium, may not have had the opportunity to earn the profits they derived from their participation in the Consortium. Because 15% of BP's profits, as well as 15% of Statoil's profits, inured to the benefit of Claimants (a total of over $40,000,000), Claimants would not have suffered any damages even if the Signature Bonus payments could be proven to have been illegal bribes.
>
> Simply put, Claimants request for an evidentiary hearing on the bribery issue was denied because the issue of whether the Signature Bonuses were or were not bribes is not a relevant issue. The relevant issue is whether the independent auditor was wrong to deduct them in his calculation of BP's Net Sales Proceeds. The auditor cannot decide the issue of whether the Signature Bonus payments violated the U. S. Foreign Corrupt Practices Act, but he can decide whether the payments should be deducted in computing BP's Net Sales Proceeds, and he did decide that issue.[7]

The 2010 Lower Court Decision on the Signature Bonus Issue

Supreme Court Justice Jane S. Solomon vacated Hochman's award of sanctions against Grynberg in her decision dated December 8, 2010,[8] on the ground that arbitrators have no power to award sanctions under New York law, which, as indicated in the above-referenced *New York Law Journal* article, ignored the applicable and controlling Federal Arbitration Act. However, Justice Solomon confirmed Hochman's award on the Signature Bonus Issue, stating:

> Based on his determination that the sole relevant issue was whether BP paid the signature bonuses, he confirmed the auditor's findings without pursuing the avenue of inquiry that the petitioners wanted. This determination does not violate any public policy concerns. Similarly Hochman's denial of the evidentiary hearing and his discussion of the proper standard for burden of proof are irrelevant to his reliance on the fact that the payments were made.[9]

The Appellate Division Overturns the Lower Court's Decision on the Signature Bonus Issue

On February 21, 2012, the First Department overturned Justice Solomon's confirmation of Hochman's award on the Signature Bonus Issue, stating:

> The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur of award four. Petitioners claim that this payment constituted a bribe. Respondents assert it was a bona fide cost of doing business. We remand for the arbitrator to determine the nature of the payment. Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy.[10]

The Arbitrator's Dilemma

The Appellate Division's remand of the Signature Bonus Issue to Hochman ordering him to decide whether or not BP's Signature Bonus payment was a bribe faced him with a dilemma because he believed—correctly—that the decision was wrong. What some would consider the easy and safe choice for him would have been to follow the instructions of the First Department and hold evidentiary hearings on the bribery issue even though he and the independent auditor previously determined the issue to be irrelevant in the context of computing BP's net profits. However, as the arbitrator noted in what was denominated his Decision and Award after Remand (the "2013 New Award"), that safe choice would have been inconsistent with his ethical duties as set forth in Cannon I.A of the Code of Ethics for Arbitrators in Commercial Disputes, which states:

> An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.[11]

Before issuing his 2013 New Award, the arbitrator sent the parties a draft in which he explained why he believed holding the hearings ordered by the First Department would be inconsistent with his ethical duties. He noted in that New Award that he had received a list of the numerous non-parties whom Grynberg stated he would subpoena to testify and a list of the extensive documents that he would subpoena from those parties in his attempt to prove his claim that the Signature Bonus payments were bribes.[12] Hochman also explained that holding such extensive hearings on the bribery issue would result in interminable delay and substantial cost and expense to the parties inconsistent with the goal of arbitration, which is for the arbitrator to decide all issues in accordance with applicable law but in a quicker, less costly and more efficient process than litigation.[13]

After the parties received Hochman's draft of the 2013 New Award, BP and Statoil proposed a solution to his dilemma that would not be inconsistent with his ethical duties, namely to summarily dismiss the Signature Bonus bribery claim because it was not a plausible one under the federal pleading standard announced by the U.S. Supreme Court in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009).[14] They argued that the bribery claim was implausible because the FCPA criminal indictment of the intermediary who allegedly transmitted the Signature Bonus payments to the Kazakh government officials was dismissed. Hochman rejected that proposal because an award based on such a summary dismissal could risk being vacated because it would deprive Grynberg of the opportunity to prove his bribery claim and thus might constitute a refusal to hear evidence pertinent and material to the controversy—a statutory ground for vacatur under Section 10 of the FAA.[15]

Hochman could have resolved the arbitrator's dilemma by taking the easy way out by complying with the First Department's remand order. He would thus have been paid his hourly rate to hold extensive evidentiary hearings on the bribery issue even though it is unlikely that Grynberg would be able to meet his burden of proof that the wire transfers from BP's bank account ultimately went to Kazakh government officials instead of the government of Kazakhstan. However, Hochman, in rejecting that easy way out, explained in his 2013 New Award that:

> In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the First Department's Remand Order to determine the nature of the Signature Bonus payments. That is because the remand was based on the Court's erroneous holding in reliance on one of New York's two non-statutory grounds for vacating an arbitral award rather than on the only non-statutory ground for vacating an arbitral award under the FAA, which is manifest disregard of the law, a much stricter standard than either of the New York standards.[16]

Grynberg's Belated and Untenable Bias Claims

When the First Department overturned Justice Solomon's lower court decision confirming Hochman's decision on the Signature Bonus Issue, Grynberg went back to the lower court and claimed, for the first time, that Hochman should be removed for bias. On March 12, 2012, soon after the First Department issued its February 21, 2012, decision ordering Hochman to hold evidentiary hearings on the bribery issue that he previously ruled in 2010 was irrelevant, Grynberg made a motion to the lower court to remove Hochman for bias.[17] Undoubtedly, Grynberg made this belated bias claim because he knew perfectly well that Hochman would, as a matter of principle, rule the same way on the Signature Bonus Issue after the First Department remanded that issue to him in 2012 as he did in his 2010 Original Award.

After his first belated attempt to remove Hochman for bias was denied, the ever persistent Grynberg made many additional attempts, all of which were also unsuccessful. His fifth failed attempt was in an appeal to the First Department on December 11, 2012. However, the First Department held that "by failing to make any argument as to the arbitrator's alleged partiality during the confirmation proceeding [in 2010 before Justice Solomon], petitioners waived that challenge." The First Department also noted that it found "petitioners' contention that the arbitrator exhibited either actual bias or the appearance of bias [to be] without merit."[18]

Because Hochman made the same ruling on the Signature Bonus Issue in his 2013 New Award as he did in his 2010 Original Award, Grynberg went back to the lower court, this time before Supreme Court Justice Cynthia S. Kern, with motions to vacate the 2013 New Award and remove Hochman as the arbitrator because he refused to follow the First Department's remand order to hold hearings on the bribery issue. Grynberg's application included a motion that Hochman be replaced by a three person AAA arbitration panel because the Settlement Agreements provided an AAA panel be substituted for Hochman if he is "unable or unwilling to serve."[19]

Justice Kern's April 2014 Decision on the Signature Bonus Issue

On April 2, 2014, Justice Kern granted Grynberg'a motions to vacate the 2013 New Award, remove Hochman as the decider of the Signature Bonus Issue and substitute

a new three person AAA arbitration panel to decide that issue.[20] That April 2014 decision related only to the Signature Bonus Issue in the arbitration that was the subject of the 2010 Original Award (the "First Arbitration"), which related to the audit that determined BP's net profits. Because the audit by the independent auditor to determine Statoil's net profits had not been completed when the 2010 Original Award was issued, the parties had agreed that any claims or issues that may arise relating to the Statoil audit would be resolved in a separate arbitration (the "Statoil Arbitration").[21] Although the Statoil audit involved the same Signature Bonus Issue that the arbitrator decided in the First Arbitration, it also involved several other important issues relating to the computation of Statoil's net profits.

Justice Kern explained that her decision to remove Hochman in the First Arbitration was not based on bias but rather on her conclusion that he exceeded his powers, stating that "the arbitrator exceeded a specifically enumerated limitation on his powers when he issued the New Award . . .[and] explicitly failed to follow the unambiguous directive of the First Department that he make a determination as to whether the signature bonus payment was a bribe."[22] Although noting that it is "within a court's discretion whether to remit an arbitration matter to the same or a different arbitrator," Justice Kern based her decision to remit the Signature Bonus Issue to the AAA panel on the fact that Hochman made it clear in his 2013 New Award that, if she remitted the matter to him, he would comply with his ethical obligation to avoid the unnecessary costs, expenses and delay that would ensue if he were to comply with the First Department's direction to hold hearings on the bribery issue that he previously ruled was irrelevant.[23]

Hochman's Rejection of Grynberg's Request to Recuse Himself in the Statoil Arbitration

Soon after Justice Kern issued her April 2014 decision removing Hochman as the decider of the Signature Bonus Issue in the First Arbitration, Grynberg requested that Hochman recuse himself as the arbitrator in the Statoil Arbitration, although it was well under way and close to a decision. In an April 21, 2014, email response to that request, Hochman gave the following reasons for refusing:

> Although I have not finally ruled on any of the claims asserted in the Statoil Arbitration, I have devoted a substantial amount of time in considering the extensive briefs submitted by the parties and in drafting and sending the parties a tentative award on several of those claims. In your 9-page letter dated July 2, 2013, you summarized the voluminous exchanges of emails, letters and other documents and communications relating to the issues in the Statoil Arbitration, including some new issues that you had properly raised. That letter also pointed out that you had brought to my attention and convinced me that Statoil's $60,253 breach of contract claim was time barred under CPLR § 215, thus requiring Statoil to resort to an equitable estoppel argument in its attempt to collect its claim for arbitration fees against Claimants relating to the First Arbitration. It would be unfair to both parties if I were to shirk my responsibilities by requiring them to start over with a new panel of three arbitrators, especially after so much time and money has already been invested in this Statoil Arbitration.[24]

The Arbitrator Explains Why He Should Not Be Removed in the Statoil Arbitration

On April 25, 2014, Hochman sent a six-page email memorandum to all parties that, in addition to supplementing the reasons he believed Justice Kern's April 2014 Decision was wrong and that his 2013 New Award should be reinstated, explained why it would also be wrong for her to remove him in the Statoil Arbitration.[25] After reminding the parties that he was not charging arbitration fees for the time he spent in researching and writing the "legal briefs" in his 2013 New Award and his subsequent emails to the parties, Hochman explained what he viewed as his ethical duties to the arbitration process as follows:

> I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues. The e-mail that I sent to all counsel on September 27, 2012, referring to the Solovay [New York Law Journal] Article was motivated solely by my duty to the arbitration process and desire to increase the likelihood that the Court of Appeals will correct what I believe was the First Department's erroneous decision relating to the Sanctions Award.
>
> My primary duty as an arbitrator is to correctly decide all claims presented to me, based on the applicable law (which includes the FAA to the extent applicable), and to do so as impartially and objectively as would an ideal judge who always made the right decision. As the Original Award made clear, I decided all of the 13 arbitration claims based solely on the applicable law even though the Arbitration Agreement incorporated the

AAA's Rules that empowered me to grant remedies that exceeded the remedies that a court could grant. Because the Settlement Agreements did not provide for attorneys' fees to a prevailing party, I denied Respondents' motions for attorneys' fees (which aggregated approximately $14 million) even though I had the authority to award them pursuant to the AAA Rules.

Although I did not award Respondents $14 million in attorneys' fees, I awarded them a total of $3 million in sanctions against Grynberg individually, who represented himself in the arbitration *pro se*, because it approximated the attorneys' fees incurred by Respondents in defending against Grynberg's claims that I found were not made in good faith. The fact that my decision on the legal fee issue was helpful to Claimants is as irrelevant as the fact that my advising the parties of the Solovay Article might be helpful to Respondents. As Justice Solomon noted, "Hochman had the discretionary power to award costs and attorneys' fees (Award, 24). He affirmatively elected to not use that power . . . ."

Notwithstanding the fact that the AAA Rules incorporated in the Arbitration Agreement gave me the power to grant any remedy or relief that I deemed just and equitable, even if it exceeded the power that the law gives to judges, I did not exercise that power because I believe that most parties who agree to arbitration, including the parties to this arbitration, do not want arbitrators to disregard the law and decide issues based on their own subjective notions of justice and equity rather than on the objective and thus predictable standards of the applicable law that courts are required to follow. When the parties agreed to name me as their sole arbitrator of any and all future disputes, they evidenced their intention to have me make a final and binding decision based on the applicable law—i.e., their intent was to choose arbitration *instead* of litigation, not arbitration *and* litigation.

To increase the likelihood that I will decide all legal issues correctly, my practice is, and has been in this arbitration, to let the parties know which way I am leaning on an issue in order to give the party that I am leaning against an opportunity to convince me that my tentative position is not correct. Thus, before issuing a final award, I send the parties a draft of my proposed award to give them an opportunity to suggest corrections or argue against my tentative decision on any issue. Not only does that minimize the risk that I may make an incorrect ruling, it also saves the parties time and expense by focusing them on the issues that I consider relevant to my goal to make a legally correct decision. Also, in the interest of complying with the intentions and needs of the parties for an efficient arbitral process as well as legally correct decisions, I refuse to permit evidentiary hearings on irrelevant issues or depositions to hear testimony that could more efficiently be heard at a hearing.[26]

In support of his duty to keep the arbitral process efficient, Hochman also explained his reluctance to order depositions in arbitrations after Grynberg, representing himself *pro se*, made numerous requests to take the depositions of various witnesses.[27] In an email response to one of Grynberg's requests (copied to all parties), Hochman stated that:

> [D]epositions are not appropriate in arbitration except in unusual circumstances (e.g., where a witness may die before a hearing can be scheduled) . . . ,[and] the proper forum to present evidence in arbitration is in an evidentiary hearing at which the arbitrator can keep the questioning focused on the relevant issues in an attempt to keep the arbitration process efficient. Depositions are not only duplicative of the evidence that can be obtained at a hearing, they can lead to costly discovery disputes and lengthy unfocused questioning (and sometimes even witness harassment) that is inconsistent with the goal that arbitration should be more efficient than litigation.[28]

It is ironic that, but for Hochman's view of his ethical duties to the arbitration process, Grynberg could have been required to pay BP and Statoil a total of $14 million in legal fees instead of only $3 million in sanctions. Thus, Hochman's decisions, which led to his removal as the arbitrator in that case, might well come under the heading of "no good deed shall go unpunished."

Justice Kern's July 2014 Decision in the Statoil Arbitration

After Hochman refused to recuse himself from the pending Statoil Arbitration, Grynberg moved to (1) re-

open Justice Kern's April 2014 proceeding, (2) disqualify Hochman from any further participation in the Statoil Arbitration, (3) consolidate the Statoil Arbitration with the First Arbitration and (4) discharge Hochman from participation as an arbitrator in any of the parties existing *or future* disputes.

On July 17, 2014, Justice Kern granted Grynberg's motion to consolidate the pending Statoil Arbitration with the First Arbitration so that the same AAA arbitration panel that would decide the Signature Bonus Issue in that completed arbitration would also decide the same issue in the pending Statoil Arbitration. Although the Signature Bonus Issue was only one of the many issues in the Statoil Arbitration, Justice Kern noted that it was the most significant dollar issue in that arbitration and that the settlement agreements did not contemplate "two separate arbitrations to be conducted before different arbitrators." Thus, there was no provision "which would allow Mr. Hochman to be the arbitrator on some issues but not on others."[29]

Despite the fact that Grynberg's motion was to remove Hochman as the arbitrator in all *future* as well as existing disputes, Justice Kern granted this motion to discharge Hochman only from participation in the parties' *existing* disputes. She refused to make any ruling "with respect to any future disputes between the parties which do not yet exist as such a ruling would constitute an advisory opinion which this court is not willing to render."[30]

The First Department Unanimously Affirms Both of Justice Kern's 2014 Decisions

On April 16, 2015, the First Department unanimously affirmed Justice Kern's April 2014 and July 2014 decisions because the arbitrator failed to follow the "clear directive" of the Court's 2012 order to determine whether the Signature Bonus payments were bribes. Notwithstanding the fact that the Statoil Arbitration involved several significant issues in addition to the Signature Bonus Issue and was almost completed, the First Department confirmed Justice Kern's consolidation of the Statoil Arbitration with the First Arbitration, noting that "Statoil did not meet its burden to show that consolidation would prejudice its substantial rights."[31]

What the First Department's 2015 Decision Got Wrong

Despite the fact that (1) arbitration is a creature of contract, (2) arbitrators have an ethical duty to the process of arbitration as well as to the parties and (3) the FAA pre-empts state arbitration law that permits an arbitrator's award to be vacated on a non-statutory ground other than manifest disregard of the law, the First Department's unanimous confirmation of Justice Kern's decisions on the Signature Bonus Issue assumed that the First Department had the power to do the following:

(1) Override the parties' arbitration agreement by limiting the broad powers that the parties gave their chosen arbitrator, including the power to exclude evidence on a factual issue that he determined was irrelevant to the issue in dispute, by ordering him to hold hearings on that irrelevant issue that would have resulted in additional and unnecessary delay and costs to the parties;

(2) Vacate the award of the arbitrator based on a non-statutory ground for vacatur that is available only where the dispute has no effect on interstate commerce (such as disputes under a collective bargaining agreement between a New York employer and a New York union); and

(3) Remove the parties' chosen arbitrator because he followed the parties' order to decide the dispute in accordance with applicable law instead of following the First Department's order which was based on New York arbitration law, which is inconsistent with and hostile to the pro arbitration policy of the FAA.

BP and Statoil's Motions For Leave to Appeal to the New York Court of Appeals

On September 1, 2015, the Court of Appeals dismissed (but did not deny) the motions of BP and Statoil for leave to appeal the First Department's unanimous 2015 decision because, under the New York Constitution, the Court of Appeals does not have jurisdiction to grant leave to appeal until *all* issues between the parties have been finally decided. Although it had been finally decided that an AAA panel will be substituted for Hochman as the decider of all existing disputes, the Signature Bonus Issue of whether Grynberg is entitled to additional profit payments from BP and Statoil will not be decided until the AAA panel decides that issue.

Irrespective of how the AAA panel decides the Signature Bonus Issue, once that issue is finally decided, then, and only then, will the Court of Appeals have jurisdiction to grant a motion by BP and/or Statoil for leave to appeal the decisions of the First Department on both the Sanctions Issue and the Signature Bonus Issue, the only clearly existing issues between the parties. However, there are significant dollar amounts at stake in those two issues. As noted above, the arbitrator's award of sanctions against Grynberg in favor of BP and Statoil totaling $3,000,000 was reversed. Also, $4,166,667 is at stake depending on the outcome of the Signature Bonus Issue (which is 15% of the $27,777,778 in Signature Bonus payments made by BP on behalf of itself and Statoil), two-thirds of which ($2,777,778) were treated as expenses of BP and one-third of which ($1,388,889) as expenses of Statoil).

Grynberg's DC Folly

In Grynberg's December 29, 2015, motion to the U.S. District Court for the District of Columbia he argued in his Declaration that the DC Court should decide the Signature Bonus Issue instead of an AAA panel because, since he is the key fact witness who can prove that the

Signature Bonus payments were bribes and, because he was then 84 years old, he might not live long enough to prove his bribery claim in the AAA arbitration. On September 8, 2016, the D.C. Court issued a 22-page decision dismissing Grynberg's motion to reopen that Court's 2008 decision that the Signature Bonus Issue should be decided by the arbitrator. Although Grynberg moved to appeal the D.C. District Court's decision to the D.C. Circuit Court of Appeals, that appeal was dismissed on January 30, 2017, based on a stipulation of all parties.

When and How Will This Story End?

It is now more than two years after Grynberg made his motion to the D.C. Court, but it is not yet known when the proceedings before the AAA arbitration panel will begin or what the outcome will be, assuming it follows Justice Kern's unanimously confirmed order that the AAA panel should decide all existing issues, presently the Sanctions Issue and the Signature Bonus Issue. We can only guess how long that arbitration will take, and it would not be surprising if the losing party on those significant dollar issues moves to vacate the AAA panel's award in favor of the winner, in which case it may be a long time before both of those issues are finally decided—a condition that must be met before the Court of Appeals will have jurisdiction to grant or deny leave to appeal the unanimous and erroneous 2012 and 2015 decisions of the First Department.

There is also the possibility that the parties may decide to settle their existing disputes, either prior to or during the AAA arbitration proceeding, in which case the Court of Appeals will never get an opportunity to correct the errors of the First Department, which signals that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms. This may be a wakeup call to amend the New York State Constitution to give the Court of Appeals jurisdiction to grant leave to appeal a final decision on any issue that has been finally decided by the appellate court even if there remains issues that have not yet been finally decided.

It is ironic that if the First Department had, in its 2012 decision, unanimously confirmed, instead of having unanimously overturned, Justice Solomon's 2010 decision confirming Hochman's decision on the Signature Bonus Issue in his 2010 Original Award that held the bribery issue was irrelevant, the Court of Appeals would have had jurisdiction to grant leave to appeal the First Department's erroneous 2012 unanimous decision confirming Justice Solomon's vacatur of Hochman's sanctions award.[32]

Hopefully, Mr. Grynberg and all others having an interest in the outcome of this case will live long enough to see how this story ends.

Endnotes

1. 92 A.D.3d 547, 938 N.Y.S.2d 439 (1st Dept. 2012).
2. N.Y.L.J, Aug. 6, 2012, p.7.
3. *Grynberg v. BP Exploration Operating Co.*, 127 AD3d 553, 7 N.Y.S.2d 125 (1st Dept. 2015).
4. *Grynberg v. BP P.L.C.*, 205 F. Supp. 3d 1 (D.D.C. 2016) [hereinafter, DC Case].
5. *Jack J. Grynberg*, Wikipedia, http://en.wikipedia.org/wiki/Jack_J._Grynberg.
6. 2013 New Award, DC Case Exhibit 7, p. 4, 205 F. Supp. 3d 1.
7. 2010 Original Award, DC Case Exhibit 4, p. 19, 205 F. Supp. 3d 1.
8. *Grynberg v. BP Exploration Operating Ltd.*, No. 116840/2004, N.Y. Slip. Op. 33401(U) (N.Y. Sup. Ct. Dec. 8, 2010), DC Case Exhibit 5, 205 F. Supp. 3d 1.
9. *Id.* at 10-11.
10. *Grynberg v. BP Exploration Operating Co.*, 92 A.D.3d 547.
11. 2013 New Award, *supra* note 6, at 9.
12. *Id.* at 17.
13. *Id*.
14. DC Case Exhibit 10, p. 5, 205 F. Supp. 3d 1.
15. 2010 Original Award, *supra* note 7, at 16-17.
16. *Id.* at 19.
17. 2013 New Award, *supra* note 6, at 6.
18. *Id.* at 7-8.
19. Settlement Agreement 1, DC Case Exhibit 2, §10.04; Settlement Agreement 2, DC Case Exhibit 3, §10.04.
20. *Grynberg v. BP Exploration Operating Co.*, No. 116840/2004, N.Y. Slip. Op. 30846(U) (N.Y. Sup. Ct. Apr. 2, 2014).
21. 2010 Original Award, *supra* note 7, at 18.
22. *Grynberg v. BP Exploration Operating Co.*, N.Y. Slip Op. 30846(U) at 5.
23. *Id.* at 6-8.
24. DC Case, Exhibit 9, p. 1-2, 205 F. Supp. 3d 1.
25. DC Case, Exhibit 10, 205 F. Supp. 3d 1.
26. 2013 New Award, *supra* note 6, at 9-10.
27. 2010 Original Award, *supra* note 7, at 29.
28. DC Case, Exhibit 29, 205 F. Supp. 3d 1.
29. *Grynberg v. BP Exploration Operating Co.*, No. 116840/2004 (N.Y. Sup. Ct. Jul. 17, 2014), DC Case Exhibit 11, p. 7, 205 F. Supp. 3d 1.
30. *Id.* at 8.
31. *Grynberg v. BP Exploration Operating Co.*, 127 AD3d 553.
32. See the author's previous N.Y.L.J. article cited in note 2 above for a more detailed explanation of why the First Department was wrong in 2012 when it unanimously upheld Justice Solomon's lower court's vacatur of Hochman's award of sanctions against Grynberg.

New York High Court Adopts Unconscionability Standard to Overcome Statute of Frauds

By Karen E. Clarke

In *In re Estate of Hennel*, the N.Y. Court of Appeals, ruling on a matter of first impression, established a stringent "unconscionability" standard applicable when a party seeks to use the promissory estoppel doctrine to overcome the statute of frauds.[1] The lower courts had been applying this standard inconsistently and, in some cases, more expansively than the Court of Appeals considered appropriate. Accordingly, the Court took the opportunity to instruct that promissory estoppel is a rare exception to the statute of frauds that may only be invoked in cases involving true unconscionability, not mere injustice or unfairness.

Proceedings Below

In re Estate of Hennel involved a petition by two grandsons of the decedent to require the estate to pay off a mortgage loan taken by the decedent in 2001, secured on an apartment building property the decedent then owned. In 2006, the decedent and the grandsons agreed that the grandsons would take over ownership and management of the property, and the decedent orally promised that he would direct his estate to satisfy the balance of the mortgage debt upon his death. To effectuate this agreement, the decedent simultaneously executed (1) a warranty deed that conveyed the property (but not the mortgage) to the petitioners while reserving a life estate to himself, and (2) a will that specifically directed that the mortgage on the property be paid from the assets of his estate. In 2008, however, the decedent executed another will that did not contain that specific direction but did generally direct payment of "any and all just debts" as soon as practicable after his death; yet he assured the grandsons that there had been "no change" in their agreement regarding the property.

The decedent died in 2010, and the grandsons filed a petition pursuant to Surrogate's Court Procedure Act (SCPA) 1809 to determine the validity of their claim against the estate for satisfaction of the mortgage loan. They asserted causes of action for breach of contract and promissory estoppel based upon the 2006 agreement, and sought a ruling that the estate was required to satisfy the mortgage loan as a "just debt" under the 2008 will. The respondent executor asserted that the decedent's alleged oral promise to direct his estate to pay off the mortgage loan upon his death was not enforceable under the statute of frauds because it was not in writing,[2] and the decedent's 2006 will could not satisfy the requirement of a writing because it was incomplete and was revoked in 2008.

On the parties' cross-motions for summary judgment, the Surrogate's Court concluded that a binding agreement was reached in 2006 and that the respondent should not be able to avoid that agreement through the statute of frauds. Given that the petitioners had performed the agreed management and maintenance duties without compensation for four years in reliance on the decedent's promise to have his estate pay the mortgage debt, the court held that this case fell "squarely within that limited class of cases where promissory estoppel should be applied to remedy a potential injustice," and accordingly granted summary judgment to petitioners.[3]

A divided Appellate Division affirmed, concluding that the elements of promissory estoppel were met and that the respondent was properly estopped from invoking the statute of frauds defense because it "would wreak an unconscionable result in this case."[4]

Court of Appeals Majority Establishes Unconscionability Standard

The Court of Appeals (5-1) reversed, holding that petitioners could not rely on the promissory estoppel doctrine because application of the statute of frauds would not inflict an unconscionable injury upon petitioners. The majority decision, by Judge Eugene Fahey, began by announcing that the Court was now adopting the principle, which it had not previously expressly recognized, that the statute of frauds could be overcome through a showing of promissory estoppel and unconscionable injury. After discussing the policy rationales behind this doctrine, the Court established a general rule that "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds."[5]

The Court specifically rejected the commonly cited standard of the Restatement (Second) of Contracts § 139 to the extent that it "permits circumvention of the statute of frauds where mere 'injustice' not rising to the level of unconscionability would result."[6] To define unconscionability, the Court looked to the general definition of an unconscionable contract—one where the inequality was "so strong and manifest as to shock the conscience and con-

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found the judgment of any person of common sense"—and instructed that the standard to avoid the statute of frauds "must be equally demanding, lest the statute of frauds be rendered a nullity."[7]

Applying this demanding standard, the Court held that petitioners did not demonstrate an unconscionable injury sufficient to estop respondent's reliance on the statute of frauds. Although petitioners had performed their end of the bargain for four years, they were not forced to expend any personal funds to pay the mortgage or to manage or maintain the property, or to sacrifice other responsibilities or opportunities. Petitioners' arguments that they were misled by the decedent in 2008 and were unfairly denied the full benefit of their oral bargain (receiving only $150,000 in equity in the property instead of the full $235,000 equity they were promised), also did not suffice. The Court explained that whenever an oral agreement is rendered void by the statute of frauds, one or both parties will be deprived of the benefit of their oral bargain, and some unfairness will typically result, but "what is unfair is not always unconscionable."[8]

The Court held that, to avoid severely undermining the statute of frauds, unconscionability will be found only when application of the statute of frauds would render "a result so inequitable and egregious 'as to shock the conscience and confound the judgment of any person of common sense.'"[9] Finding no such unconscionable result here, the Court reversed the Appellate Division's order and directed that respondent's motion for summary judgment dismissing the petitioners' claim be granted.[10]

Dissent Focuses on Distinct "Just Debts" Issue

In his dissenting opinion, Judge Rowan Wilson fully agreed with the majority's conclusions regarding the unconscionability standard and petitioners' failure to meet it. He dissented only as to the result, stating that instead of reversal, the matter should be remitted to the Appellate Division for resolution of the Surrogate's Court's alternative holding that decedent's estate was obligated to satisfy the mortgage as a "just debt" of the decedent, which the Appellate Division had not addressed.[11]

The Surrogate's Court had ruled that "despite the omission from the Decedent's 2008 Will of the language contained in Article Fifth of his 2006 Will, the Court finds that the mortgage debt is a 'just debt' of the Decedent and must be paid by the Estate pursuant to Article First of the 2008 Will."[12] The Surrogate's Court rejected respondent's argument that EPTL 3-3.6 (which provides generally that encumbrances on a decedent's property are not chargeable against assets of decedent's estate) effectively removed the mortgage from the will's provision for the payment of debts. Section 3-3.6, by its explicit language, only applies when the property is "specifically disposed of by will or passes to a distributee" in intestacy, whereas the property here had been conveyed to the petitioners by deed four years prior to the decedent's death and never became part of his estate. The Surrogate's Court concluded,

> Since the Petitioners did not assume the mortgage when accepting title to the property, and the Note that the Decedent gave to Trustco Bank is a 'just debt' of the Decedent, the Estate is obligated to pay the outstanding balance of the Note, which would in turn discharge the mortgage on the property.[13]

"The Court of Appeals (5-1) reversed, holding that petitioners could not rely on the promissory estoppel doctrine because application of the statute of frauds would not inflict an unconscionable injury upon petitioners."

The Appellate Division did not decide the "just debt" issue, apparently deeming it unnecessary in light of its conclusion that the Surrogate's Court had the authority to direct the estate to pay the mortgage debt as a "valid claim against the estate" based on promissory estoppel.[14]

In the Court of Appeals, as dissenting Judge Wilson explained, "The parties did not brief or argue the 'just debts' issue…, so the Surrogate Court's determination remains law of the case, meaning we cannot reverse and order judgment for respondent. The correct result here should be to remit the matter to the Appellate Division to determine the 'just debts' issue."[15] Thus, the dissenting judge believed that the question whether the decedent's mortgage debt owed to the bank was a "just debt" payable by the decedent's estate was distinct from, and not necessarily dependent upon, the question whether the petitioners had a legally enforceable contract with the decedent. The dissent acknowledged the possibility that the Surrogate's Court, with its broad equitable authority under SCPA 201, could deem the bank loan a "just debt" that was required to be paid under the will's terms regardless of the legal unenforceability of the decedent's agreement with the petitioners.[16]

The majority, in contrast, viewed the Surrogate's Court's "just debt" ruling as dependent upon its finding that the decedent was bound by the oral agreement. Thus, the majority believed that to remit for further consideration of the "just debt" issue would be "inconsistent" with the Court's holding that the decedent was not bound by the oral bargain. The majority also noted that neither party had raised any argument on the "just debt" issue in the Court of Appeals.[17]

Conclusion

In *In re Estate of Hennel*, the New York Court of Appeals provided a helpful clarification of the demanding unconscionability standard that must be met to avoid the statute of frauds on promissory estoppel grounds. Although the issue arose in an estate case, this instructive ruling will presumably govern all commercial cases. In estate cases, as the dissenting judge noted, there is an additional lingering question regarding the extent to which a Surrogate's "just debt" determination may be analytically distinct from a determination of the legal enforceability of an oral promise.

Endnotes

1. *In re Estate of Hennel*, 29 N.Y.3d 487, 58 N.Y.S.3d 271 (2017).
2. The pertinent statute of frauds provisions are N.Y. Estates, Powers & Trusts Law (EPTL) 132.1(a)(2), covering promises to make testamentary provisions of any kind, and N.Y. General Obligations Law § 5-701(a)(1), applicable when the performance is not to be completed before the end of a lifetime.
3. *In re Estate of Hennel*, 40 Misc. 3d 547, 557-60, 967 N.Y.S.2d 625 (Sur. Ct. Schenectady Co. 2013).
4. *In re Estate of Hennel*, 133 A.D.3d 1120, 1123, 20 N.Y.S.3d 460 (3d Dep't 2015).
5. 29 N.Y.3d at 494.
6. *Id.* at 494 n.3.
7. *Id.* at 495.
8. *Id.* at 497.
9. *Id.* (citation omitted).
10. *Id.* at 498.
11. *Id.* at 498.
12. 40 Misc. 3d at 560.
13. *Id.*
14. 133 A.D.3d at 1123.
15. 29 N.Y.3d at 499-500.
16. *Id.* at 499.
17. *Id.* at 498.

Online Dispute Resolution: The "New Normal"

By Marcy Einhorn

It may come as a surprise that online dispute resolution has been around for more than 20 years. Described as "the application of information and communications technology to the practice of dispute resolution,"[1] this digital technology emerged in the U.S. in the 1990s "in tandem with the proliferation of e-commerce."[2]

The first players in the field were some of the big online retailers that most of us are very familiar with now: eBay and Paypal are the best examples. Early on these online vendors realized that they needed a means of resolving disputes involving small amounts of money between parties who were separated by great distances.

An early designer of these dispute resolution programs, Modria, Inc., spearheaded by tech guru Colin Rule, launched a quick, easy, low-cost dispute resolution model, using automation, that is capable of handling millions of disputes seemingly effortlessly.

eBay, Paypal and other large online retailers quickly realized that a low-cost means of resolving customer disputes would be a key component to the growth of online retail. They didn't waste any time in launching platforms that were user friendly and were programmed to be neutral, providing the parties with human input if the online process proved less than satisfactory.

As successful as the ODR process has been for big online retailers, the road to online dispute resolution was quite a rocky one at first.[3] Computer mediated disputes when first created were thought to dehumanize communication and create a shortcut to problem solving that was only for the wealthy.[4]

However, since its first appearance, online dispute resolution has expanded rapidly with the increased digitization of society.[5] Today, online dispute resolution, or ODR, has taken off, with thousands of ODR neutrals and supporting technicians, designers, developers and managers offering their services to the ODR community around the globe. We've even seen the launch of ODR conferences, websites that serve the ODR community, and the creation of ethical standards and principles that address ODR practices and procedures exclusively.[6]

With its extensive impact, it's not hard to understand why technology has been referred to as the "Fourth Party," along with the disputants and any neutrals, or to agree with the prediction that the range of techniques will inevitably continue to expand as technology continues to evolve.[7]

If you were surprised to learn how long ODR has been around, you may be even more surprised to learn that Europe and Canada are on the cutting edge when it comes to integrating ODR platforms into all sorts of disputes. In Europe, where ODR was originally made available for resolving commercial disputes, it now goes well beyond that initial use, and is available as a resource in resolving housing issues, divorce proceedings, family violence and other emotionally fraught disputes across Europe. The Netherlands implemented an ODR platform for complex relational disputes, such as divorce and landlord-tenant disputes, more than a year ago. That platform involves a three-step process: Intake, Negotiation and Review, with optional mediation and arbitration services, an optional free diagnosis, a compulsory intake procedure and a mandatory dialogue phase that is based on model solutions, with compulsory review by a legal professional. The parties can request mediation or adjudication at any point in the process and the platform makes use of user surveys to continually innovate the service.

In Canada, British Columbia's Legal Services Society launched a do-it-yourself legal services website for the middle class, and others, regardless of economic status, just last year.[8] The new site provides free tools and solutions for everyday legal problems including family issues, family violence conflicts, wills, powers of attorney and personal planning, and foreclosure. The website's stated purpose is to empower BC residents to accomplish legal tasks on their own while providing reliable online help, up-to-date information, links, downloadable worksheets, documents, and plans. The site represents a shift in focus from "a system designed to support the inside stakeholders to becoming more focused on what the user needs."

The site was financed with $775,000 in non-government funding, costs $60,000 annually in maintenance and requires only sixth grade literacy skills. For anyone who can afford a lawyer, the site will point out where they will get the most value for their money. Under their model, triage and the unbundling of legal services are viewed as a reliable tool for lawyers and clients to start working together. It's interesting to see how the site works: couples can negotiate a separation agreement using a chat box, at their own pace, in privacy without meeting face to face. Then, if they agree on the terms, the site produces an agreement.

The plusses of the website are that its tools are not tied to geography or jurisdiction; it has the capability of improving access to justice; providing speedier and better outcomes, and maintaining a high degree of relevance with its customers. The minuses are the potential for

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perpetuating power imbalances, and enabling parties to avoid difficult emotional conversations that could promote a transformative negotiation experience.

In another cutting-edge development, the Ministry of Justice in British Columbia has created the Civil Resolution Tribunal, or CRT, as it is commonly known, which, according to Colin Rule, "may be the most forward-thinking court ODR system in the world." CRT is Canada's first online tribunal, and the Justice Ministry is considering making it mandatory in all civil cases, which would be a most aggressive, game-changing development.[9]

In 2013 The European Commission launched a website for alternative dispute resolution of consumer disputes over goods or services purchased online. [10] The site explains that ADR includes all the ways of resolving a complaint which do not involve going to court, such as mediation, conciliation, arbitration, ombudsmen or complaints boards. It goes on to explain that Online Dispute Resolution is an ADR procedure that is conducted entirely online. The EU's ODR platform is designed to allow for maximum geographical and sectoral coverage across the European Union.

The EU's authorizing directive provides the legal basis for ADR as a whole and ensures that EU consumers can turn to ADR for all contractual disputes in all economic sectors, across borders, whether online or offline purchases. It assures respect for the core principles of ADR which are identified as impartiality, transparency, effectiveness and fairness. The legislation established an EU-wide platform to facilitate ODR of contractual disputes between EU consumers and traders over purchases made online; links all the ADR entities notified by the member states, and requires that traders must provide a link to the EU ODR platform on their website

The benefits of cross-cultural ADR/ODR services include increased confidence in trading online and across borders; disputes can be settled online in a simple, fast, low-cost way; the development of a new culture of out-of-court dispute resolution between consumers and traders in the EU; and the ability to maintain good business reputations and good customer relations based on the efficient, fair resolution of disputes.

One measure of that coverage is the number of ADR tribunals that have been approved to participate in the platform: there are almost 600 pages of providers across almost the whole of the European Union who are available to facilitate the EU Commission's ADR program.

The website explains that "the platform is user-friendly, multilingual and accessible to everyone." Accessibility is the key to the success of the platform. It doesn't take much computer literacy to make use of the program. According to the website, any dispute can be resolved in four simple steps, with a final resolution issued in 90 days.

According to the website, 60 percent of EU vendors do not sell online to other countries due to the perceived difficulties of solving a problem from such sales; 40 percent of EU traders do not know about ADR; 30 percent are aware and willing to use it; 15 percent would like to use it but it's not available in their sector.

On the consumer side, 45 percent of consumers think it is easy to resolve disputes through ADR and 70 percent are satisfied with how their complaint was handled by ADR.

In the U.S., the expansion of ODR into court systems is still in the exploratory stage in New York,[11] while states like Michigan, Texas, and Utah are using ODR to deliver services to their constituents and improve case management statistics.[12]

Following the lead of the ODR platforms that are de rigeur in European online trading, and the platforms that are already performing dispute resolution functions in several states in the U.S., it is easy to foresee the time when we won't have to pick between online and offline dispute resolution for a broad array of disputes and will be able to move back and forth between various methods of dispute resolution. Although we're not there yet, we can expect that ODR will become the new normal in the near future.

Endnotes

1. *Technology and the Future of Dispute Resolution*, Colin Rule, Dispute Resolution Magazine, Winter 2015, p. 5.
2. JTC Resource Bulletin, "Online Dispute Resolution and the Courts," Joint Technology Committee, Version 1.0, adopted November 30, 2016, p. 7. "This document is a product of the Joint Technology Committee (JTC) established by the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC)."
3. For a survey of early ODR websites and their effectiveness see *The Pros and Cons of Online Dispute Resolution: An assessment of Cyber-Mediation Websites*, 2 Duke Law & Technology Review, 2003, p. 1-16.
4. *Technology and the Future of Dispute Resolution*, p. 6.
5. *Technology and the Future of Dispute Resolution,* p. 5.
6. For a comprehensive discussion of ethics and ODR see *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, Leah Wing, Original Publication, International Journal of Online Dispute Resolution, Vol. 3, No. 1, 2016, pgs. 12-29.
7. *Technology and the Future of Dispute Resolution,* p. 6.
8. MyLawBC (http://www.mylawbc.com/). The British Columbia Legal Society was established in 1979. The website had 1.4 million hits last year.
9. See https://civilresolutionbc.ca/ for a complete explanation of CRT and how it works.
10. Ec.europa.eu/consumers.
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12. *Id*.

Think Before You Tweet: Discoverability of Private Social Media Account Information in Litigation

By Daniel A. Schnapp and Catherine A. Savio

The average person spends approximately two hours on social media every day, outranking the average total time spent eating, drinking, socializing, and grooming.[1] Social media platforms are steadily becoming one of the most commonly used forms of communication and expression. Whether it be the illusory protection of a computer screen, or the appearance of control with regard to where and with whom such information is shared, many people write or post items on the internet that they would not necessarily say in person.

In a realm when people are often tempted to say and do things they would not otherwise do, the result of disclosing such content to an opposing party in litigation could be disastrous. The sheer quantity of information stored on social media websites makes them an attractive source of discoverable information for practitioners and a potential minefield of harmful information for litigants. As a result, the platforms have become fertile ground for practitioners to request disclosure of private messages, posts, and even a party's username and password in discovery. Regardless of any appearance of privacy, practitioners and clients alike should be aware of the very real danger that the content of social media accounts may be discoverable in litigation. In resolving disputes over such disclosure requests, courts appear to employ a fact-based, case-by-case balancing test ensuring both full disclosure of all material relevant to the prosecution or defense of an action but also seeking to protect individual privacy.

The New York Courts' Approach to Disclosure of Contents on Private Social Media Websites

New York Civil Practice Law and Rules (CPLR) 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." Courts in New York have applied this broad statutory scope of disclosure to the discovery of social media websites, such as Facebook, Twitter and Instagram. Under New York law, social media postings relevant to the issues in a case are not necessarily shielded from discovery merely because a party used a social media website's privacy settings to restrict access to certain postings.[2]

The mere fact that a party utilized a social media account is, however, an insufficient basis to provide an opposing party unlimited access to such an account.[3] For example, with regard to a personal injury action, the party requesting access to the social media account has the burden of establishing that the social media account contains information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses and other claims" in order for the posting to be discoverable.[4]

New York courts consistently apply established discovery principles in the context of discovery requests seeking a party's social media information.[5] A party seeking access to social media postings is required to specify the evidence sought and "…establish a factual predicate with respect to the relevancy of the evidence."[6]

In practice, however the broad discovery mandate contained in CPLR 3101(a) may not pave an easy path for parties looking to discover private social media information.

Recent Case Law

In *Forman v. Henkin*,[7] the plaintiff was seeking damages for injuries allegedly incurred while riding one of the defendant's horses. Specifically, the plaintiff claimed, "the accident resulted in cognitive and physical injuries that have limited her ability to participate in social and recreational activities."[8] At her deposition, the plaintiff testified that she had posted and sent messages on her Facebook account during the time period surrounding her injury.[9] As a result, the defendant sought an order compelling the plaintiff to provide the defendant unlimited authorization to obtain records from her Facebook account.[10] The trial court granted the motion to compel and the First Department, in reversing the trial court's order, held that the defendant had not established entitlement to the plaintiff's private Facebook postings merely because the plaintiff had admittedly used the social media website in the past.[11] Although the First Department noted that there hypothetically may be photographs or messages on the plaintiffs account that dispute her claimed injuries, it continued,

> [D]efendant's speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to plaintiff's Facebook account. Allowing the unbridled disclosure of such information, based merely on speculation that some relevant information might be found, is the very type of "fishing expedition" that cannot be countenanced.[12]

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On February 3, 2018, the Court of Appeals reversed the First Department's holding in *Forman*, noting that discovery requests, including those involving social media, "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure."[13] The Court instructed, "[r]ather than applying a one-size-fits-all rule at either of these extremes [full disclosure of social media accounts or no disclosure of social media accounts], courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper 'fishing expeditions.'"[14]

The Court noted relevant considerations in relation to social media discovery and concluded, "the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to the Supreme Court's order were reasonably calculated to contain evidence 'material and necessary' to the litigation."[15]

Likewise, in *Melissa G v. North Babylon Union Free Sch. Dist.*,[16] the plaintiff alleged that, as a result of injuries stemming from illegal sexual contact with a teacher, the plaintiff missed school, suffered emotional distress, suffered from post-traumatic stress disorder, mental anguish, lost her employment and her educational and employment opportunities were either lost or impaired.[17] In reviewing the public portion of the plaintiff's Facebook page, the defendant discovered photographs of the plaintiff engaged in a number of recreational activities including working, rock climbing and drinking with friends.[18] As a result, the defendant requested "authorizations to obtain full access to and copies of the plaintiff's current and historical records/information on her Facebook and MySpace accounts."[19] The court held that the defendant had established the requisite factual predicate to be granted access to plaintiff's Facebook account explaining,

> [i]n light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action.[20]

The court directed the plaintiff to "print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials."[21]

Method of Disclosing Information Contained on Social Media Accounts

New York courts have taken a variety of approaches concerning the manner in which material stored on social media websites should be disclosed. In some instances, full access to a party's social media account has been granted with no restrictions. For example, in *Romano v. Steelcase Inc.*,[22] the court directed the plaintiff to deliver "a properly executed consent and authorization ... permitting [the] defendant to gain access to plaintiff's Facebook and MySpace records, including any records previously deleted or archived" by the websites.

Alternatively, certain courts have ordered parties to produce physical copies of specific information stored on social media accounts. In *Jennings v. TD Bank*,[23] the court ordered the plaintiff "to produce any and all current and historical Facebook pictures, videos or relevant status postings from her personal Facebook account since the date of the alleged incident, including any records previously deleted or archived ...."[24]

In an effort to protect a litigant's privacy, some New York courts have directed that a party's Facebook postings be submitted to the court for an *in camera* inspection to assess the materiality and relevance of the materials.[25]

New York courts have recognized, however, that in certain situations not all social media communications are relevant to a party's claims.[26] In Melissa G, the court did not grant defendant's request for "the complete, unedited account data" of plaintiff's Facebook accounts, noting that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress."[27] Accordingly, the court held that not all of plaintiff's personal communications were properly subject to scrutiny in connection with her claims.[28]

Potential Pitfalls in Requesting Unfettered Access of a Party's Social Media Account

Practitioners should be wary of requesting unlimited access to an individual's social media account in the form of a username and password as opposed to a more nuanced request. In a recent case in the state of New Jersey,[29] the defendants moved for an order compelling the plaintiff to provide her username and password for all social media accounts utilized by the plaintiff. The Court held:

> A request that the plaintiff produce the user name and password for all plaintiff's social medical accounts is not "calculated" to lead to the discovery of admissible evidence. There is no information that is available to the defendant that suggests that defendant is privy to some investigation signifying that there is information in plaintiff's social media

> accounts that in any way contradicts any of the information supplied by plaintiff in discovery to date. To compel production of the user name and password of all plaintiff's social media accounts may result in the disclosure of a great deal of potentially personal, sensitive information unrelated to any issue arising in the litigation. Moreover, for the reasons set forth above, entry of the order sought by defense counsel would be an extremely intrusive not only to the plaintiff, but any of plaintiff's Facebook friends.[30]

Potential Constitutional Privacy Issues and Fourth Amendment Protections

Some litigants have turned to the protections provided by the Fourth Amendment in order to prevent the disclosure of information contained on social media accounts. As it became clear that privacy settings on various social media websites were insufficient to protect information from disclosure in litigation, questions arose regarding whether certain circumstances could give rise to a reasonable expectation of privacy on social media accounts in order to invoke the protections of the Fourth Amendment. The Fourth Amendment's right to privacy protects people, not the platform on which an individual choses to express herself.[31] In order for a right to privacy to exist under the Fourth Amendment, courts require, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[32]

Although courts have held that a reasonable expectation of privacy may exist in the context of social media postings and/or internet communications, it is unclear to what extent such expectation may actually protect material from being discoverable in a litigation. The Second Circuit has held that a reasonable expectation of privacy may exist in postings made on the internet or in email.[33] The District Court of New Jersey likewise addressed privacy expectations in connection with emails and other shared writings such as social media posts. In *Beye v. Horizon Blue Cross Blue Shield of New Jersey,*[34] the court held that in connection with online journals and diary entries of children who had been denied health coverage as a result of alleged eating disorders, "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information."[35] In *Mellissa G.*, discussed at length *supra,* although the court did grant defendant access to much of plaintiff's social media postings, the First Department appeared to invoke the protection of the Fourth Amendment in limiting the scope of the discoverable information explaining,

> Since there is a reasonable expectation of privacy attached to the one-on-one messaging option that is available through Facebook accounts, private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.[36]

In 2012, a criminal court in the state of New York undertook and in-depth analysis of privacy concerns in relation to social media accounts. In *People v. Har*ris, the court compared certain aspects of individuals social media accounts to bank statements, stating,

> Like bank records, user information and Tweets can contain sensitive personal information. With a click of the mouse or now with even the touch of a finger, Twitter users are able to transmit their personal thoughts, ideas, declarations, schemes, pictures, videos and location, for the public to view. The widely believed (though mistaken) notion that any disclosure of a user's information would first be requested from the user and require approval by the user is understandable, but wrong. While the Fourth Amendment provides protection for our physical homes, we do not have a physical "home" on the Internet * * *As a consequence, some of our most private information is sent to third parties and held far away on remote network servers. A Twitter user may think that the same "home" principle may be applied to their Twitter account. When in reality the user is sending information to the third party, Twitter. At the same time the user is also granting a license for Twitter to distribute that information to anyone, any way and for any reason it chooses.[37]

The Court reasoned that although a great deal of personal information may be contained on an individual's twitter account, because Twitter does not guarantee privacy to its users, and indeed notifies users that their tweets are publicly viewable on default sites, tweets were public.[38] Thus, the defendant had no standing to quash a subpoena for his Twitter records on privacy grounds.[39]

Conclusion

As communications via social media and other electronic formats continue to rise exponentially in popularity, the frequency in which such communications are requested in discovery practice will likewise rise. Accessing the group chat of employees, instant messages of co-workers, an individual's associations and opinions, and even potentially assessing the amount of funds a potential defendant may have access to, can all be obtained through the

disclosure of social media account information. Whether it be in connection with the drafting of a litigation hold notice, discovery requests, or general advice, practitioners should be aware of the dangers and opportunities contained on so-called private social media accounts. The discoverability of information contained on social media accounts may depend upon a balancing of disclosing all relevant material to a litigation, and the degree to which the protection of personal privacy is implicated.

Endnotes

1. https://www.socialmediatoday.com/marketing/how-much-time-do-people-spend-social-media-infographic.
2. *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 617, 931 N.Y.S.2d 311 (1st Dep't 2011); *Romano v. Steelcase Inc.*, 30 Misc.3d 426-433, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010).
3. *See Tapp v. New York State Urban Dev. Corp*., 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dep't 2013).
4. *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 621, 958 N.Y.S.2d 392 (1st Dep't 2013); *McCann v. Harleysville Insurance Company of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010).
5. *See, e.g., Richards v. Hertz Corp.*, 100 A.D.3d 728, 730–731, 953 N.Y.S.2d 654 (2d Dep't 2012) (refusing to compel the disclosure of Facebook information absent showing that t disclosure would reveal relevant evidence or lead to discovery of information bearing on the claim); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614 (4th Dep't 2010) (denying access to Facebook information when defendant failed to establish a factual predicate of relevancy, referring to the defendant's request as "a fishing expedition ... based on the mere hope of finding relevant evidence") .
6. *McCann v. Harleysville Insurance Co. of New York*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614 (4th Dep't 2010).
7. *Forman v. Henkin*, 134 A.D.3d 529, 533, 22 N.Y.S.3d 178, 182 (1st Dep't 2015).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 541.
12. *Id.*
13. *Forman v. Henkin*, ___ N.E.3d ___ (2018, 2018 N.Y. Slip Op. 01015.
14. *Id.* at *4.
15. *Id*. at *6.
16. 48 Misc. 3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk Co. 2015).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id; see also Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010) ("Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity access to these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings.").
22. 30 Misc. 3d 426, 435, 907 N.Y.S.2d 650 (Sup.Ct., Suffolk Co. 2010).
23. 2013 N.Y. Slip Op. 32783(U), 2013 WL 5957882 (Sup.Ct., Nassau Co. 2013).
24. *Id.*
25. *See, e.g., Richards v. Hertz Corp., supra* note 5, 100 A.D.3d 728, 953 N.Y.S.2d 654 (2d Dep't 2012); *see also Nieves v. 30 Ellwood Realty LLC*, 39 Misc.3d 63, 966 N.Y.S.2d 808 (1st Dep't 2013); *Loporcaro v. City of New York*, 35 Misc. 3d 1209(A), 950 N.Y.S.2d 723 (Sup. Ct., Richmond Co. 2012).
26. *See Patterson v. Turner Constr. Co., supra* note 2, 88 A.D.3d 617, 931 N.Y.S.2d 311.
27. *Melissa G v. North Babylon Union Free School District*, 48 Misc. 3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk Co. 2015); *Giacchetto v. Patchogue–Medford U.F.S.D.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013).
28. *Id.*
29. *Tameka S. Brown v. Baheejah A. Rasheed, Michael J. Smith and Jessica Smith*, Docket No. L-2011-15 (Atlantic County Superior Court).
30. *Id.*
31. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").
32. *Id.* at 361, 88 S.Ct. 507, 516 (Harlan, J. concurring).
33. *U.S. v. Lifshitz*, 369 F.3d 173, 4 A.L.R.6th 697 (2d Cir. 2004) citing *Guest v. Leis*, 255 F.3d 325, 2001 Fed.App. 0206P (6th Cir. 2001); *but see United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (holding that individuals do not have a reasonable expectation of privacy in internet postings or e-mails, stating, "Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting").
34. 568 F. Supp. 2d 556, 06–5337 (D.N.J. December 14, 2007).
35. *See also Moreno v. Hanford Sentinel Inc.*, 172 Cal.App.4th 1125, 91 Cal.Rptr.3d 858 (Ct.App. 5 Dist. 2009) (holding no reasonable expectation of privacy where person took affirmative act of posting own writing on MySpace); *Dexter v. Dexter*, 2007 WL 1532084, 2007 Ohio App. LEXIS 2388 (Ohio Ct. App. Portage Co. 2007).
36. *Melissa G v. N. Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389, 393, 6 N.Y.S.3d 445, 449 (Sup. Ct., Suffolk Co. 2015).
37. *People v. Harris*, 36 Misc. 3d 613, 616–24, 945 N.Y.S.2d 505, 507–13 (Crim. Ct., New York Co. 2012) ("[T]here have been manifestations of an underlying discomfort with the facial unfairness of depriving a bank customer of any recourse, including standing, for disclosure of financial information concerning the customer's personal bank accounts which are widely believed to be confidential.").
38. *Id.* ("Indeed that is the very nature and purpose of Twitter.").
39. *People v. Harris*, 36 Misc. 3d 613, 616–24, 945 N.Y.S.2d 505, 507–13 (Crim. Ct., New York Co. 2012).

Sometimes Less Is More (and Vice Versa): A Primer on Pleading Practice in Arbitration

By Theodore K. Cheng

Arbitration is intended as an alternative to court litigation to resolve disputes. At least in the commercial arena, its objective is to achieve a final, binding resolution of a dispute in a fair, expeditious, and cost-effective manner. Because of its inherent flexibility and customizability, arbitration is meant to be faster and less expensive than court litigation. This objective is often (but not always) accomplished through the parties' negotiations and drafting over a dispute resolution clause or provision in their contract. Thus, arbitration is often referred to as a "creature of contract," in that the right to an arbitral forum for dispute resolution arises from the parties' written agreement to arbitrate. Consistent with this objective are the existence of procedural rules that are quite different from civil court procedural rules.

Arbitration procedural rules are meant to streamline the proceedings by eliminating much of the formalism found in court rules. There are essentially two types: administered rules and non-administered (or self-administered) rules. As the name suggests, the former are promulgated by an administrator or provider of arbitration services, such as the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention and Resolution (CPR Institute), Resolute Systems, or the Financial Industry Regulatory Association (FINRA).[1] The latter are used by the arbitrator or panel, the parties, and their counsel on a stand-alone or ad hoc basis without the involvement of an administrator.[2] This article will take a closer look at how the rules pertaining to pleading practice in domestic commercial arbitration cases impact how those matters should be handled.

Commencing an Arbitration Proceeding

Generally, it is far easier to commence an arbitration than a lawsuit, particularly when a provider is involved, and the rules usually set forth the necessary steps.[3] For example, under the AAA Commercial Arbitration Rules, the initiating party (called the "claimant") files a "Demand for Arbitration" (more simply referred to as the "demand") with the AAA, along with an administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract that provides for arbitration.[4] The filing with the AAA should include (a) the name of each party; (b) the address for each party, including telephone and fax numbers and e-mail addresses; (c) if applicable, the names, addresses, telephone and fax numbers, and email addresses of any known representative for each party; (d) a statement setting forth the nature of the claim including the relief sought and the amount involved; and (e) the locale requested, if the arbitration agreement does not specify one.[5] All of the foregoing information is required on the AAA's standard Commercial Demand Form (available on its website at www.adr.org), but a claimant is not required to use this form.

No specific format is required so long as the above information is provided, and, in that regard, the "notice pleading" required in an arbitration proceeding is far more perfunctory than in court, thereby making it rather easy to commence an arbitration. However, advocates often submit an additional document, typically styled as a "Statement of Claim," to accompany the demand. These documents contain factual averments, usually pleaded upon information and belief, set forth in consecutively numbered paragraphs and conclude with a prayer for relief. Thus, as in commercial matters filed in court and/or when experienced/sophisticated advocates are involved, commencement documents often look very much like a lawsuit complaint. Filing a statement of claim along with the formal demand is a strategic opportunity for the claimant to persuade the trier of fact (in this case, the arbitrator or panel) well in advance of the evidentiary hearing because it is one of the few documents provided to the arbitrator or panel even before the preliminary hearing conference (or initial arbitration case management conference) in the proceeding. Like a complaint, a statement of claim could include a section setting forth an "introduction," "nature of case," or "relevant background" that permits the advocate to frame the issues and serve in the role of a storyteller akin to giving an opening statement to a judge or jury. Additionally, in the absence of formal pleading rules like in court, an advocate has a lot of flexibility and leeway in crafting the statement of claim, and, hence, can take a fair amount of liberties with the text without the fear of having to later defend the equivalent of a motion to strike for having pled "redundant, immaterial, impertinent, or scandalous matter."[6]

Of course, preparing such a document entails incurring some additional legal fees, and, thus, increases the cost to file the matter in the first instance. But if the stakes or the amount in controversy are high enough, the additional cost may be warranted. Moreover, the filing fees involved in commencing an arbitration may be (but are not

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always) greater than the filing fees required to commence a court litigation. For some parties, that can be a deterrent in selecting the arbitral forum, at least as an *ex-ante* matter when the dispute resolution clause is being negotiated. This requires careful consideration of the advantages and disadvantages of utilizing arbitration versus litigation to resolve both anticipated and unanticipated future disputes between the parties, which is beyond the scope of this article.[7]

The claimant must also provide a copy of the demand and any supporting documents to the opposing party(ies).[8] No formal process server needs to be engaged. In turn, the AAA provides notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied.[9]

Answering a Demand/Statement of Claim

In responding to the demand, one issue that arises with respect to how matters are commenced in an arbitration proceeding is to what extent a claimant, who chooses to file a detailed statement of claim instead of simply submitting a demand form, should be held to any deficiencies in that document, as might be the case for a deficient complaint. Although a respondent might be tempted to file a motion akin to one to dismiss under Federal Rule of Civil Procedure 12(b)(6) or CPLR 3211, motions to address the sufficiency of a statement of claim are generally discouraged in arbitration proceedings. The reason is that undertaking such a procedure, in most cases, is at odds with the expeditiousness of the arbitration mechanism for resolving disputes, lengthening the duration of the case, increasing the costs, and reducing efficiency. That said, if there is a clear basis for a motion that would significantly dispose of the entire case and/or narrow the issues in the case, thereby resulting in savings to the parties in terms of time and cost, such a motion may be appropriate.[10] For example, if the claimant should plead factual averments in the statement of claim that, even if taken as true, do not rise to the level of a legally cognizable claim, those circumstances might justify an early dismissal by the arbitrator or panel upon the respondent's motion. To be clear, however, a deficiency that can easily be cured through repleading probably counsels for foregoing such a motion because all that would be accomplished is increased cost and delay in the proceedings.

This issue should be raised by the respondent during the preliminary hearing conference. The arbitrator or panel should then read the statement of claim as broadly as possible and discuss the alleged deficiencies with the parties so as to ensure that the bases for the claims truly exist and perhaps explore ways to test any threshold issues on the merits, such as bifurcating the proceedings between issues. If the respondent is insistent on filing a motion to test the sufficiency of the claims, one way to handle the matter is for the respondent to submit a letter application seeking leave to file the motion, followed by a response from the claimant, and then have the arbitrator or panel entertain whether to permit the motion to be filed. Undertaking this process, which does not add significantly to the cost of the proceeding, may have the benefit of causing the claimant to withdraw patently deficient claims and/or properly replead the claims in question. During this process, the parties should be encouraged to meet and confer in hopes of finding some agreement as to the precise ruling on which they would like the arbitrator or panel to issue. After all, it is ultimately the arbitrator's or the panel's responsibility to clarify the claims and issues in the case.

Aside from a preliminary motion to test the sufficiency of the statement of claim, unlike in court, no formal answer or response (referred to as the "answering statement") to a demand is generally required. In such a situation, the answering party (called the "respondent") is deemed to have denied all the claims in the demand.[11] For example, under the AAA Commercial Arbitration Rules, a respondent may file an answering statement within 14 calendar days after notice of the filing of the demand is sent by the AAA and must also send a copy of the document to the claimant and all other parties to the arbitration.[12] If no answering statement is filed, the respondent will be deemed to deny the claim.[13]

A respondent may file a counterclaim at any time after the AAA sends notice of the filing of the demand (subject to certain limitations set forth in Rule R-6) and send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it should include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. An additional filing fee must also be paid.[14] The information required in an answering statement or counterclaim is again set forth in the AAA's standard Commercial Answer Form (also available on its website at www.adr.org), but, again, a respondent is not required to use this form.

No specific format is required so long as the above information is provided. However, as a practical matter, because an answering statement is also one of the few documents provided to the arbitrator or panel before the preliminary in the proceeding, preparing one—much like preparing a detailed statement of claim—can be an opportunity to persuade the arbitrator or panel. Like an answer or responsive pleading in court, these more detailed answering statements will usually contain general and specific denials; perhaps include some additional factual averments, again pleaded upon information and belief; utilize consecutively numbered paragraphs; interpose affirmative defenses; and conclude with a prayer for relief. Consequently, whether to submit an answering statement should also be viewed as a strategic decision to be considered by both the advocate and the client.

An issue that arises at this stage of the proceeding if the respondent chooses not to file an answering statement is whether it nonetheless has some obligation to apprise

the claimant of the defenses it intends to pursue in the proceeding. Conversely, if the respondent does file an answering statement and interposes affirmative defenses, another issue that arises is whether the respondent is now somehow limited to those articulated defenses, even though it had no obligation to file an answering statement in the first instance. If handled poorly, either situation could inject confusion, a degree of uncertainty, and perhaps unfairness into the proceeding.

Both situations can be properly addressed at a well-conducted preliminary hearing where the defenses can be explored and an appropriate information exchange set forth in the scheduling order. Additionally, status conferences along the way can address the bases for new defenses that arise during the course of the proceeding. The arbitrator or panel could also set forth a deadline by which the respondent must disclose its defenses so as to avoid surprise to the claimant and to ensure an orderly information exchange. Doing so would later permit the arbitrator or panel to issue an order barring the respondent from pursuing a defense it had not timely disclosed.[15] At the very least, the final pre-hearing conference would be the last opportunity before the evidentiary hearing for the arbitrator or panel to clarify the defenses that are anticipated to be presented and pursued during the hearing so that all parties and the arbitrator or panel can properly prepare themselves. Of course, the foregoing discussion could apply equally to any new claims that a claimant seeks to pursue that arise during the course of the proceeding.

Amending Claims and Counterclaims

Consistent with streamlining procedural matters in the arbitral forum, amending a claim or counterclaim is easily accomplished.[16] For example, under the AAA Commercial Arbitration Rules, a party may, at any time before the close of the hearing (or a date set by the arbitrator or panel), increase or decrease the amount of its claim or counterclaim by providing written notice to the AAA.[17] Any new or different claim or counterclaim must be filed with the AAA and a copy provided to the other parties, who will have 14 calendar days to file an answering statement to the proposed change of claim or counterclaim.[18] However, after the appointment of the arbitrator or panel, no new or different claim may be submitted absent consent from the arbitrator or panel.[19]

Some Final Practice Notes

Here are some final practice notes regarding pleading practice in an arbitration proceeding. First, in drafting either the demand/statement of claim or answering statement, it is very common for the parties to insert, almost as boilerplate, a request that the arbitrator or panel award reasonable attorneys' fees in the prayer for relief. Doing so can have unintended consequences. Although an arbitrator or panel is not permitted to award attorneys' fees absent the parties having contractually authorized such an award in the arbitration clause or if the governing substantive law provides for such an award,[20] if the parties independently request an award of attorneys' fees in their arbitration pleadings, at least under the AAA's rules (which appear to be unique in this regard), those requests can operate to provide authority to the arbitrator or panel to render such an award.[21]

Additionally, advocates should be mindful that, unlike court pleadings, the demand/statement of claim and answering statement are almost always reflexively marked as exhibits at or before the evidentiary hearing by the parties and/or the arbitrator or panel and are often deemed admitted as part of the evidentiary record. Thus, any statements made in these pleadings that end up being inconsistent with the actual evidence adduced at the hearing may create certain evidentiary difficulties at the end of the proceeding. That said, it is still ultimately up to the arbitrator or panel to determine the evidentiary weight to be accorded the pleadings.[22]

The foregoing practice notes serve to highlight how important it is for advocates to know, understand, and appreciate the impact of the applicable procedural rules governing the arbitration proceeding. (Incidentally, they also underscore the importance for transactional counsel to appreciate these rules, or at least coordinate with litigation counsel, so that a dispute resolution clause customized to the parties and any anticipated circumstances or preferences is negotiated and drafted in the underlying contract.) Beyond simply knowing and appreciating the applicable procedural rules, because arbitration best practices and the law governing arbitration proceedings are constantly changing, attending timely continuing legal education programs and hearing from and/or speaking with arbitrators about their views on the current state of pleading practice in arbitration proceedings can be highly illuminative. Finally, consulting authoritative and helpful resources will be of enormous assistance in navigating this field.[23]

Endnotes

1. *See, e.g.*, AAA (American Arbitration Association) Commercial Arbitration Rules (October 1, 2013); CPR (International Institute for Conflict Prevention & Resolution) Administered Arbitration Rules (July 1, 2013); Resolute Systems Commercial Arbitration Rules; JAMS Comprehensive Arbitration Rules and Procedures (July 2014); FINRA Code of Arbitration Procedure for Industry Disputes (2017).
2. *See, e.g.*, CPR Rules for Non-Administered Arbitration (November 1, 2007); UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules (2013).
3. *See, e.g.*, AAA Commercial Arbitration Rules, Rule R-4; CPR Administered Rules, Rules 3.1-3.5; Resolute Systems Commercial Arbitration Rules, Rule 2; JAMS Comprehensive Arbitration Rules, Rules 5 and 9; CPR Non-Administered Rules, Rules 3.1-3.3; UNCITRAL Arbitration Rules, Articles 3 and 20; FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13300 and 13302.
4. *See* AAA Commercial Arbitration Rules, Rule R-4(a).
5. *See id.*, Rule R-4(e).
6. Fed. R. Civ. P. 12(f); *accord* N.Y. C.P.L.R. 3024(b) ("A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.").

7. On that subject, there are a number of good resources. *See, e.g.*, Steven M. Greenspan and Conna A. Weiner, *Reassessing Commercial Arbitration: Making It Work for Your Company*, *ACC Docket* (Mar. 2017), available at https://svamc.org/wp-content/uploads/Reassessing-Commercial-Arbitration-Making-it-Work-for-Your-Company.pdf.
8. *See* AAA Commercial Arbitration Rules, Rule R-4(g).
9. S*ee id.*, Rule R-4(h).
10. *See, e.g.*, *id.*, Rule R-33 ("The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.").
11. *See, e.g.*, *id.*, Rule 5; CPR Administered Rules, Rules 3.6 through 3.9; Resolute Systems Commercial Arbitration Rules, Rule 2; JAMS Comprehensive Arbitration Rules, Rule 9(c) through 9(e); CPR Non-Administered Rules, Rules 3.4 through 3.7; UNCITRAL Arbitration Rules, Articles 4 and 21. *But see* FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13303(a) (mandating that an answering statement be filed and providing that "[p]arties that fail to answer in the time provided may be subject to default proceedings under Rule 13801"). *See also* Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided."); CPLR 3018(a) ("A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.").
12. *See* AAA Commercial Arbitration Rules, Rule R-5(a).
13. *See id.*
14. *See id.*, Rule R-5(b).
15. Rule 13308(b) of the FINRA Code of Arbitration for Industry Disputes also provides that "[i]f a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing."
16. *See, e.g.*, AAA Commercial Arbitration Rules, Rule 6; CPR Administered Rules, Rule 3.10; JAMS Comprehensive Arbitration Rules, Rule 10; FINRA Code of Arbitration for Industry Disputes, Rules 13309-13311; CPR Non-Administered Rules, Rule 3.8; UNCITRAL Arbitration Rules, Article 22.
17. *See* AAA Commercial Arbitration Rules, Rule R-6(a).
18. *See id.*, Rule R-6(b).
19. *See id.*
20. *See, e.g.*, 17 U.S.C. § 517 (authorizing award of attorneys' fees in copyright infringement cases); 42 U.S.C. § 1988 (authorizing award of attorneys' fees to prevailing party in civil rights cases).
21. *See* AAA Commercial Arbitration Rules, Rule R-47(d)(ii) ("The award of the arbitrator(s) may include: . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement."). *See also Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 713-14 (8th Cir. 2011) (affirming Wells Fargo's contention that, because both parties had requested attorneys' fees in their pleadings, the applicable AAA rule permitted the award of such fees); *B/E Aerospace, Inc. v. Jet Aviation St. Louis, Inc.*, No. 11 Civ. 8563 (SAS), 2012 WL 1577497, at *4 (S.D.N.Y. May 3, 2012) (holding that the fact that both parties sought attorneys' fees in their pleadings made the award of such fees permissible under the applicable AAA rule); *Lasco Inc. v. Inman Constr. Corp.*, 467 S.W.3d 467, 471-75 (Tenn. Ct. App. 2015) (holding that, because both parties had requested their respective attorneys' fees during the proceedings, such an award was proper under the applicable AAA rule, even though the parties' agreement did not expressly authorize such an award).
22. *See, e.g.*, AAA Commercial Arbitration Rules, Rule R-34(b) ("The arbitrator shall determine the admissibility, relevant, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.").
23. *See, e.g.*, Stephen K. Huber and James E. Lawrence, eds., AAA Yearbook on Arbitration & the Law (JurisNet, LLC 29th ed. 2018); James M. Gaitis, A. Holt Gwyn, Laura A. Kaster, John J. McCauley, eds., College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (JurisNet, LLC 4th ed. 2017).

Proposal to Mitigate Risk Associated With Inadvertent Privilege Waiver During Disclosure

To: John W. McConnell,
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: January __, 2018

Re: Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Privilege Waiver During Disclosure

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, dated November 15, 2017 ("Memorandum"), proposing an amendment to the Rules of the Commercial Division (the "Rules") to include "sample 'privilege claw-back' language to use in the standard form stipulation and order for the production of confidential information in matters before the Commercial Division."

As stated in the Memorandum, the proposal of the Commercial Division Advisory Council ("CDAC") seeks to amend the Rules to make them generally consistent with the existing protocols established at the federal level and in other states concerning the handling of inadvertent disclosure of information during the course of discovery. The formal proposal by the CDAC ("CDAC Memorandum") is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The CDAC's proposal seeks to amend Commercial Division Rule 11-g, which governs the use of confidentiality orders in the Commercial Division, to include the following language in the current confidentiality stipulation and order as follows:

> "(c) In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:
>
> a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information") are identified and withheld from production.
>
> b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
>
> c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.
>
> In the event the parties wish to deviate from the foregoing language, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
>
> (d) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules."

II. SUMMARY OF PROPOSAL

As stated in the Memorandum, the CDAC desires to incorporate existing New York law with regard to inadvertent disclosure into the Commercial Division's Standard Form to achieve the following goals:

> *First*, it makes it facially apparent that the new provision is intended to be consistent with existing New York state law.
>
> *Second*, it ensures that the parties commit to taking appropriate steps to screen for privilege and promptly remediate

any error – *i.e.* steps that are necessary under New York law to avoid an inadvertent waiver.

Third, the new provision eliminates the possibility that the presumptive non-waiver embodied in the so-ordered Standard Form will be litigated, thereby reducing greatly the chance that a non-party seeking to challenge the implications of an inadvertent production in another forum will become aware of its occurrence in the first instance.

CDAC Memorandum at 5.

The CDAC acknowledges that "quick peek" agreements (which occur when parties produce documents prior to doing an appropriate privilege review) would be excluded from its proposal since they "are inconsistent with New York law" as they are "entirely ineffective against waiver claims interposed by non-parties to [such agreements]" *Id.* at 6. As such, the CDAC further notes that the risks under existing law "that a party who voluntarily produces privileged material will effectuate a subject matter waiver—a privilege waiver that goes beyond the document disclosed." *Id.*

III. COMMENTS

The Section views favorably the position taken by the CDAC and fully endorses its proposal to amend the Standard Form governed by Commercial Division Rule 11-g which would allow parties to include "sample 'privilege claw-back' language" that limits the risks associated with inadvertent disclosure of information.

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

November 15, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure

The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council, to amend Commercial Division Rule 11-g (22 NYCRR § 202.70[g], Rule 11-g[c] and [d]) to include sample "privilege claw-back" language for use in the standard form of stipulation and order for the production of confidential information in matters before the Commercial Division (Exh. A, pp. 3-4, pp. 6-7). The proposed language is designed, in a manner consistent with New York law, to mitigate the risks of inadvertent disclosure associated with voluminous document production in major commercial actions. Parties employing the language would agree to (1) implement and adhere to reasonable procedures to ensure that documents protected from disclosure are identified and withheld from production, (2) take reasonable steps to correct errors when protected information is inadvertently produced, (3) return or destroy copies of inadvertently produced protected information upon request of the producing party, and (4) neither challenge the producing party's document review procedure or its efforts to rectify the production error, nor claim that the return of the protected information has caused it to suffer prejudice (Exh. A, p. 7). The Subcommittee notes that the most efficacious manner of addressing the problem of inadvertent disclosure of confidential information is by legislative enactment – perhaps through amendment of New York's Civil Practice Law and Rules – but that, absent such recourse, the proposed language would serve as a helpful interim measure to maintain the standing of the Commercial Division as a world-class forum for resolving commercial disputes (Exh. A, pp. 3-4).

Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than January 16, 2018.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

COUNSEL'S OFFICE • 25 BEAVER STREET, NEW YORK, NEW YORK 10004 • TEL: 212-428-2150 • FAX: 212-428 2155

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

DATE: September 5, 2017

RE: **Proposal to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure**

Introduction and Background

Electronic discovery has now become standard fare in commercial litigation, and it has impacted the disclosure process in several ways. Chief among these has been a veritable explosion in the sheer number of documents to be reviewed and an increased complexity in the process surrounding the review of documents for responsiveness and privilege. Of course, with increased volume and complexity invariably comes increased cost to the litigants.

But the cost is not just monetary. It also manifests itself in an increased likelihood of error during the review process. Arguably the most grievous potential error is the inadvertent production of privileged material. Whether the production of privileged material is inadvertent can (and often does) become the subject of satellite litigation, and the consequences of a judicial finding that the inadvertent production constitutes a privilege waiver can be catastrophic. An inadvertent waiver not only results in the surrender of an erstwhile privileged document to the adversary, but it exposes the privilege holder to the risk that waiver will extend to other privileged material that addresses the same subject matter as the mistakenly produced privileged communication.

Federal Rule of Evidence 502 became part of federal practice in 2007. FRE 502 mitigates the risk of privilege waiver by establishing: (1) uniform criteria for what constitutes an "inadvertent" production in the federal system; (2) uniform criteria for determining when waiver

extends to the subject matter of the document disclosed; and (3) a stipulated-to mechanism whereby a party may simply request the return of an inadvertently produced document, and the receiving party must return it without challenging whether the production effectuated a privilege waiver. Moreover, FRE 502 also provides that by embodying their agreement in a court order, the parties' decision to deem inadvertent production not to trigger a waiver binds not only the parties, but nonparties to the litigation (*i.e.* those who might otherwise seek to rely upon the inadvertent production as the basis for privilege waiver in another litigation or proceeding) as well.

Since FRE 502's enactment, several states have followed suit with their own version of the rule -- Alabama, Arizona, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Oklahoma, Tennessee, Vermont, Washington, West Virginia and Wisconsin.[1] By adopting some variant of FRE 502, these states have explicitly recognized both the problems associated with the inadvertent waiver of privilege and the need to mitigate against the risk of such waiver.

All the state law analogs to FRE 502 referenced above share one significant attribute: they are all memorialized in the states' evidence codes. This makes sense; these analogs represent attempts to make uniform and/or modify the parameters surrounding the waiver of privileges that, themselves, are creatures of statewide statute or rule.

There have been proposals made to enact a FRE 502 analog in New York State. *See* e.g. Supporting Statement to New York State Bar Association's Committee on Civil Practice Law and Rules Proposed CPLR 4549 (Undated); New York State–Federal Judicial Counsel's Report on the Discrepancies between Federal and New York State Waiver of Attorney–Client Privilege (January 2014).

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[1] Attached to this explanatory memorandum as **Exhibit A** is a chart, which sets forth those aspects of FRE 502 these other jurisdictions have elected to incorporate.

The Subcommittee's Proposal

It seems clear that the most efficacious approach for addressing privilege waiver during disclosure would be an amendment to the CPLR; a CPLR amendment would maximize the rule's statewide impact and clarity and enhance predictability for counsel (and their clients). While the bench and bar await the passage of such an amendment, however, the Commercial Division can and should implement an interim measure to maintain its standing as a world-class forum for resolving commercial disputes. Accordingly, the Subcommittee recommends an amendment to the Commercial Division's Statewide Rules of Practice.[2]

The most logical context within which to establish this interim measure is by amending Commercial Division Rule 11–g, which addresses confidentiality orders in the Commercial Division. Rule 11–g itself references Appendix B to the Statewide Rules, which contains the standard form of confidentiality order utilized by many of the justices in the Division (the "Standard Form"). The Subcommittee recommends that to the extent parties wish to increase predictability and mitigate against the risk of inadvertent disclosure, they incorporate the

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[2] The promulgation of such a rule via administrative order is entirely appropriate. As this Subcommittee has observed previously:

> "Article VI, Section 30, of the New York State Constitution provides the legislature the power to regulate proceedings in the courts, and permits the legislature to delegate to the chief administrator of the courts any power possessed by the legislature 'to regulate practice and procedure in the courts.'[2] Section 212(2)(d) of the Judiciary Law authorizes the chief administrator to do the following: 'Adopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts, in accordance with the provisions of section thirty of article six of the constitution.'" (*See* Memorandum to the Commercial Division Advisory Council from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution entitled "Public Comments on Proposed Rule on Use of Interrogatories in the Commercial Division of the Supreme Court of New York" (February 24, 2014)).

Accord, State v Robert F., 25 NY3d 448 [2015](New York courts have "latitude to adopt procedures consistent with general practice as provided by statute . . . . Courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law")(internal citations omitted).

following language into the Standard Form[3], or into another form of order utilized by the Justice presiding over the matter:

> "__. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:
>
> a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information")[4] are identified and withheld from production.
>
> b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
>
> c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice."

Rational for Proposal

Because the Subcommittee's proposal takes the form of an amendment to the Statewide Rules, rather than a modification to the CPLR, the Subcommittee has taken steps to ensure that it

[3] If added to the Standard Form, we believe that the language should be included as new paragraph 21. Attached as **Exhibit B** is a copy of the Standard Form, tracked to show the addition of the foregoing non-waiver language.

[4] The referenced CPLR provisions correspond, respectively, to Attorney Work Product, Materials Prepared in Anticipation of Litigation and the Attorney-Client Privilege.

remains consistent with existing law regarding inadvertent privilege waiver. Under established New York precedent, the inadvertent production of documents does not effectuate a waiver if:

a. the producing party had no intention of producing the document;

b. the producing party took reasonable steps to ensure that the document was not disclosed;

c. the producing party took prompt action to rectify the inadvertent production; and

d. the party receiving the inadvertently produced document would not suffer prejudice by having to return the document.

See AFA Protective Sys., Inc. v City of New York, 13 AD3d 564, 565 [2d Dept 2004]; *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]; *McGlynn v Grinberg*, 172 AD2d 960 [3d Dept 1991]; *Manufacturers and Traders Tr. Co. v Servotronics, Inc.*, 132 AD2d 392 [4th Dept 1987].

Incorporating New York's standard for determining inadvertence into the Standard Form accomplishes several distinct, but related goals. *First*, it makes it facially apparent that the new provision is intended to be consistent with existing New York state law. *Second*, it ensures that the parties commit to taking appropriate steps to screen for privilege and promptly remediate any error – *i.e.* steps that are necessary under New York law to avoid an inadvertent waiver. *Third*, the new provision eliminates the possibility that the presumptive non-waiver embodied in the so-ordered Standard Form will be litigated, thereby reducing greatly the chance that a non-party seeking to challenge the implications of an inadvertent production in another forum will become aware of its occurrence in the first instance.

There is one obvious limitation on the utility of the proposed non-waiver language. By drafting it to be consistent with existing New York state law, it must, of necessity, exclude

protection for so-called "quick peek" [5] arrangements. Quick peek agreements are inconsistent with New York law, and while they may protect against later claims of waiver by one party against the other, they will be entirely ineffective against waiver claims interposed by non-parties to the agreement. New York law makes clear that the voluntary production of privileged material effectuates a complete waiver of the privilege. *See, e.g. Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [4th Dept 2000]. In addition, there is a real risk under New York law that a party who voluntarily produces privileged material will effectuate a subject matter waiver – a privilege waiver that goes beyond the document disclosed. *See e.g. Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 199 [Sup Ct 2003]. Protecting parties to quick peek arrangements against waiver claims by third parties would require the legislative modification of existing law and the adoption of the so-called selective waiver doctrine. *See Diversified Indus., Inc. v Meredith*, 572 F2d 596, 606 [8th Cir 1977].

Conclusion

Although the optimal solution to shielding against inadvertent waiver of privilege involves legislative action, the Subcommittee believes that its proposed amendment to the Standard Form will mitigate greatly against claims of inadvertent waiver and provide significantly more predictability than currently exists.

Accordingly, we respectfully submit that Statewide Commercial Division Rule 11-g be amended as set forth below.

(I) The text of current rule 11-g(c) shall be deleted and replaced with the following language:

[5] A "quick peek" agreement involves parties to a litigation exchanging documents without first conducting any privilege review whatsoever. Under these arrangements, the producing party turns over all material responsive to the production request, the receiving party takes a "quick peek" at the material and designates the documents it wants to use, and the producing party then asserts or foregoes the privilege.

"(c) In the event the parties wish to incorporate a privilege claw-back provision into the confidentiality order to be utilized in their commercial case, they shall insert the following text as separate paragraph:

'__. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:

a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information") are identified and withheld from production.

b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.'

In the event the parties wish to deviate from the foregoing language, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter."

(II) A new subsection (d) shall be added to Rule 11-g, which shall read:

"Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules."

Exhibit A

Analysis of State Analogues to FRE 502*

State	State Rule of Evidence	502(a) Equivalent (Subject Matter Waiver)	502(b) Equivalent (Inadvertent Waiver)	502(c) Equivalent (Disclosure Made in Another Proceeding)	502(d) Equivalent (Controlling Effect of Court Order)**	502(e) Equivalent (Controlling Effect of Party Agreement)
Alabama	510	☑	☑	☑	☑	☑
Arizona	502	☑	☑	☑	☑	☑
Colorado	502	☑	☑	☑	☑	☑
Delaware***	510	☑	☑	☑	☑	☑
Illinois	502	☑	☑	☑	☑	☑
Indiana	502	☑	☑	☒	☑	☑
Iowa	5.502	☑	☑	☑	☑	☑
Kansas	60-426a	☑	☑	☑	☑	☑
Oklahoma	2502	☑	☑	☒	☒	☒
Tennessee	502	☒	☑	☒	☒	☒
Vermont	510	☑	☑	☑	☑	☑
Washington	502	☑	☑	☑	☑	☑
West Virginia	502	☑	☑	☑	☑	☑
Wisconsin	905.03	☑	☑	☒	☒	☒

*Copies of FRE 502 and each of the listed state rules of evidence are attached hereto.

**FRE 502(d) provides: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding." (Emphasis added). All but three of the states that implemented a state court analogue to FRE 502 have incorporated an equivalent to sub-section (d). Of the states that have done so, all of them—save for one—simply say that the court order prevents waiver "in any other proceeding" (which will likely be read to mean "any other [insert name of State] court proceeding.") The one exception is Alabama, which refers in its rule to "any other Alabama proceeding."

***Per the attached, many of the state rules mirror almost precisely the form and substance of FRE 502. Delaware—the chief competitor to New York's Commercial Division—does not. *See, e.g.* D.R.E. 510(e).

Federal Rule of Evidence 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on..., FRE Rule 502

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article V. Privileges

Federal Rules of Evidence Rule 502, 28 U.S.C.A.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding 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, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

CREDIT(S)
(Pub.L. 110-322, § 1(a), Sept. 19, 2008, 122 Stat. 3537; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES
2011 Amendments

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTES
Explanatory Note (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-

production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

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

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order

is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order--predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

Committee Letter

The letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Committee on the Judiciary of the U.S. Senate and House of Representatives, dated September 26, 2007, provided:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must by approved by an Act of Congress, 28 U.S.C. § 2074(b).

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Advisory Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that [sic] 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Advisory Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference. It is enclosed with this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule

412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work-product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work-product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

•*Limitations on Scope of Waiver.* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

•*Protections Against Inadvertent Disclosure.* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

•*Effect on State Proceedings and Disclosures Made in State Courts.* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

•*Orders Protecting Privileged Communications Binding on Non-Parties.* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

•*Agreements Protecting Privileged Communications Binding on Parties.* Subdivision (c) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings--and even when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal-to-state" problem).

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

•Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

•In the Advisory Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

The Judicial Conference has no position on the merits of separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502--against mistaken disclosure and subject matter waiver--would also bind state courts as to disclosures initially made at the

federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work-product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively--to the government--and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is available on request.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal

Chair, Committee on Rules of Practice and Procedure

Addendum to Advisory Committee Notes

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or

state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases--for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)--Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to a federal office or agency, they do not apply to uses of information--such as routine use in government publications--that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)--Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate In the circumstances.

Subdivision (e)—Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

Notes of Decisions (44)

Fed. Rules Evid. Rule 502, 28 U.S.C.A., FRE Rule 502
Including Amendments Received Through 8-1-17

ALABAMA

Rule 510. Waiver of privilege by voluntary disclosure., AL ST REV Rule 510

Code of Alabama
Alabama Rules of Evidence
Article V. Privileges

ARE Rule 510

Rule 510. Waiver of privilege by voluntary disclosure.

Currentness

(a) *Generally.* A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) *Attorney-Client Privilege and Work Product; Limitations on Waiver.* Notwithstanding section (a) of this rule, the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(1) DISCLOSURE MADE IN AN ALABAMA PROCEEDING; SCOPE OF WAIVER. When the disclosure is made in an Alabama proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Alabama proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) the disclosed and undisclosed communications or information should, in fairness, be considered together.

(2) INADVERTENT DISCLOSURE. When made in an Alabama proceeding, the disclosure does not operate as a waiver in an Alabama proceeding if:

(A) the disclosure is inadvertent;

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedure set out in Alabama Rule of Civil Procedure 26(b)(6)(B).

(3) DISCLOSURE MADE IN A PROCEEDING IN FEDERAL COURT OR IN ANOTHER STATE. When the disclosure is made in a proceeding in federal court or in another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Alabama proceeding if the disclosure:

Rule 510. Waiver of privilege by voluntary disclosure., AL ST REV Rule 510

(A) would not be a waiver under this rule if it had been made in an Alabama proceeding; or

(B) is not a waiver under the law governing the federal or state proceeding in which the disclosure occurred.

(4) CONTROLLING EFFECT OF A COURT ORDER. An Alabama court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other Alabama proceeding.

(5) CONTROLLING EFFECT OF A PARTY AGREEMENT. An agreement on the effect of disclosure in an Alabama proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) DEFINITIONS. In this rule:

(A) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(B) "Work product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
(Amended eff. 10-1-2013.)

Editors' Notes

ADVISORY COMMITTEE'S NOTES

This rule, stated substantially in the language of the corresponding Uniform Rule of Evidence, sets forth in express terms what is to be implied from the statement of all privileges -- i.e., the privilege falls when that which is protected by the privilege is voluntarily disclosed by the holder. See Unif.R.Evid. 510. Such a waiver may occur, for example, when the holder allows an unnecessary third party to be privy to an otherwise privileged communication. Additionally, it may arise when the holder tells a third party about the privileged matter. See, e.g., Perry v. State, 280 Ark. 36, 655 S.W.2d 380 (1983) (clergyman privilege waived by disclosure of inculpatory statements to others); State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982). This waiver doctrine is consistent with preexisting Alabama law. See Ex parte Great Am. Surplus Lines Ins. Co., 540 So.2d 1357 (Ala.1989) (attorney-client privilege); Swoope v. State, 115 Ala. 40, 22 So. 479 (1897) (husband-wife privilege); C. Gamble, McElroy's Alabama Evidence §§ 394.01 (waiver of attorney-client privilege), and 103.01(4) (husband-wife privilege) (4th ed. 1991).

The waiver doctrine has two significant limitations. First, waiver arises only when the holder has disclosed, or allowed disclosure of, the "privileged matter." The client does not waive the attorney-client privilege, for example, by disclosing the subject discussed without revealing the substance of the discussion itself. See Fed.R.Evid. 511 (not enacted) advisory committee's note; E. Cleary, McCormick on Evidence § 93 (3d ed. 1984). Even if the holder discloses a portion of the privileged matter, however, the second limitation is that the

disclosure must be of a "significant part" of it. Disclosure of an insignificant part of the privileged matter does not waive the privilege. Whether a significant part of the privileged matter has been disclosed is a common sense question for the judge. See N.D.R.Evid. 510 explanatory note. It should be observed, of course, that the holder need not disclose every detail of the privileged matter in order to waive the privilege. See Or.R.Evid. 511 legislative commentary. No waiver occurs if the disclosure, even of a significant part of the privileged matter, is made in the course of another privileged communication. Perry v. State, 280 Ark. 36, 655 S.W.2d 380 (1983).

The concept of fairness underlies the waiver doctrine. It has been held unfair to permit offensive assertion of a privilege. When a party, for example, offers a portion of the privileged matter in proof of his or her case, fairness dictates that the opponent be allowed to offer or discover the remainder. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985). This is consistent with preexisting Alabama law under which the attorney-client privilege falls when a plaintiff client puts the attorney-client communications at issue or charges the attorney with misconduct. Ex parte Malone Freight Lines, Inc., 492 So.2d 1301 (Ala.1986); Dewberry v. Bank of Standing Rock, 227 Ala. 484, 150 So. 463 (1933).

ADVISORY COMMITTEE'S NOTES TO AMENDMENT TO RULE 510 EFFECTIVE OCTOBER 1, 2013

Rule 510 has been amended to establish a standard for determining whether inadvertent disclosure in an Alabama proceeding of matter otherwise protected by the attorney-client privilege or the work-product doctrine results in waiver of the privilege or protection. This amendment is to be read consistent with revisions made to the Alabama Rules of Civil Procedure in 2010 to accommodate the discovery of electronically stored information (ESI).

The amendment is also intended to align Alabama law with Federal Rule of Evidence 502 and to provide predictable, uniform standards whereby parties can protect against waiver of the privilege or protection in an Alabama proceeding. All substantive changes to Rule 510 are found in a new section (b), which is modeled on Federal Rule 502.

Section (a). Generally. No changes have been made to the original paragraph of Rule 510, which is now designated as Rule 510(a). Rule 510(a) governs the consequences of voluntary disclosure of privileged matter generally, in circumstances not covered by Rule 510(b).

Section (b). Attorney-Client Privilege and Work Product; Limitations on Waiver. Rule 510(b) addresses only the effect of disclosure, in an Alabama proceeding, of information otherwise protected by the attorney-client privilege or the work-product doctrine and whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility. The failure to address in Rule 510(b) other waiver issues or other privileges or protections is not intended to affect the law regarding those other waiver issues, privileges, or protections. The amendment does not alter existing Alabama law for determining whether a communication or information qualifies for protection under the attorney-client privilege or the work-product doctrine in the first instance.

Subsection (b)(1). Disclosure Made in an Alabama Proceeding; Scope of Waiver. Rule 510(b)(1) adopts the standard set forth in Federal Rule 502(a). The advisory committee's notes accompanying Federal Rule 502(a) provide a clear description of this standard.

"[A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, *e.g.*, *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C.1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in

an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."

Fed.R.Evid. 502(a) (Advisory Committee's Notes).

Subsection (b)(2). Inadvertent Disclosure. Subsection (b)(2) fills a gap in Alabama law regarding the proper standard for determining whether an inadvertent disclosure of matter protected by the attorney-client privilege or work-product doctrine during discovery results in waiver of the privilege or protection. See *Koch Foods of Alabama LLC v. Gen. Elec. Capital Corp.*, 531 F.Supp.2d 1318, 1320-21 (M.D.Ala.2008) (observing that courts have used three standards for determining whether an inadvertent waiver has occurred but that "Alabama law does not fall neatly into any of these categories"). See also Ala.R.Civ.P. 26(b)(6)(B) (Committee Comments to 2010 Amendment) (2010 amendment "provides a procedure to assert a claim of attorney-client privilege or work-product protection after production [that is] applicable to both non-ESI and ESI data, but [the change] is procedural and does not address substantive waiver law").

The substantive standard set forth in this subsection is intended to apply in the absence of a court order or a party agreement regarding the effect of disclosure. In determining whether waiver has occurred, court orders and party agreements should ordinarily control. *Cf.* Ala.R.Civ.P. 16(b)(6) (Committee Comments to 2010 Amendment) ("subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced").

Alabama Rule 510(b)(2) adopts verbatim the three-part standard set out in Federal Rule 502(b). Under this standard, disclosure does not operate as a waiver if: (1) the disclosure was inadvertent, (2) the holder took reasonable steps to prevent disclosure, and (3) the holder took prompt and reasonable steps to rectify the error including (if applicable) providing the notice and following the other steps set forth in Rule 26(b)(6)(B) of the Alabama Rules of Civil Procedure.

The standard adopted is intended to be flexible. Accordingly, no attempt is made to define "reasonable steps" or to list factors that must be considered in every case. Guidance for applying this standard can be found in the advisory committee's notes accompanying Federal Rule 502(b), which provide:

"Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal.1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

"The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the

producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently."

Fed.R.Evid. 502(b) (Advisory Committee's Notes).

Subsection (b)(3). Disclosure Made in a Proceeding in Federal Court or in Another State. Alabama Rule 510(b)(3) corresponds to Federal Rule 502(c) and addresses the situation where the initial disclosure occurred in a proceeding in federal court or in another state's court and the disclosed matter is subsequently offered in an Alabama proceeding. Rule 510(b)(3) provides that, in the absence of a court order, the disclosure will not operate as a waiver in an Alabama proceeding if: (1) the disclosure would not have resulted in a waiver in an Alabama proceeding by application of Ala.R.Evid. 510(b), or (2) if the disclosure would not have resulted in waiver under the law applicable to the federal or state proceeding in which it occurred. Stated differently, the law that is the most protective of privilege and work-product should be applied.

Subsection (b)(4). Controlling Effect of a Court Order. Alabama Rule 510(b)(4) corresponds to Federal Rule 502(d). Under Rule 510(b)(4), a confidentiality order governing the consequences of disclosure entered in an Alabama proceeding is enforceable against nonparties in a subsequent Alabama proceeding. Rule 510(b)(4), like its federal counterpart, is intended to provide predictability and reduce discovery costs. See Fed.R.Evid. 502(d) (Advisory Committee's Notes) ("[T]he utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation."). *Cf.* Ala.R.Civ.P. 16(b)(6) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's scheduling order); Ala.R.Civ.P. 26(f) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's discovery-conference order).

Subsection (b)(5). Controlling Effect of a Party Agreement. Alabama Rule 510(b)(5) corresponds to Federal Rule 502(e) and recognizes that parties may enter into agreements concerning the effect of disclosure of privileged or protected materials in an Alabama proceeding. However, such an agreement is binding only on the parties unless it is incorporated into a court order as provided in Rule 510(b)(4).

Subsection (b)(6). Definitions. Alabama Rule 510(b)(6) adopts verbatim the definitions for "attorney-client privilege" and "work-product protection" contained in Federal Rule 502(g). The definitions are general. No substantive change in existing Alabama law is intended. *Cf.* Ala.R.Evid. 502(a) (attorney-client privilege); Ala.R.Civ.P. 26(b)(4) (trial-preparation materials).

Notes of Decisions (5)

Ala. Rules of Evid., Rule 510, AL ST REV Rule 510
Current with amendments received through July 15, 2017

End of Document

ARIZONA

Rule 502. Attorney-Client Privilege and Work Product;..., AZ ST REV Rule 502

Arizona Revised Statutes Annotated
Rules of Evidence for Courts in the State of Arizona (Refs & Annos)
Article V. Privileges

Arizona Rules of Evidence, Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in an Arizona proceeding; scope of a waiver.

When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding 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, including (if applicable) following Arizona Rule of Civil Procedure 26(b)(6)(B).

(c) Disclosure made in a proceeding in federal court or another state.

When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Arizona proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Arizona proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling effect of a court order.

An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling effect of a party agreement.

An agreement on the effect of disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions.

In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Added Sept. 3, 2009, effective Jan. 1, 2010. Amended Sept. 8, 2011, effective Jan. 1, 2012; Sept. 2, 2016, effective Jan. 1, 2017.

17A Pt. 1 A. R. S. Rules of Evid., Rule 502, AZ ST REV Rule 502
Current with amendments received through 7/1/17

COLORADO

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK..., CO ST REV Rule 502

West's Colorado Revised Statutes Annotated
Title 13. Courts and Court Procedure
Related Court Rules
Chapter 33. Colorado Rules of Evidence (Refs & Annos)
Article V. . Privileges

CRE Rule 502

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Colorado Proceeding or to a Colorado Office or Agency; Scope of a Waiver. When the disclosure is made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Colorado proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government, the disclosure does not operate as a waiver in a Colorado proceeding 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, including (if applicable) following C.R.C.P. 26(b)(5)(B).

(c) Disclosure Made in a Federal or other State Proceeding. When the disclosure is made in a proceeding in federal court or the court of another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Colorado proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Colorado proceeding; or

(2) is not a waiver under the law governing the state or federal proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Colorado court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Colorado proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted eff. March 22, 2016.

Rules of Evidence., Rule 502, CO ST REV Rule 502
Current with amendments received through July 15, 2017

End of Document

DELAWARE

RULE 510. WAIVER OF PRIVILEGE OR WORK PRODUCT;..., DE R REV Rule 510

West's Delaware Code Annotated
Delaware Rules of Court
Delaware Uniform Rules of Evidence
Article V. Privileges

D.R.E., Rule 510

RULE 510. WAIVER OF PRIVILEGE OR WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of information or communications that are privileged under these rules or that are subject to work-product protection.

(a) Waiver by Intentional Disclosure. A person waives a privilege conferred by these rules or work-product protection if such person or such person's predecessor while holder of the privilege or while entitled to work-product protection intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information. This rule does not apply if the disclosure itself is privileged or protected.

(b) Disclosure; Scope of a Waiver. When the disclosure waives a privilege conferred by these rules or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(c) Inadvertent Disclosure. A disclosure does not operate as a waiver 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, including following any applicable court procedures to notify the opposing party or to retrieve or request destruction of the information disclosed.

(d) Disclosure Made in a Non-Delaware Proceeding. Notwithstanding anything in these rules to the contrary, a disclosure made in a non-Delaware proceeding does not operate as a waiver if the disclosure is not a waiver under the law of the jurisdiction where the disclosure occurred.

RULE 510. WAIVER OF PRIVILEGE OR WORK PRODUCT;..., DE R REV Rule 510

(e) Disclosure to a Law Enforcement Agency. Notwithstanding anything in these rules to the contrary, a disclosure made to a law enforcement agency pursuant to a confidentiality agreement does not operate as a waiver of an existing privilege.

(f) Controlling Effect of a Court Order. Notwithstanding anything in these rules to the contrary, a court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

(g) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(h) Definition. In this rule:

(1) "work-product protection" means the protection that applicable law provides for documents and tangible things (or their intangible equivalents) prepared in anticipation of litigation or for trial.

Credits
[Adopted effective July 1, 2014.]

Editors' Notes

COMMENT

The revisions to D.R.E. 510 are based on F.R.E. 502, which rule has been the subject of almost 200 law review articles. At least 30 articles are comprehensive discussions of the rule and post-enactment judicial use of the rule. This proliferation of learned journal commentary on inadvertent disclosure of privileged communications parallels the exponential increase in e-discovery requests and responses in major cases. F.R.E. 502 takes a "middle ground" position on inadvertent disclosure, requiring an inquiry into the means taken by counsel to identify and protect privileged communications, unless the parties agree on a different protocol for dealing with inadvertent disclosure. The revised D.R.E. 510 contains similar protection against the admission or use of inadvertently disclosed privileged or protected communications to ensure the integrity of the litigation process in Delaware.

D.R.E. 510 conforms to the federal rule in terms of handling inadvertent disclosure. A leading case interpreting F.R.E. 502 is *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008). At least one Delaware decision deals with claims of waiver of attorney-client privilege through inadvertent disclosure and contains the following discussion:

An inadvertent disclosure of privileged communications will not necessarily operate to waive the attorney-client privilege. In order to determine whether the inadvertently disclosed documents have lost their privileged status, the Court must consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and extent of disclosure; and (4) the overall fairness, judged against the care or negligence with which the privilege is guarded.

In re Kent County Adequate Public Facilities Ordinances Litigation, 2008 Del. Ch. LEXIS 48, at *24 (Apr. 19, 2008) (Noble, V.C.) (citations omitted). The factors set forth in these decisions are not explicitly codified in D.R.E. 510, as they constitute non-determinative guidelines that may vary from case to case.

As in F.R.E. 502, new D.R.E. 510 also clarifies that when a voluntary disclosure constitutes a waiver of attorney-client privilege as to a communication or information, the scope of the waiver is generally limited to the privileged communication or information disclosed. The rule does not disturb existing Delaware law regarding the scope of waiver of work-product protection by voluntary disclosure. *See Rollins Properties, Inc. v. CRS Sirrine, Inc.*, 1989 WL 158471 (Del. Super. Dec. 13, 1989).

The rule governs only certain waivers by disclosure and is not intended to alter existing law with respect to waiver of privilege or work product protection by other means. *See, e.g., Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051 (Del. Ch. Sept. 17, 2004) (discussing "at issue" exception to attorney-client privilege as form of waiver "where the issue was lack of good faith" (citation omitted)).

Subsection 510(c) codifies the ruling by Chancellor Chandler in *Saito v. McKesson HBOC, Inc.*, Civ. A. 18553, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002). *Saito* involved the question of whether the defendant waived its work-product protection as to the documents at issue by sharing them with the SEC in an investigation.

Subsection 510(f) contains the introductory clause, "[n]otwithstanding anything in these rules to the contrary," in part so that a court may allow the parties in a matter to agree to quick-peek arrangements without pre-production privilege review. Otherwise, the parties to such an arrangement may be deemed to have waived a privilege pursuant to subsection 510(a).

D.R.E., Rule 510, DE R REV Rule 510
Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through August 15, 2017. All other state and local court rules are current with amendments received through August 15, 2017.

ILLINOIS

Rule 502. Attorney-Client Privilege and Work Product;..., IL R EVID Rule 502

West's Smith-Hurd Illinois Compiled Statutes Annotated
Court Rules
Illinois Rules of Evidence (Refs & Annos)
Article V. Privileges

Evid. Rule 502
Formerly cited as IL ST Evid. Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any proceeding 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, including (if applicable) following Supreme Court Rule 201(p).

(c) Disclosure Made in a Federal or Another State's Proceeding or to a Federal or Another State's Office or Agency. When the disclosure is made in a federal or another state's proceeding or to a federal or another state's office or agency and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Illinois proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Illinois proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. An Illinois court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted Nov. 28, 2012, eff. Jan. 1, 2013.

I.L.C.S. Evid. Rule 502, IL R EVID Rule 502
Current with amendments received through 6/1/2017

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INDIANA

Rule 502. Attorney-Client Privilege and Work Product;..., IN ST REV Rule 502

West's Annotated Indiana Code
Title 34 Court Rules (Civil)
State Court Rules (Civil)
Indiana Rules of Evidence (Refs & Annos)
Article V. Privileges

Rules of Evid., Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Intentional disclosure; scope of a waiver. When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a court proceeding, a disclosure does not operate as a waiver 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, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).

(c) Controlling effect of a party agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(d) Controlling effect of a court order. If a court incorporates into a court order an agreement between or among parties on the effect of disclosure in a proceeding, a disclosure that, pursuant to the order, does not constitute a waiver in connection with the proceeding in which the order is entered is also not a waiver in any other court proceeding.

Rule 502. Attorney-Client Privilege and Work Product;..., IN ST REV Rule 502

Credits
Adopted Sept. 20, 2011, effective Jan. 1, 2012. Amended Sept. 13, 2013, effective Jan. 1, 2014.

Rules of Evid., Rule 502, IN ST REV Rule 502
Current with amendments received through June 15, 2017.

End of Document

IOWA

Rule 5.502. Attorney-client privilege and work product; limitations on waiver, IA R 5.502

Iowa Code Annotated
Iowa Court Rules
I. Rules of Practice and Procedure
Chapter 5. Rules of Evidence (Refs & Annos)
Article V. Privileges

I.C.A. Rule 5.502

Rule 5.502. Attorney-client privilege and work product; limitations on waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

a. *Disclosure made in a court or agency proceeding; scope of a waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) The waiver is intentional;

(2) The disclosed and undisclosed communications or information concern the same subject matter; and

(3) They ought in fairness to be considered together.

b. *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver 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, including (if applicable) following Iowa Rule of Civil Procedure 1.503(5)(b).

c. *Disclosure made in a federal or state proceeding.* When a disclosure is made in a federal or state proceeding and is not the subject of a federal or state court order concerning waiver, the disclosure does not operate as a waiver in an Iowa proceeding if the disclosure:

(1) Would not be a waiver under this rule if it had been made in an Iowa proceeding; or

(2) Is not a waiver under the law of the jurisdiction where the disclosure occurred.

d. *Controlling effect of a court order.* A court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

e. *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

f. *Controlling effect of this rule.* Notwithstanding rules 5.101 and 5.1101, this rule applies to all proceedings in the circumstances set out in the rule.

g. *Definitions.* In this rule:

(1) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications.

(2) "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted Sept. 28, 2016, eff. Jan. 1, 2017.

I. C. A. Rule 5.502, IA R 5.502
State court rules are current with amendments received through July 15, 2017.

End of Document

KANSAS

60-426a. Attorney-client privilege and work product; limitations on waiver, KS ST 60-426a

West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
E. Privileges

K.S.A. 60-426a

60-426a. Attorney-client privilege and work product; limitations on waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) *Disclosure made in a court or agency proceeding; scope of waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) The waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness be considered together.

(b) *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver in any proceeding 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, including, if applicable, following subsection (b)(7)(B) of K.S.A. 60-226, and amendments thereto.

(c) *Disclosure made in a non-Kansas proceeding.* When the disclosure is made in a non-Kansas proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Kansas proceeding if the disclosure:

(1) Would not be a waiver under this section if it had been made in a Kansas proceeding; or

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(d) *Controlling effect of a court order.* A court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other proceeding.

(e) *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) *Definitions.* As used in this section:

(1) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications.

(2) "Work-product protection" means the protection that applicable law provides for tangible material, or its intangible equivalent, prepared in anticipation of litigation or for trial.

Credits
Laws 2011, ch. 96, § 1, eff. July 1, 2011.

K. S. A. 60-426a, KS ST 60-426a
Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

OKLAHOMA

§ 2502. Attorney-Client Privilege, OK ST T. 12 § 2502

Oklahoma Statutes Annotated
Title 12. Civil Procedure (Refs & Annos)
Chapter 40. Evidence Code (Refs & Annos)
Article V. Privileges

12 Okl.St.Ann. § 2502

§ 2502. Attorney-Client Privilege

Currentness

A. As used in this section:

1. An "attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

2. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney;

3. A "representative of an attorney" is one employed by the attorney to assist the attorney in the rendition of professional legal services;

4. A "representative of the client" is:

a. one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or

b. any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client; and

5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;

2. Between the attorney and a representative of the attorney,

§ 2502. Attorney-Client Privilege. OK ST T. 12 § 2502

3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;

4. Between representatives of the client or between the client and a representative of the client; or

5. Among attorneys and their representatives representing the same client.

C. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. There is no privilege under this section:

1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

3. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;

4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

§ 2502. Attorney-Client Privilege, OK ST T. 12 § 2502

E. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if:

1. The disclosure was inadvertent;

2. The holder of the privilege took reasonable steps to prevent disclosure; and

3. The holder of the privilege took reasonable steps to rectify the error including, but not limited to, information falling within the scope of paragraph 4 of subsection B of Section 3226 of this title, if applicable.

F. Disclosure of a communication or information meeting the requirements of an attorney-client privilege as set forth in this section or the work-product doctrine to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of nongovernmental persons or entities. Disclosure of such information does not waive the privilege or protection of undisclosed communications on the same subject unless:

1. The waiver is intentional;

2. The disclosed and undisclosed communications or information concern the same subject matter; and

3. Due to principles of fairness, the disclosed and undisclosed communications or information should be considered together.

Credits
Laws 1978, c. 285, § 502, eff. Oct. 1, 1978; Laws 2002, c. 468, § 32, eff. Nov. 1, 2002; Laws 2009, c. 251, § 2, eff. Nov. 1, 2009; Laws 2013, c. 316, § 1, eff. Nov. 1, 2013.

Editors' Notes

EVIDENCE SUBCOMMITTEE'S NOTE

Prior Oklahoma statutory law dealing with the attorney client privilege was sparse indeed. Sections 335(4) and (6) of Title 12 of the Oklahoma Statutes were applicable to this privilege. Section 385 provided:

"The following persons shall be incompetent to testify: ... (4) An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent. .... (6) .... Provided, that if a person offer himself as a witness, that is to be deemed a consent. ...."

Section 502 represents a much more comprehensive approach to the privilege and should furnish much better guidelines for lawyer and judge alike in dealing with this privilege.

Section 502(A) containing the definitions is, with a rearrangement of subdivisions (1) through (5) by the Legislature, in substance, the same as Uniform Rule 502(a).

§ 2502. Attorney-Client Privilege, OK ST T. 12 § 2502

Section 502(A)(1) defines "attorney". Oklahoma has not dealt with so much of the substance of § 502(A)(1) involving communications made with a good faith mistaken belief that the person was an attorney. The "reasonable belief" of the client test is a reasonable approach to take on this question.

Section 502(A)(2) defining "client" is consistent with the law in the Tenth Circuit in that it covers corporate clients (See Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968)) and does not make actual employment necessary as long as the consultation was with a view to retaining the attorney's professional services. See Hurt v. State, 303 P.2d 476 (Okla.Cr.1956).

Under § 502(A)(3) defining "representative of the attorney", Gaines v. Gaines, 207 Okla. 619, 251 P.2d 1044 (1952), indirectly supports the proposition that an attorney's secretary would be a "representative" within the meaning of this rule. Legal interns, office administrators, and the like would also appear to be covered if analogies to the physician-patient privilege are to be followed. See the Note to § 503, infra. The definition in this subdivision of § 502 would be broad enough to encompass secretaries, interns and office administrators since attorneys need the services of people in different capacities to meet the needs of their clients in the best manner possible and the privilege should apply.

No prior Oklahoma authority has been found defining a "representative of a client" as in § 502(A)(4) and it would have a supplementing effect.

Section 502(A)(5) deals with the meaning of confidential communications. To be protected, the communication should be made under circumstances manifesting an intent of nondisclosure. Parnacher v. Mount, 207 Okla. 275, 248 P.2d 1021 (1952). The presence of a third person will not destroy the confidential character of a communication if there was an intention that the communication remain confidential and the presence of a third person was reasonably necessary to the transmission of the communication. Oklahoma law is consistent with the rule. See Ratzlaff v. State, 122 Okla. 263, 249 P. 934 (1926); Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942); and Blankenship v. Rowntree, 219 F.2d 597 (10th Cir. 1955).

Section 502(B), with the exception of substituting the word "attorney" for "lawyer" is identical to the Uniform Rule and would be an excellent addition to the law in Oklahoma since there are few, if any expository principles enunciated in the law dealing with the scope of privilege.

Section 502(C) deals with whom may claim the privilege and, except for terminology change is also identical to the Uniform Rule. It has been held the privilege exists for the benefit of the client as a general rule. Hurt v. State, 303 P.2d 476 (Okla.Cr.1956). The case law in Oklahoma is consistent with the thrust of the statute. It has been held that the privilege may be claimed by an incompetent and his general guardian, Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942), by an executor of the estate, Marcus v. Harris, 496 P.2d 1177 (Okla. 1972), and by an administrator of the estate. In re Wilkins' Estate, 199 Okla. 249, 185 P.2d 213 (1947).

Sections 502(D)(1) through (6) set forth the exceptions. As to § 502(D)(1) dealing with the furtherance of crime or fraud, in Oklahoma professional communications between the attorney and client are not privileged when made for the purpose of assisting in the commission of a crime. Cole v. State, 50 Okla.Cr. 399, 298 P. 892 (1931). This is the view of the Code of Professional Responsibility stating that "A lawyer may reveal: .... (3) The intention of his client to commit a crime and the information necessary to prevent the crime." Furthermore, Canon 37 of the Canons of Professional Ethics exemplify these principles. The statute is consistent with Oklahoma law though it does go further in providing for what the client knew or reasonably should have known and protects the client who is erroneously advised that the action is within the law.

§ 2502. Attorney-Client Privilege, OK ST T. 12 § 2502

As to the exception of § 502(D)(2) dealing with claimants through the same deceased client, it is consistent with prior Oklahoma law (Gaines v. Gaines, 207 Okla. 619, 251 P.2d 1044 (1952)) though § 502(D)(2) is even clearer by stating that the manner in which the claim arose is not a factor.

With reference to the breach of duty exception of § 502(C)(3), the Code of Professional Responsibility provides that "A lawyer may reveal: .... (4) Confidences or secrets necessary to .... defend himself .... against an accusation against wrongful conduct." Canon 37 of the Canons of Professional Ethics is consistent with this view and with the statute.

Oklahoma has also adhered to the attested document rule of § 502(D)(4). See In re Wilkins' Estate, 199 Okla. 249, 185 P.2d 213 (1947).

Section 502(D)(5) deals with the "joint client" exception. The "joint client" exception has also been recognized on Oklahoma. Bush v. Bush, 142 Okla. 152, 286 P. 322 (1930).

Section 502(D)(6) has not heretofore been dealt with in Oklahoma. The rule is sound in principle and a good rule for the Oklahoma Evidence Code.

Notes of Decisions (95)

12 Okl. St. Ann. § 2502, OK ST T. 12 § 2502
Current with legislation of the First Regular Session of the 56th Legislature (2017) effective through September 1, 2017

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TENNESSEE

Rule 502. Limitations on Waiver of Privileged Information or..., TN R REV Rule 502

West's Tennessee Code Annotated
State and Local Rules Selected from West's Tennessee Rules of Court
Tennessee Rules of Evidence
Article V. Privileges

Rules of Evid., Rule 502

Rule 502. Limitations on Waiver of Privileged Information or Work Product

Currentness

Inadvertent disclosure of privileged information or work product does not operate as a waiver if

(1) the disclosure is inadvertent,

(2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure, and

(3) the holder promptly took reasonable steps to rectify the error.

Credits
[Adopted December 14, 2009, effective July 1, 2010.]

Editors' Notes

2010 ADVISORY COMMISSION COMMENT
This language is taken from Federal Rule of Evidence 502(b). Compare Tennessee Rule of Civil Procedure 26.02(5) on discovery of electronically stored information.

Rules of Evid., Rule 502, TN R REV Rule 502
State court rules are current with amendments received through June 15, 2017.

VERMONT

RULE 510. WAIVER OF PRIVILEGE AND WORK-PRODUCT..., VT R REV Rule 510

West's Vermont Statutes Annotated
West's Vermont Court Rules
Rules of Evidence (Refs & Annos)
Article V. Privileges

Vermont Rules of Evidence, Rule 510

RULE 510. WAIVER OF PRIVILEGE AND WORK-PRODUCT BY DISCLOSURE

Currentness

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if that person or that person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Limitations on waiver. Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out below, to disclosure of a communication or other information covered by the lawyer-client privilege or work-product protection.

(1) *Disclosure made in a Vermont proceeding or to a Vermont office or agency; scope of waiver.* When a disclosure is made in a Vermont proceeding or to a Vermont office or agency and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness be considered together.

(2) *Inadvertent disclosure.* When made in a Vermont proceeding or to a Vermont office or agency, the disclosure does not operate as a waiver in any proceeding if:

(A) the disclosure is inadvertent;

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder took reasonable steps to rectify the error, including (if applicable) following V.R.C.P. 26(b)(5)(B).

(3) *Disclosure made in non-Vermont proceeding.* When the disclosure is made in a non-Vermont proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Vermont proceeding if the disclosure:

(A) would not be a waiver under this rule if it had been made in a Vermont proceeding; or

(B) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(4) *Controlling effect of a court order.* A Vermont court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court in which event the disclosure is also not a waiver in any other proceeding.

(5) *Controlling effect of a party agreement.* An agreement on the effect of a disclosure in a Vermont proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) *Definitions.* In this rule:

(A) "lawyer-client privilege" means the protection that these rules provide for confidential lawyer-client communications; and

(B) "work-product protection" means the protection that the applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(c) Other provisions governing waiver and work-product. The provisions of this rule governing waiver of privilege and work-product are subject to the Uniform Mediation Act, chapter 194 of Title 12 of the Vermont Statutes Annotated. V.R.C.P. 16.3(g), and V.R.C.P. 26(b)(4).

Credits
[Amended November 22. 2011, effective January 23, 2012.]

Editors' Notes

REPORTER'S NOTES--2012 AMENDMENT
The amendment is based upon F.R.E. 502 adopted by Congress in 2008. The rule was adopted because of the enormous costs involved in reviewing documents, especially electronic ones, for privileged and work-product protected materials and to resolve disputes regarding subject matter waiver and inadvertent disclosures. Explanatory Note on Rule 502. Vermont has adopted an amendment to the discovery rules which provides for a claw back of inadvertently disclosed information, V.R.C.P. 26(b)(5)(B), but the rule does not control whether the disclosure constitutes a waiver of protection for the information in that or other proceedings. The rule fills the gap and accomplishes the first of the purposes of the federal rule. The rule avoids disputes which will arise in Vermont courts as the scope of electronic evidence continues to expand. Adoption of the amendment will also harmonize state and federal practice.

The amendment is placed in V.R.E. 510 because that section of the rules governs waiver of privilege. Consequently, the numbering of the Vermont amendment does not follow that of the federal rule. The Vermont rule utilizes the term "attorney-client privilege" rather than the "lawyer-client privilege" terminology from the federal rule for consistency

with V.R.E. 502. The title of V.R.E. 510 has been changed to reflect that the waiver rule now encompasses nonvoluntary disclosures and work-product. The amendment governs only certain types of waiver by disclosure. Sections (a) and (b)(6) require that parties must consider whether the disclosure involves privilege or work-product, and also whether a form of disclosure not protected by (b), and falling within the general waiver provisions of (a), might apply under the circumstances.

Section (a) is amended to make the language gender neutral and internally consistent.

Section (b)(1) addresses the scope of waiver. The section generally provides for waiver only of the information actually disclosed, and provides for limited rather than subject matter waiver. It provides that "subject matter waiver (of either privilege or work-product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation to the disadvantage of the adversary." Explanatory Note on Rule 502.

Section (b)(2) addresses inadvertent waiver. The section adopts the most prevalent approach to the issue of whether such disclosure results in a waiver of the disclosed information. This approach appears consistent with that taken by the Court in *Hartnett v. Medical Center Hospital of Vermont*, 146 Vt. 297, 503 A.2d 1134 (1985). The Court examined the circumstances surrounding disclosure of a document containing work-product and affirmed a trial court determination that the disclosure did not constitute a waiver. The party who made the disclosure will be protected if the court finds the party met the conditions set forth in (b)(2)(B) & (C). The drafters of the federal rule did not attempt to "explicitly codify that test because it is really a set of non-determinative guidelines that vary from case to case." Explanatory Note on Rule 502. The Note refers readers to considerations identified in the pre-rule cases and suggests two avenues a party may use to advance a claim of reasonable steps: use of advanced analytical software applications and linguistic tools, and adoption of an efficient system of records management before the litigation.

The Explanatory Note explains why the rule extends to offices and agencies: "[T]he consequences of waiver, and the concomitant cost of pre-production review, can be as great with respect to disclosures to offices and agencies as they are in litigation."

Section (b)(3) provides protection comparable to (b)(2) for parties in Vermont proceedings who make the inadvertent disclosures in another jurisdiction. F.R.E. 502(c) provides that the federal courts will accord that protection to litigants in the federal courts. Rather than leave the question of how Vermont would treat out-of-jurisdiction disclosures to full faith and credit and comity, the Vermont Advisory Committee chose to adopt the clearer federal model to best effectuate the purpose of the rule.

Section (b)(4) provides an important means to control the costs of pre-production review and provide predictability with regard to whether disclosure will result in waiver. The "non-determinative guidelines" of (b)(2) do not ensure that a court will protect an inadvertently disclosing party from a finding of waiver. In spite of the apparent policy of the rule favoring protection against inadvertent disclosure, courts which have decided early cases under F.R.E. 502 have often come to different conclusions about waiver under similar circumstances. See, e.g., *P. Oot, The Protective Order Toolkit: Protecting Privilege With Federal Rule Of Evidence 502*, 10 Sedona Conf. J. 137 (2009). Section (b)(4) provides predictable protection with a court order even if the party has not taken the care necessary for protection under (b)(2). It provides for protection against nonparties. "[T]he rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work-product." Explanatory Note on Rule 502. To promote predictability and control costs, the section attempts to provide protection embodied in a Vermont court order in other jurisdictions.

A section (b)(5) party agreement provides much more limited protection than a court order, binding only the parties to the agreement.

Section (b)(6) sets forth limits of the amendment. The rule applies only to attorney-client privilege and work-product protection, not other privileges and privilege-like protections. The rule incorporates existing meanings of these two doctrines.

Discovery of intangible work-product in Vermont has traditionally been governed by the common-law principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). The 2011 amendment to V.R.C.P. 26(b)(4) protects as work-product various communications with expert witnesses in both tangible and intangible form. See Reporter's Notes to that amendment. Likewise, this amendment of Rule 510 makes no distinction between the forms of inadvertent disclosure.

Section (c) advises the bar that the general waiver provisions of Rule 510 are subject to the more specific statute and the civil rules cited. The reference to V.R.C.P. 26(b)(4) is to make it clear that matters deemed work-product under that rule are not waived by counsel's disclosure of most information to his expert and preparation of draft disclosures or reports required under Rule 26(b). The Uniform Mediation Act contains restrictive waiver provisions to further the policy of protecting "mediation disclosures."

REPORTER'S NOTES

This rule is identical to Uniform Rule 510 and varies from proposed Federal Rule 511 only in detail.

The rule includes waiver by testimony of the holder of the privilege and by allowing testimony of another to the privileged matter without objection. Once disclosure has been made, no claim of privilege will restore it. See Federal Advisory Committee's Note to proposed Federal Rule 511.

No Vermont case directly in point has been found, but the rule is consistent with cases holding that there is no privilege for statements made in the presence of others. See State v. Fitzgerald, 68 Vt. 125, 126, 34 A. 429, 429 (1896); State v. Hodgdon, 89 Vt. 148, 149, 94 A. 301, 301 (1915). Also, failure to testify as to a privilege at a preliminary hearing has been held a waiver. State v. Louanis, 79 Vt. 463, 467, 65 A. 532, 533 (1907). If the waiver in that case is assumed to have been voluntary, it was a form of voluntary consent to disclosure of the allegedly privileged matter. See discussion of these cases in Reporter's Notes to Rule 502. It should further be noted that 12 V.S.A. § 1612, providing for a patient's privilege, expressly allowed for waiver by the patient, presumably including voluntary disclosure. See discussion in Reporter's Notes to Rule 503.

Rules of Evid., Rule 510, VT R REV Rule 510

State court rules are current with amendments received through August 15, 2017.

WASHINGTON

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK..., WA R REV ER 502

West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title V. Privileges

Washington Rules of Evidence, ER 502

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Washington Proceeding or to a Washington Office or Agency; Scope of a Waiver. When the disclosure is made in a Washington proceeding or to a Washington office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Washington proceeding or to a Washington office or agency, the disclosure does not operate as a waiver in any proceeding 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, including (if applicable) following CR 26(b)(6).[1]

(c) Disclosure Made in a Non-Washington Proceeding. When the disclosure is made in a non-Washington proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Washington proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Washington proceeding; or

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Washington court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Washington proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits

[Adopted effective September 1, 2010.]

Footnotes

1 The Court has published for comment a suggested amendment to add a new CR 26(b)(6). The text of this suggested amendment assumes adoption of the new CR 26(b)(6). If the Court does not adopt that new subsection, the phrase ", including (if applicable) following CR 26(b)(6)" should be removed from this suggested new rule.

ER 502, WA R REV ER 502

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 8/15/17. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 8/15/17.

End of Document

WEST VIRGINIA

Rule 502. Attorney-Client Privilege and Work Product;..., WV R REV Rule 502

West's Annotated Code of West Virginia
State Court Rules
West Virginia Rules of Evidence
Article V. Privileges

West Virginia Rules of Evidence (WVRE), Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) Disclosure Made in a Court or Agency Proceeding; Scope of a Waiver. When the disclosure is made in a West Virginia court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a West Virginia court or agency proceeding, the disclosure does not operate as a waiver 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.

(c) Disclosure Made in a Proceeding in a Federal or Another State's Court or Agency. When the disclosure is made in a federal or another state's court or agency proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a West Virginia proceeding if the disclosure would not be a waiver under this rule if it had been made in a West Virginia court or agency proceeding.

(d) Controlling Effect of a Court Order. A West Virginia court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other court or agency proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a West Virginia proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
[Effective September 2, 2014.]

Editors' Notes

COMMENT ON RULE 502

This a new rule patterned after Rule 502 of the Federal Rules of Evidence. Subsection (c)(2) of the federal rule has been eliminated, because it is not needed under West Virginia law. Under West Virginia law, attorney-client privilege determinations are governed by the law of the forum. *See Kessel v. Leavitt*, 204 W.Va. 95, 184-85, 511 S.E.2d 720, 809-10 (W. Va. 1998) (citing Syl. Pts. 2 & 3, *Forney v. Morrison*, 144 W. Va. 722, 110 S.E.2d 840 (1959)). The substance of subsection (c)(1) of the federal rule has been retained to protect a party in a West Virginia proceeding who made an inadvertent disclosure in another jurisdiction.

Rules of Evid. Rule 502, WV R REV Rule 502
Current with amendments received through June 1, 2017.

End of Document

WISCONSIN

905.03. Lawyer-client privilege, WI ST 905.03

West's Wisconsin Statutes Annotated
Evidence (Ch. 901 to 937)
Chapter 905. Evidence--Privileges (Refs & Annos)

W.S.A. 905.03

905.03. Lawyer-client privilege

Effective: March 29, 2014
Currentness

(1) Definitions. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. There is no privilege under this rule:

905.03. Lawyer-client privilege, WI ST 905.03

(a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Forfeiture of Privilege. (a) *Effect of inadvertent disclosure.* A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply:

1. The disclosure is inadvertent.

2. The holder of the privilege or protection took reasonable steps to prevent disclosure.

3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).

(b) Scope of forfeiture. A disclosure that constitutes a forfeiture under par. (a) extends to an undisclosed communication only if all of the following apply:

1. The disclosure is not inadvertent.

2. The disclosed and undisclosed communications concern the same subject matter.

3. The disclosed and undisclosed communications ought in fairness to be considered together.

Credits
<<For credits, see Historical Note field.>>

905.03. Lawyer-client privilege, WI ST 905.03

Editors' Notes

JUDICIAL COUNCIL NOTE--2012

Attorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession's highest duties. Arguably, strict rules about the consequences of disclosing confidences, even inadvertently, may serve to promote greater care in dealing with privileged information. However, precaution comes at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than in earlier eras, thorough preproduction privilege review often can be prohibitively expensive. Most clients seek a balanced approach.

The various approaches available are discussed in the Advisory Committee Note and in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, ¶¶28-32, nn.15-17, 271 Wis. 2d 610. Sub. (5) represents an "intermediate" or "middle ground" approach, which is also an approach taken in a majority of jurisdictions. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling any holding in Sampson. Sampson holds that a lawyer's deliberate disclosure, without the consent or knowledge of the client, does not waive the lawyer-client privilege. Neither subpart of sub. (5) alters this rule. Sub. (5)(a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures might come into play under sub. (5)(b), which provides that, when a disclosure is not inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undisclosed communications and information as well. However, such an extension ensues only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the Sampson rule.

In judging whether the holder of the privilege or protection took reasonable steps to prevent disclosure or to rectify the error, it is appropriate to consider the non-dispositive factors discussed in the Advisory Committee Note: (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of disclosure, (5) the number of documents to be reviewed, (6) the time constraints for production, (7) whether reliable software tools were used to screen documents before production, (8) whether an efficient records management system was in place before litigation; and (9) any overriding issue of fairness.

Measuring the time taken to rectify an inadvertent disclosure should commence when the producing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

In judging the fourth factor, which requires a court to determine the quantity of inadvertently produced documents, it is appropriate to consider, among other things, the number of documents produced and the percentage of privileged documents produced compared to the total production.

In assessing whether the software tools used to screen documents before production were reliable, it is appropriate, given current technology, to consider whether the producing party designed a search that would distinguish privileged documents from others to be produced and conducted assurance testing before production through methods commonly available and accepted at the time of the review and production.

Sub. (5) employs a distinction drawn lately between the terms "waiver" and "forfeiture." See *State v. Ndina*, 2009 WI 21, ¶¶28-31, 315 Wis. 2d 653.

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Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice-of-law analysis. See *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶¶24-25, 270 Wis. 2d 356.

The language of sub. (5) also differs from the language of Rule 502 in a way that should not be considered material. Sub. (5) applies to a privileged "communication." Rule 502 applies to a privileged "communication or information." The reason for the difference is that sub. (5) is grafted onto sub. (2), which states the general rule regarding the lawyer-client privilege in terms of "communications" between lawyers and clients, not "communications and information." Sub. (5) follows suit. This different language is not intended to alter the scope of the lawyer-client privilege or to provide any less protection against inadvertent disclosure of privileged information than is provided by Rule 502.

Sub. (5) is modeled on subsections (a) and (b) of Fed. R. Evid. 502. The following excerpts from the Committee Note of the federal Advisory Committee on Evidence Rules (Revised 11/28/2007) and the Statement of Congressional Intent regarding Rule 502 are instructive, though not binding, in understanding the scope and purposes of those portions of Rule 502 that are borrowed here:

This new [federal] rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

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

...

905.03. Lawyer-client privilege, WI ST 905.03

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D. N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of preproduction privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases-for example, as to whether steps taken to rectify an

erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

JUDICIAL COUNCIL COMMITTEE'S NOTE--1974

Sub. (1)(a). Wisconsin is in accord. Definition of "client" in Wis.Stat. s. 885.22 (1969) includes persons, State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969), Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); corporations, State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967), Tomek v. Farmers Mutual Automobile Ins. Co., 268 Wis. 566, 68 N.W.2d 573 (1955); and public officers, State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 112 N.W.2d 686, 113 N.W.2d 537 (1961). Wis.Stat. s. 885.22 (1969) is repealed.

(b). Wisconsin is in accord with definitions of a lawyer authorized to practice law in a state, Wis.Stat. s. 256.28 (1969) [SCR 40.02]. However, the adoption of this subsection extends the privilege of the client to communications had with persons who the client "reasonably believed" was authorized to practice law. The burden is placed on the client to show that he had information or facts which would lead a reasonable person to believe that the person he disclosed a confidential communication to was an authorized lawyer. This is contrary to Brayton v. Chase, 3 Wis. 456 (1854), where it was held that the communication must be made to a licensed lawyer.

(c). Wisconsin is in accord. State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967).

(d). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Koeber v. Somers, 108 Wis. 497, 84 N.W. 991, 52 L.R.A. 512 (1901); Herman v. Schlesinger, 114 Wis. 382, 90 N.W. 460, 91 Am.St.Rep. 922 (1902); State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Estate of Hoehl, 181 Wis. 190, 193 N.W. 514 (1923).

Sub. (2). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Kearney & Trecker v. Giddings and Lewis, Inc., 296 F.Supp. 979 (E.D.Wis.1969); State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1962); Continental Casualty Co. v. Pogorzelski, 275 Wis. 350, 82 N.W.2d 183 (1957); Dickson v. Bills, 144 Wis. 171, 128 N.W. 868 (1910); Dudley v. Beck, 3 Wis. 274 (1854); Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913); Wojciechowski v. Baron, 274 Wis. 364, 80 N.W.2d 434 (1957).

The protection against eavesdropping has been extended in this section.

Sub. (3). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969). Petition of Sawyer, 129 F.Supp. 687 (E.D.Wis.1955); State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Tomek v. Farmers Mutual Automobile Ins. Co., 268 Wis. 566, 68 N.W.2d 573 (1955); State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1961).

Sub. (4). Exceptions.

905.03. Lawyer-client privilege, WI ST 905.03

(a). Wisconsin is in accord. In Re Sawyer's Petition, 229 F.2d 805 (1956), certiorari denied Sawyer v. Barczak, 76 S.Ct. 1025, 351 U.S. 966, 100 L.Ed. 1486, rehearing denied 77 S.Ct. 24, 352 U.S. 860, 1 L.Ed.2d 70; Dudley v. Beck, 3 Wis. 274 (1854).

(b). Wisconsin is in accord. Estate of Smith, 263 Wis. 441, 57 N.W.2d 727 (1953); Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929).

(c). Wisconsin is in accord. Wis.Stat. § 885.22 (1969); State v. Markey, 259 Wis. 527, 49 N.W.2d 437 (1951); Murphey v. Gates, 81 Wis. 370, 51 N.W. 573 (1892).

(d). Wisconsin is in accord. Boyle v. Robinson, 219 Wis. 567, 109 N.W. 623 (1906); McMaster v. Scriven, 85 Wis. 162, 55 N.W. 149, 39 Am.St.Rep. 829 (1893).

(e). Wisconsin is in accord. Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929); Johnson v. Andreassen, 227 Wis. 415, 278 N.W. 877 (1938); Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Boyle v. Kempkin, 243 Wis. 86, 9 N.W.2d 589 (1943).

Notes of Decisions (209)

W. S. A. 905.03, WI ST 905.03
Current through 2017 Act 57, published August 10, 2017.

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____,

Plaintiff,

- against –

_____,

Defendant.

Index No. _____

STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, (individually "Party" and collectively "Parties") for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment (hereinafter the "Documents" or "Testimony").

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on each page of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

(b) "Producing Party" shall mean the parties to this action and any non-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

(c) "Receiving Party" shall mean the Parties to this action and/or any non-party receiving "Confidential Information" in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such

documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

(a) personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

(b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

(c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

(g) any other person agreed to by the Producing Party.

6. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so

only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as "Confidential Information" under the terms hereof. Any deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness's compliance with the Stipulation.

11. A Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation

is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

In Counties WITH Electronic Filing

12.

(a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the "Redacted Filing"). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(b) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party's Confidential Information unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF

system. If the Producing Party's timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

In Counties WITHOUT Electronic Filing

13. (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information.

(b) If the Producing Party does not file a motion to seal within the aforementioned three (3) day period, the Party (or, as appropriate. non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as well as an indication of the nature of the contents and a statement in substantially the following form:

> "This envelope, containing documents which are filed in this case by (name of Party or as appropriate, non-party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court."

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party's Confidential Information unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or

containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

17. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party's right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential Information designation shall not preclude a subsequent challenge thereto.

18. This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by

properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

19. This Stipulation shall continue to be binding after the conclusion of this litigation except that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

20. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

[OPTIONAL PARAGRAPH 21]

21. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:

(a) to implement and adhere to reasonable procedures to ensure that documents protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.

(b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error.

~~20.~~(c) upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify

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the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

21-22. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

22. If a Receiving Party is called upon to produce Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of

11

such Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

23. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

24. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]	[FIRM]
By: _____	By: _____
_____	_____
New York, New York	New York, New York
Tel: _____	Tel: _____
Attorneys for Plaintiff	*Attorneys for Defendant*
Dated: _____	

SO ORDERED

_____

J.S.C.

EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____,

Plaintiff,

- against -

_____,

Defendant.

Index No. _____

AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL

I, _____, state that:

1. My address is _____.

2. My present occupation or job description is _____.

3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on _____.

4. I have carefully read and understand the provisions of the Stipulation.

5. I will comply with all of the provisions of the Stipulation.

6. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.

7. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

DPARKE\304889.6 - 03/21/16

8. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: _____ _____

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Committees serve as the laboratory for much of the Section's greatest work: reports, comments on pending legislation or rule changes, continuing education of the bench and bar, and receptions with leading figures in a practice area or in the judiciary.

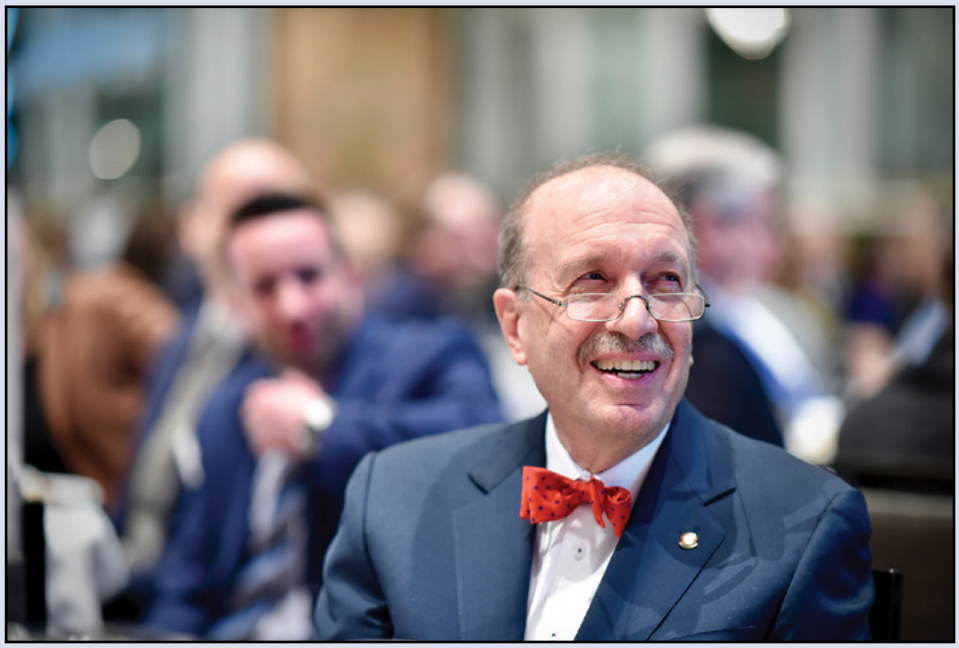
Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Antitrust (FED1300)
___ Appellate Practice (FED1400)
___ Alternative Dispute Resolution (FED1200)
___ Civil Practice Law and Rules (FED1900)
___ Civil Prosecution (FED2000)
___ Commercial Division (FED5200)
___ Commercial Division Law Report (FED6700)
___ Commercial Jury Charges (FED7700)
___ Continuing Legal Education (FED1020)
___ Corporate Litigation Counsel (FED6600)
___ Creditors' Rights and Banking Litigation (FED2700)
___ Diversity (FED6100)
___ Electronic Discovery (FED6400)
___ Employment and Labor Relations (FED3000)
___ Ethics and Professionalism (FED4300)
___ Federal Judiciary (FED3200)
___ Federal Procedure (FED3300)
___ Hedge Fund and Capital Markets Litigation (FED7600)
___ Immigration Litigation (FED7000)
___ International Litigation (FED3600)
___ Internet and Intellectual Property Litigation (FED6900)
___ Legislative and Judicial Initiatives (FED7400)
___ Membership (FED1040)
___ Mentoring (FED7300)
___ Securities Litigation and Arbitration (FED4600)
___ Social Media (FED7500)
___ State Court Counsel (FED5700)
___ State Judiciary (FED4700)
___ White Collar Criminal Litigation (FED6800)

NYSBA

Justice Ramos Receives Stanley H. Fuld Award

The following are the remarks of the Honorable Charles E. Ramos upon his acceptance of the Stanley H. Fuld Award on January 24, 2018:



Justice Charles E. Ramos was awarded the Stanley H. Fuld Award on January 24, 2018 during the 2018 NYSBA Annual Meeting.

Once I recovered from the shock of being told I was to receive the Fuld Award, I had a little chuckle. The Section is giving the Fuld Award to an economist. My undergraduate studies were science and economics. I see the world through that filter.

As an economist, I am going to make an observation about you, the members of this Section and the judges that serve you.

The people in this room do more to maintain peace in the world than a room full of diplomats from the UN! You do it without intending or being aware of it. Now I have to back that up.

The renowned economist, John Maynard Keynes, studied the relationship between economics and war/peace and concluded that nations existing in a state of economic interdependence were less likely to go to war. They needed one another or at least shared in mutually beneficial transactions so that they would not try to destroy one another.

Now, commerce and civilization have always gone hand in hand, but nevertheless, we have endured wars for centuries. Look at Europe. 2,000 years of almost continuous warfare. 100 years ago, WW1 was still raging. It gave us 20 million dead, destruction, Hitler and WW2. That war gave us 80 million more dead. What a terrible world record. 100 million dead in a span of 31 years.

But what happened after 1945? WW3 didn't happen, that's what happened. The world had listened to JMK. He concluded that the prospect of death and destruction did not prevent war, but God forbid nations would destroy some economic advantage; well then it is a time for a strategic re-evaluation. Unlike after WW1, when the defeated were isolated and their economies destroyed, after WW2 Europe formed the EEC and the EU. Europe has become economically interdependent. France, England and Germany have never before enjoyed 70 years of continuous peace.

It may sound profane to say this, but this is an example of the power of money. I sound like Tony Soprano. Actually, money is not profane, greed is. But the people of the world are not greedy, by and large. They need enough. They want reasonable prosperity. They know that money feeds us, houses us, clothes us, cares for our health, educates our children, I could go on.

So, if commerce creates wealth and the by-product peace, who needs us, the commercial lawyers and judges?

The reason we are needed is that the key to economic interdependence is in the magnitude of the commercial activity. The benefits of commerce must overcome humanity's predilection to engage in tribalism and conflict.

That is where you come in. New York State possesses such a wealth of legal and judicial talent that it attracts and concentrates commercial activity to such an extent that all the world wants of us is our business. We have achieved a legal critical mass of law and procedure, and a worldwide reputation for skill and fairness that causes success to lead to further successes.

In all fairness, we did not invent this; we have fine-tuned it, but we did inherit this culture from the Dutch. America is Dutch. If you have read the book *The Island at the Center of the World*, you understand. If not, read the First Amendment to the U.S. Constitution. It's four elements are not English, they are Dutch.

Consider that if it wasn't for the Brits, this would be a meeting of the New Netherlands State Bar Association in the city of New Amsterdam. The Hudson River was a Dutch commercial highway and two centuries later, we, New York, dug the Erie Canal. The wealth of America flowed from Buffalo to Brooklyn across the canal and down the Hudson. New York State contributed more to the wealth and success of America than any other state in the nation. We call New York the Empire State. That is not conceit, it is reality. We built it.

I came to realize how much the world's judiciary respects you when I attended a judicial conference last year in London. This conference was the First Standing Forum of International Commercial Courts. The American commercial judges attending were Loretta Preska, a former recipient of the Fuld award; Larry Marks, the Chief Administrative Judge of New York State Unified Court System who not only runs our courts from Niagara to Montauk, but also moonlights as a commercial justice, and I tagged along, representing the Commercial Division.

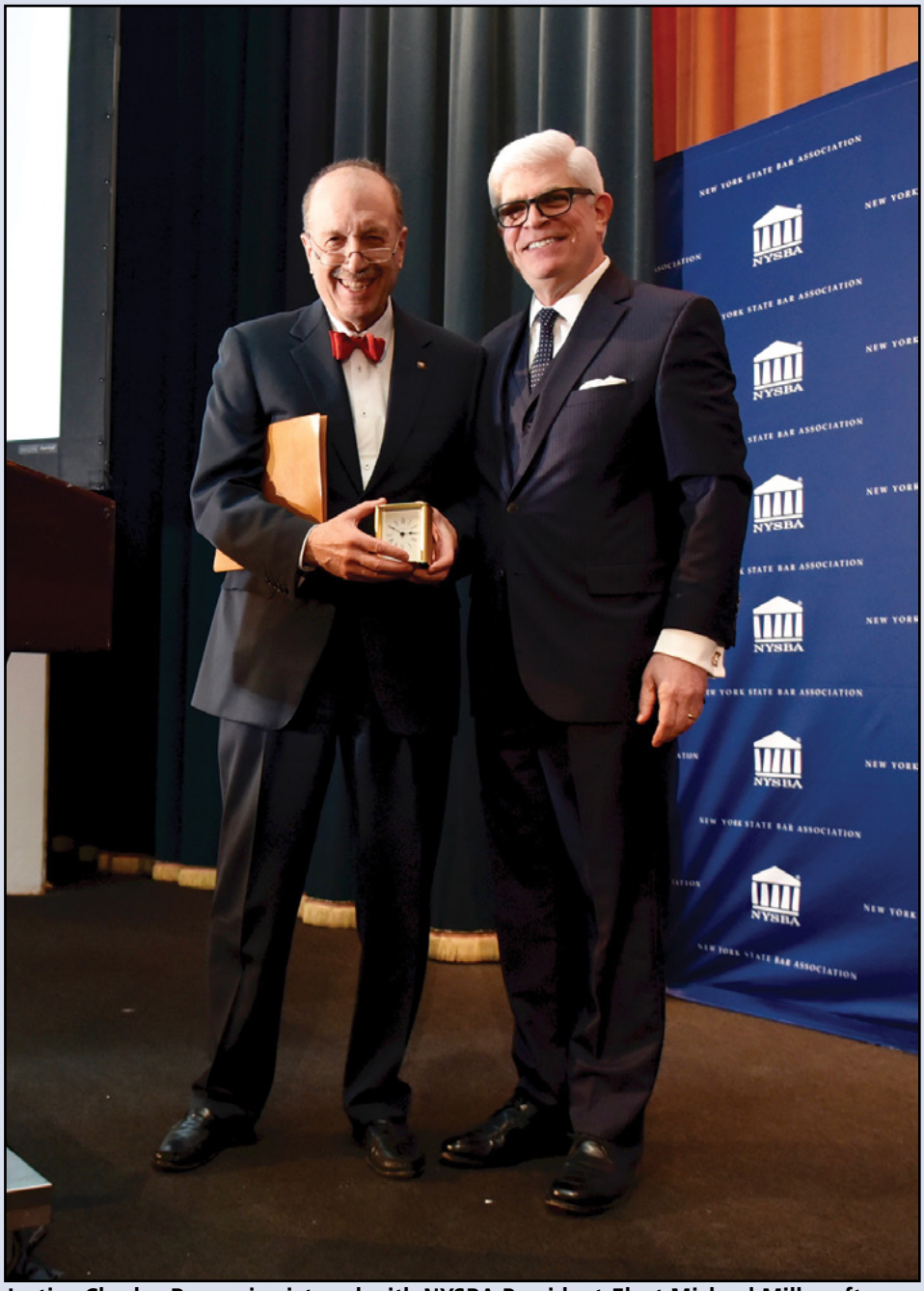
The British organized what was a great party but the best thing I took away was what the other judges from, 27 countries, thought of us. They knew who we were, what you do, how efficient we all are and even read and copy our rules. Bob Haig, take a bow.

Loretta, always fast on her feet, had the presence of mind to make sure that the second Standing Forum would take place here in New York. The other attendees were delighted. They want to come to New York because we do commercial law so well. This Second International Forum is being organized by Loretta, Larry and yours truly. We have been joined by Kevin Castel, also from the federal courts.

Our event will be a judge-to-judge conference. Not like the bench/bar events we have been having and that are so helpful. Your participation will be through the federal and state bars who are assisting us. We have already met with Michael Miller, the incoming State Bar President, and this Section through Steve Younger.

Having these judges come here from commercial centers around the world is probably a once in a lifetime opportunity for you, your firms and your clients. We will get them here to New York; you take it from there. Michael Miller and this Section will have the who, what, where, when that you might need.

I am running over. Time for thank you. Thank you, this Sec-



Justice Charles Ramos is pictured with NYSBA President-Elect Michael Miller after receiving the Stanley H. Fuld Award at Annual Meeting.

tion, Mitch Katz and Michael Miller for the Fuld Award. This is the one that matters.

Thank you, Kathi. She is a teacher of remarkable skill who taught me, among many other things, that teaching is indeed its own reward.

Thank you to my parents for whom education was like a religion. Bill, they gave us a great start in life.

I also must thank the trustees at Horace Mann who gave us scholarships and changed the direction of our lives.

Thank all of you in this room who make Monday mornings the best time of the week for me. You are the brightest, hardest working most skilled professionals imaginable.

Thank you for being my clients. Judges should not admit this, but we are service providers. We resolve disputes for you and your clients. Think of us as the alternative to Alternative Dispute Resolution. Don't mediate, litigate. I know I don't treat you like clients, but with 410 cases in my inventory, it's impossible to be both charitable and efficient.

From left to right, ComFed Section Chair Mitch Katz, Justice Charles Ramos and NYSBA President-Elect Michael Miller.

And thank you for taking losses with such good grace. I just call balls and strikes and I know it's not fun to strike out.

And thank you for providing the environment, the matrix that allows commerce to thrive here in New York. Without knowing it, you are the enablers of peace. Remember Mao's *Little Red Book*? To miss-quote Mao, peace does not come out of the barrel of a gun.

And, thank you for your kind attention. Have a wonderful day.

Justice Charles Ramos delivers his remarks to a packed house during the award ceremony at Annual Meeting in January.

The Business Theory of Diversity: How Diversity Improves Law Firms' Bottom Lines

By Mitchell J. Katz and Moshe O. Boroosan

Introduction

Modern law firms aspire to diversity. Whether large or small, most firms have stated policies as well as genuine intentions to maintain a diverse workforce and to hire and advance people based on merit and without discriminating against anyone based on a diversity factor. For the most part, these intentions come from a moral and ethical imperative to do the right thing. Yet, despite good intentions, lack of diversity continues to plague the legal profession. According to the American Bar Association's National Lawyer Population Survey 10-Year Trend in Lawyer Demographics, in 2017, 68.7 percent of attorneys are male, 35.3 percent are female, 4.1 percent are African-American, and 3.9 percent are Hispanic. These percentages represent only slight divergences from the status quo 10 years ago when 69.9 percent of attorneys were male, 30.1 percent were female, 3.2 percent were African-American, and 3.1percent were Hispanic. Moving beyond race, lawyers with disabilities accounted for only 0.38 percent of all lawyers, and attorneys identifying as being openly LGBT accounted for only 2.48 percent of all lawyers.[1]

These statistics show that, unfortunately, good intentions are simply not enough. This is ironic because the legal profession is leading the push for equality in all other aspects of life.[2] Recognizing that good intentions can only carry a diversity initiative so far, this article offers an alternative basis for the unapologetic and unwavering implementation of diversity initiatives in the legal profession: the law firm's bottom line.

Part I of this article provides a workable definition of diversity that transcends race and gender. Part II of this article surveys some of the leading studies which support the business case for diversity. Part III looks at three specific instances where the implementation of diversity initiatives directly affects a law firm's bottom line, including (i) the generation of corporate clients with social awareness; (ii) associate attorney retention, and the costs of attrition; and (iii) women in the law, and the corresponding loss of revenue caused by law firms' failure to provide women with the support needed to excel in law firm culture. Part IV concludes.

I. Diversity Defined

We suggest that diversity is about far more than just race and gender, and is not limited to immutable traits. Instead, at its core, diversity is about variety.[3] It is an "all-inclusive term that extends beyond race and gender and incorporates people in many different classifications," including age, sexual preferences, and myriad other personal, demographic, and organizational characteristics.[4] Similarly, the phrase "workforce diversity" refers to "policies and practices that seek to include people from within a workforce who are considered to be, in some way, different from those in the predominant group."[5]

Using a broad definition of diversity is material to this analysis. First, because the business theory of diversity is an expansive theory that depends on the inclusion of all types of individuals, a broad definition of diversity is the starting point for any serious discussion about the financial implications of diversity initiatives.[6] By way of contrast, organizations that seek to correct a company bias against a particular group may define diversity more narrowly according to their specific needs.[7] Using a narrow definition of diversity may undermine the ultimate goal of increased financial success through diversity initiatives. Second, using a broad definition of diversity moves diversity issues beyond an "us-vs.-them" approach to a focus on using diversity to accomplish overall organizational goals.[8]

II. Survey of Studies

The business theory of diversity in corporate America has been well-researched and sourced. One of the leading studies on the business theory of diversity indicates that "diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits."[9] This core finding is supported by numerous other studies showing that workforce diversity translates into economic prosperity.[10]

A 2014 analysis of 366 public companies across a range of industries in Canada, Latin America, the United Kingdom, and the United States found that companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians.[11] Companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians.[12] Conversely, companies in the bottom quartile both for gender and racial diversity are statistically less likely to achieve above-average financial returns than average peer companies.[13] A similar study conducted by the British government in 2007 found that companies with more women on their boards outperform their rivals with a 42 percent higher return on sales, 66 percent higher return on invested capital, and 53 percent higher return on equity.[14] Similarly, recent Credit Suisse research suggests a link between female directors and business performance: companies with at least one female director show better financial outcomes on a range of measures than do those with no women board members.[15]

Other research has produced similar results. A 2014 Gallup study found that "[g]ender-diverse business units in retail companies have 14 percent higher comparable revenue than less-diverse business units."[16] The study found a similar increase in net profit among diverse companies in the hospitality industry.[17] An American Sociological Association study supports this research, finding that for every 1 rise percent in the rate of gender and ethnic diversity in a workforce, there is a 3 percent and 9 percent rise in sales revenue, respectively.[18]

A Harvard Business School study advocates an approach referred to as the "integration and learning perspective."[19] This approach embraces workforce diversity for the robust exchange of ideas it fosters, which in turn promotes further innovation and success."[20] The Wharton Business School's Diversity Analysis Research Team (the "Study") concluded that diverse group members that engage in constructive debates have a stronger chance of performing their goals with excellent results.[21] The Study concluded that if group members engage in constructive debates, then they have a higher chance of performing well due to the effective communication that arises.[22] Central to the Study's conclusion is the notion that the beneficial effects of diversity are inherent, and can be elicited further through effective leadership.[23]

These studies illustrate that diversity is not just a matter of abstract ideas, but of dollars and cents as well.

III. Three Specific Applications to Law Firms

We suggest that workforce diversity in the corporate world can produce financial benefits to law firms in three areas: (i) the firm's ability to generate corporate clients; (ii) the firm's ability to attract and retain talented associates; (iii) the firm's ability to attract and retain female associates and partners, and to overcome gender and disparity concerns.

A. Client Generation

The "most basic laws in economics" are those of supply and demand.[24] In the context of law firms, that means providing the clients with the services they require. Consumers of corporate legal services have used their market power to address some of the most critical problems facing the elite law firms, with a special focus on the lack of diversity on the legal teams handling corporate matters.[25]

These efforts were spearheaded in 1999 by Charles R. Morgan, the CEO for BellSouth Corporation, who developed a pledge titled "Diversity in the Workplace: A Statement of Principle" (the "Statement of Principle") as a reaction to the lack of diversity at law firms providing legal services to Fortune 500 companies.[26] More than 400 Chief Legal Officers of major corporations signed the Statement of Principle.[27]

In 2004 Rick Palmore, an executive at Sara Lee Corporation, authored "A Call to Action: Diversity in the Legal Profession" (the "Call to Action").[28] The Call to Action built upon the Statement of Principle, and focused on three major elements: (i) the general principle of having a principal's interest in diversity; (ii) diversity performance by law firms, especially in hiring and retention; and (iii) commitment to no longer hiring law firms that do not promote diversity initiatives.[29] By the end of 2004, the Call to Action had received signatory responses from 72 companies, including corporate giants such as American Airlines, UPS, and Wal-Mart.[30]

The objective advanced by the Statement of Principle and the Call to Action have become mainstream among corporate consumers of legal services. In August 2016, the ABA House of Delegates passed Resolution 113, calling on corporate legal departments to use their purchasing power to increase economic opportunities for diverse attorneys.[31] Two dozen in-house counsels from major U.S. companies signed a letter pledging to uphold the resolution.[32]

HP adopted a program in February of 2017 which requires at least "one woman and one racially/ethnically diverse attorney performing at least 10 percent of the billable hours worked on HP matter."[33] In April 2017, Facebook announced that it will require that women and ethnic minorities account for at least 33 percent of law firm teams working on its matters.[34] Metlife announced a similar new policy that same month.[35] Verizon's general counsel, Craig Silliman, also said that "diversity of the team is one of the specific criteria" used in deciding which outside firms to hire.[36]

Facebook general counsel Colin Stretch said it best: "Law firms generally do what their clients want, and we want to see them win our cases and create opportunities for women and people of color. We think firms are ready—our articulation gives them not just permission, but a mandate."[37] It would behoove law firms—and their bottom lines—to accept this mandate and implement true diversity based business practices.

B. Associate Retention and Costs of Associate Attrition

As with all businesses, in order to remain competitive and financially successful, law firms must not only the most talented candidates, they must retain them. Yet, while many law firms strive for diversity in *hiring*, they too often neglect to create an atmosphere of true inclusiveness.[38] This lack of a genuinely inclusive work environment causes minority and diverse associates to feel misunderstood, underappreciated, and disrespected, before ultimately leaving the firm.[39] Research demonstrates that a large part of minority attorney attrition from law firms is "due to the firms' not fully integrating the minority lawyers into their folds and the minority practitioner not being afforded full and equal opportunity to the work, the resources, and the relationships they require in order to succeed."[40] The net result is that law firms' diversity efforts have resulted in "little growth in the number of such

lawyers who stay long term and move into leadership ranks."[41]

Law firms incur major costs to train new associates and their early departure can be financially devastating. The cost of employee exodus from law firms range from $400,000 to more than $800,000, for more experienced attorneys.[42] Turnover rates costs the legal industry roughly $9.1 billion annually in just the 400 largest firms in the US.[43] In terms of profitability, "[t]he economics of hiring of new law school graduates can no longer be taken for granted, given the time and expense of the process required to get them up to practice speed."[44] Given the cost of recruiting and partner interview time before hiring, the reduced productivity of new associates as they get up to speed with the firm and its clients, and the cost of ongoing associate training, a new associate can cost well over $200,000 in the first two years of practice.[45] Large firm managing partners indicate that it typically takes three to five years to break even on investing in a new associate. Because turnover costs are so expensive, "the cost of losing an associate can average $200,000 to $500,000 considering recruiting and training costs, the price of a resource shortage, administrative and human resource man hours, and other factors."[46]

High turnover rates can also cause significant harm to a firm's reputation and morale. Not only can this adversely affect a law firm's ability to recruit new talent, [47] but it can also affect a firm's overall ratings in industry publications.[48] Both of these affect a firm's bottom line.[49]

Unfortunately, rather than addressing the issues that cause diverse associates to leave the firm in the first place, minority candidates are often penalized for the high attrition rate of minority practitioners in law firms.[50] As firms review their books and feel the burn of the financial losses caused by minority associate attrition, they fail to recognize that promoting inclusivity on the back end will prevent those same associates from leaving the firms at all.[51] By dedicating the time and effort to create genuine inclusiveness, firms can negate and avoid the economic fallout from diverse associates who leave law firms because of the perceived, or actual, inability to progress.[52]

C. Women

According to a January 2017 report from the Commission on Women in the Profession, women make up 36 percent of the legal profession.[53] Yet, according to the latest National Association for Law Placement (NALP) study, their representation across partnership ranks at major U.S. firms averages 22.1 percent, despite gender parity in graduating classes during the past two decades.

In November 2017, the New York State Bar Association adopted the Commercial and Federal Litigation Section's Task Force on Women's Initiatives published a report entitled *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR* devoted to the issue of women litigators in the courtroom[54] (the "Report"). The Report noted that the striking gender disparity between men and women in the legal industry has long been known. As far back as 1988, the ABA Commission on Women in the Profession (the "ABA Commission"), with Hillary Rodham Clinton serving as its inaugural chair, published a groundbreaking report documenting the lack of adequate advancement opportunities for women lawyers.[55] Unfortunately, despite the positive attention that ABA Commission report received, the plight of women attorneys remained relatively stagnant.

In 2015, the ABA Commission published *First Chairs at Trial: More Women Need Seats at the Table* (the "ABA Report"), which revealed that women are consistently underrepresented in lead counsel positions and in the role of trial attorney.[56] The ABA Report then outlined factors that might help to explain the gender disparities evidenced by the data. In particular, the ABA Report posited that:

> The underrepresentation of women among lead lawyers may . . . stem from certain client preferences, as some clients prefer a male lawyer to represent them in court . . . In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance at their firms.

The Report also analyzed other research that corroborates the extent to which gender disparities continue to persist within the legal profession, particularly within law firm culture. This research shows that the presence of women in the legal profession has not translated into equal opportunities for women lawyers at all levels. For example, a recent study conducted by the New York City Bar Association found a dramatic disparity in lawyer attrition rates based on gender, with 18.4% of women leaving the surveyed law firms in 2015, compared to just 12.9 percent of white men.[57] A 2015 survey by the National association of Women Lawyers found that women held only 18 percent of all equity partner positions—just 2 percent higher than they did approximately a decade earlier.[58]

Ultimately, the Report concluded that women attorneys remain considerably underrepresented in courtrooms across New York State:

> In sum, the low percentage of women attorneys appearing in speaking roles in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters.[59]

These statistics show that the mere existence of diversity initiatives aimed at helping women succeed in the le-

gal profession have not produced their intended results. As one article put it, "[a]ll those gender diversity initiatives at large law firms . . . don't seem to be making a difference."[60] Another article bears the telling title, *Women Are Not Convinced by Law Firms' Statements of Commitment to Diversity*, and notes that on a holistic level, women experience a workplace skewed in favor of men.[61] Yet another recent study argues that while law firms have many of the right policies and programs in place to improve gender diversity, "more can be done to translate stated commitments into measurable outcomes."[62]

While women make up more than a third of all attorneys in the United States,[63] despite decades of diversity initiatives aimed at helping women succeed, female attorneys still face the same types of silent hostility as other minorities in an industry dominated primarily by white men.[64] They do not have the opportunity to participate in lead counsel roles in courtrooms statewide.[65] They are paid less than their male counterparts.[66] And they are leaving law firms at substantially higher rates than male attorneys, often because of their perceived and actual inability to reach the highest levels of the firm.[67] Ultimately, law firms suffer the costs of female attorney attrition, lost talent, and potentially large corporate contracts. To be clear, the business model of diversity contemplates a broad definition that transcends race and gender. Nevertheless, in light of the incredible challenges facing women, it would be irresponsible and short-sighted for a law firm aiming for financial prosperity to disregard this vast and talented pool of minority professionals.

Conclusion

For too long, programs to effect real diversity in the profession have been elusive. Improving workforce diversity and creating an atmosphere of true inclusiveness are critical to financial success. Having a truly diverse and inclusive work environment can help law firms attract large corporate clients, and attract and retain talented minority associates. It really is a matter of dollars and sense.

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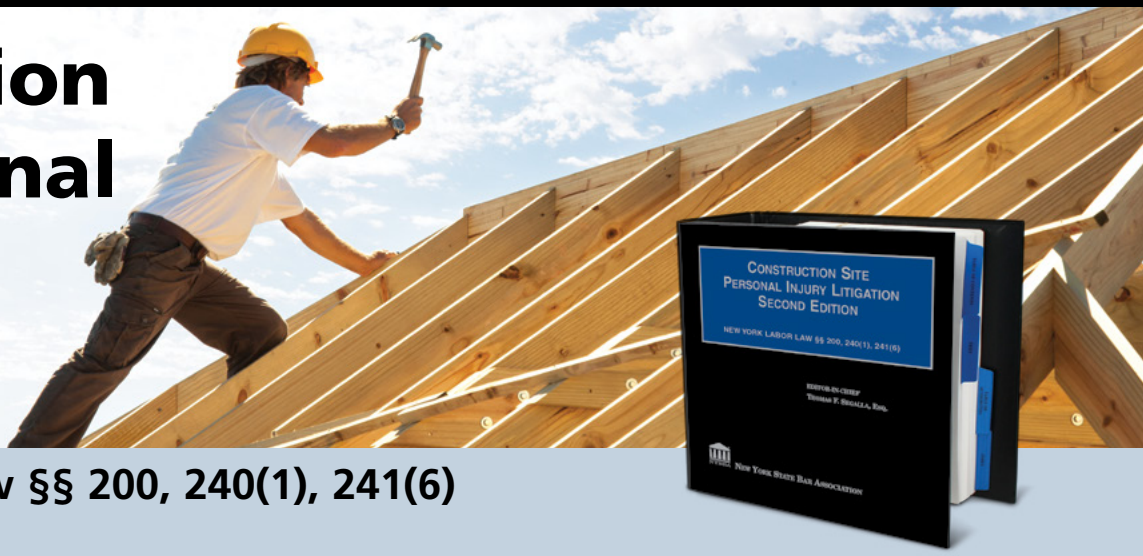

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Second Edition

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