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LITIGATION NEWS

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Litigation Section

The Section of Litigation is often the vanguard of changes in today's litigation environment, influencing the course of the law and the adversary system for the benefit of the public and the trial bar. The goal of *Litigation News* is to advance the art of advocacy by informing litigators of Section activities and other news of professional interest.

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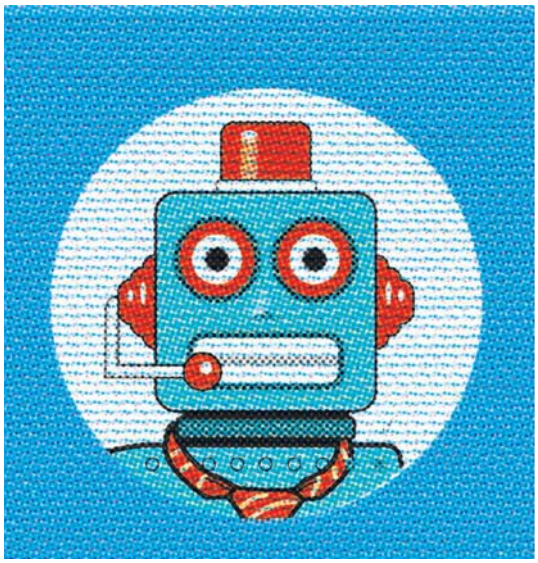

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COLUMNS

DEPARTMENTS

Legal Considerations for Remote Healthcare Work

By Christina M. Jordan, *Litigation News* Associate Editor

Ongoing safety precautions due to the COVID-19 pandemic have required millions of people, regardless of their profession, to work from home. The pandemic has resulted in a turn toward technology to help people work from home effectively. Workers in the medical field face unique challenges when performing healthcare work remotely.

While healthcare providers expand efforts to provide care for a growing patient population in view of the COVID-19 pandemic, telehealth and telemedicine services have become more attractive to both patients and healthcare providers. Expanded availability of services allows individuals to limit their exposure to COVID-19 by receiving care outside of healthcare facilities. Remote use of healthcare tools also reduces the number of in-person patient visits that could otherwise overwhelm hospital care units and medical equipment supply chains. Healthcare providers' and patients' homes have become the doctor's office waiting room, the examination room, and the emergency room.

The telecommunication applications used for providing remote healthcare services provide a convenient way for personal two-way communication. Healthcare providers should be mindful of choosing an application that is user friendly, choosing a private location in the home, and testing equipment in advance of communicating with patients. There are small steps healthcare providers can take to impress upon their patients that the nature of the discussion is similar to what it would have been if it was in person, and demonstrate professionalism, respect, and privacy of the discussion.

As telehealth and telemedicine services become more widely used, there likely will be increased access to, and electronic transmission of, confidential health information. Attorneys should become familiar with legal issues surrounding remote healthcare work, including potential measures for mitigating risk and protecting devices and data.

What Are Telemedicine and Telehealth?

Telemedicine refers to traditional clinical care, like diagnosing and monitoring patients, performed remotely. Telehealth is slightly broader than telemedicine and can include services such as patient education, wellness promotion, and monitoring of wearable devices. There are four main categories of telehealth: (1) live two-way communication with a healthcare provider using audiovisual telecommunications technology; (2) transmission of digital images, such as x-rays, through a secure electronic communications system; (3) remote patient monitoring of vital statistics by clinicians; and (4) mobile health using smartphone and wearable device technology, such as cameras, microphones, sensors, and applications.

Many remote healthcare workers are turning to new technologies that help facilitate telehealth services, such as videoconferences, data sharing, and project management. Healthcare workers should be mindful of whether technology has been developed specifically for handling protected health information. It is important that technology used for telemedicine and telehealth support Health Insurance Portability and Accountability Act (HIPAA) compliance and ensure that health information is properly protected.

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Government Facilitates Access to Remote Healthcare Services

As the United States continues efforts to address the COVID-19 pandemic, federal and state governments have implemented measures and provided additional guidance for expanding access to telehealth services. For example, some states have revised the technology requirements for telemedicine services and have relaxed telemedicine standards to address medical- and health-related needs arising out of the COVID-19 pandemic. While changes to the regulations have created a much more favorable environment for providing telemedicine and telehealth services, healthcare workers nevertheless should become familiar with legal risks they could face, which include those associated with traditional, in-person care and those arising out of aspects particular to providing remote healthcare services.

Relaxed Technology Requirements

Congress passed new legislation providing emergency funding for federal agencies, including expanding Medicare coverage for telehealth services during the COVID-19 public health emergency. With the exception of virtual check-ins with patients, the Centers for Medicare and Medicaid Services typically did not permit reimbursement for furnishing telehealth services at home or across state lines. During the current COVID-19 public health emergency, telehealth services such as remote monitoring, emergency room visits, therapy services, and other non–face-to-face care management may be billed as if they were provided in person.

With respect to audiovisual telecommunications technology for providing live two-way communication with a healthcare provider, the U.S. Department of Health & Human Services Office for Civil Rights (HHS OCR) advised that healthcare providers may use non–public-facing applications to deliver care. Examples of permissible applications include Zoom, Skype, and Apple FaceTime, whereas examples of public-facing applications that are impermissible for telehealth services include Facebook Live, Twitch, and TikTok. HHS OCR recommends that providers notify patients of privacy risks from using audiovisual telecommunications technology. Providers are also encouraged to seek additional available privacy protections for confidential health information.

Transmission of Protected Health Information

Remote healthcare workers can store and transmit large amounts of confidential patient information, resulting in risks associated with protecting data and electronic devices. Technology used for remote healthcare work must meet HIPAA security and privacy requirements. Digital data transmission increases the risk of sensitive patient information being intercepted and exploited by a third party. Remote healthcare providers should regularly audit security measures and data privacy and protection policies to ensure they are being HIPAA compliant.

With increased use of videoconferencing platforms to provide two-way communication, many telecommuters are using free versions of videoconferencing platforms, which do not support HIPAA compliance. Remote healthcare providers should consider licensing specialized videoconferencing solutions that provide additional privacy protections and HIPAA-compliant platforms.

While healthcare providers are working remotely, they are often using personal devices, such as smartphones and personal computers, to provide care. It may be difficult to distinguish between different patients' medical records on personal devices and to ensure that personal devices meet security and regulatory compliance. If possible, practitioners should refrain from using personal devices, and instead use devices dedicated to remote healthcare work that have been verified to meet organizational security configuration requirements.

It is important that technology used for telemedicine and telehealth support HIPAA compliance and ensure that health information is properly protected.

Virtual private networks (VPNs) provide another layer of data security, offering a secure, encrypted connection between the office and a device. A VPN connection to the office provides firewall protection, among other data security features, for remote users. VPNs can also help protect the confidentiality of information stored and transmitted by remote users.

Currently, there is no cure or vaccine for COVID-19, and minimizing physical contact is an effective way to limit the spread of the virus. Until COVID-19 is controlled, patients and healthcare providers will likely continue to take advantage of telehealth and telemedicine platforms even after the spread of the virus has decreased to more manageable numbers. And the importance of understanding the legal issues that arise as a result of the nature of remote healthcare work will remain after the COVID-19 pandemic is over. LN

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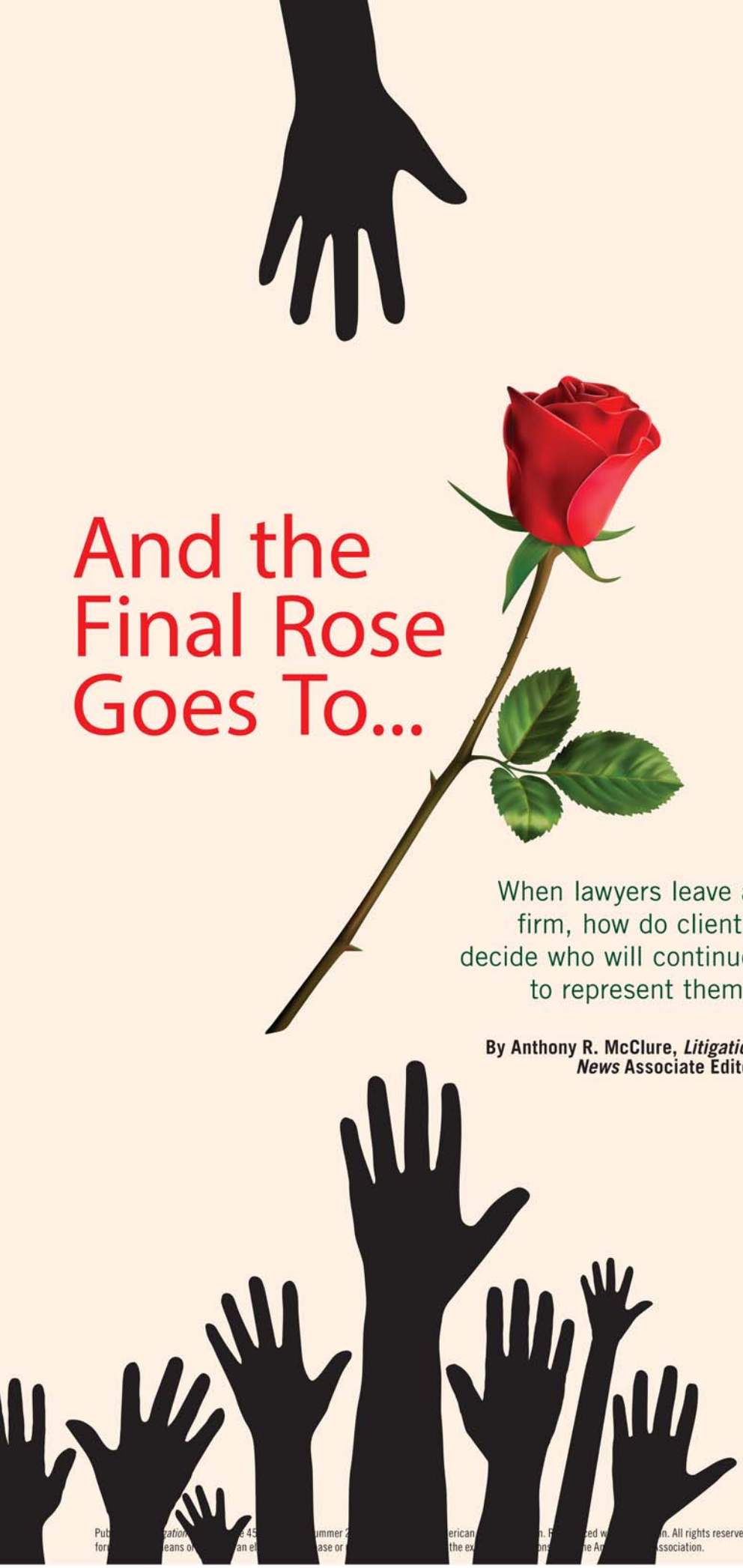

And the Final Rose Goes To...

When lawyers leave a firm, how do clients decide who will continue to represent them?

By Anthony R. McClure, *Litigation News* Associate Editor

PERHAPS NOW MORE THAN EVER in today's ever-changing economy, issues relating to lawyers transitioning between firms are top of mind. A state bar committee on professional responsibility has issued an opinion on the "ethical obligations that arise when a lawyer departs from her law firm." This opinion provides that, above all else, the primary directive is that the client's interests must come first, the client has the right to the counsel of his or her choice, and lawyers must protect their clients' interests during all phases of any transition.

In Formal Opinion No. 2020-201, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California recognizes that "[l]awyer mobility is a reality in today's legal marketplace" and that the news is filled with stories of transitions that are "accompanied by tales of acrimony or contentiousness between the departing lawyer(s) and the former law firm." The opinion thus identifies multiple ethical principles for lawyers and their firms to follow during any such transition.

The opinion first identifies a fundamental principle: clients are not the property of any law firm or lawyer. As a result, the guiding ethical principles governing any attorney departure are the protection of the client's best interests and the client's right to the counsel of his or her choice. And above all else, "the client's interest always remains paramount."

Duty to Communicate

The opinion discusses the mutual obligations of both the departing lawyer and the former law firm to "inform certain clients about [the lawyer's] departure as soon as reasonably practical to allow clients to make an informed choice in counsel and to provide for a smooth transition to avoid prejudice to clients." The general test of whether a client should be informed of a lawyer's departure is to consider it from the client's point of view, according to the opinion, because communications should always be governed by the overall principle of what is in the best interest of the client.

On the question of *when* clients should be told of the lawyer's departure, the opinion suggests a reasonableness standard. Although this

question is often fact specific, any suggestion that the departing lawyer should be compelled to wait to notify clients until after leaving the law firm has been widely rejected, according to the opinion. On the other hand, generally speaking, the departing lawyer should not tell clients about the decision to leave until after telling the law firm.

As to the form of the communication to the client, the law firm and departing lawyer should attempt to agree upon and provide a joint written notice to relevant clients. If the parties cannot agree on a joint notice, unilateral notice is ethically permissible and may be required in some circumstances. And although it is not essential that *both* parties inform the client, "if one fails to notify a client, or refuses to do so, the other one must."

The opinion identifies various categories of information that should be provided in the client notice, including the timing of the departure, where the departing lawyer is going, the ability and willingness of either side to continue with the representation, the client's options, and location of the client's file. When the notice is unilateral, however, one side should be cautious about opining on the ability of the other side to handle the matter, as "[m]aking such statements poses a risk that the information could be false or misleading."

Solicitation Is Permitted Within Limits

The opinion provides that when the departing lawyer has a "prior professional relationship" with the client, that lawyer is ethically permitted to solicit that client in compliance with the appropriate ethical rules and statutes. Under no circumstances, however, should a lawyer attempt to keep a client by imposing conditions on how or when the client can leave the firm, transfer matters, or receive files.

On whether solicitation is permissible before the lawyer actually departs, the opinion concedes this to be an "open question that is likely to be a very fact-specific inquiry." The opinion notes, however, that prohibiting lawyers who have already given notice to the law firm of the departure from properly soliciting clients and competing for clients on equal footing with the law firm could undermine client choice.

Although protecting client confidences is always an important obligation of any lawyer, this duty often is implicated when a departing lawyer must check for conflicts with a potential new law firm. The opinion recognizes an "obvious tension between the duty to maintain client confidences and the duty to avoid conflicts of interests with clients," but it declined to address the issue of whether and under what circumstances information protected by the duty to maintain confidences can be provided in order to permit a conflict check.

Avoiding a "Custody Battle"

"The key takeaway from this opinion," says Michael S. LeBoff, Newport Beach, CA, cochair of the ABA Section of Litigation's Professional Liability Litigation Committee, is that the committee "doesn't want the client to be caught in the middle of some type of custody battle between the law firm and the departing attorney." The ultimate "custody" of the client must be based on the client's interests, not the lawyer's or the firm's. "The committee wants to make sure the departing attorney and the law firm's own economic interests come second to the interests of the client," says LeBoff.

Lawyers and firms positioning to take or keep clients may soon become an even more crucial issue. "This opinion is extremely timely given the current pandemic, which will no doubt result in many firms downsizing and/or reorganizing," says Jeanne M. Huey, Dallas, TX, newsletter & web editor for the Section of Litigation's Ethics & Professionalism Committee. "Every firm should create or update its policies and procedures manual to address each step involved when either a lawyer or a client leaves the firm and make sure that all employees understand and follow those procedures," she advises.

Huey makes another important point about these uncertain times: "The reminder that the client's interest remains paramount takes on even more import when times are hard, and lawyers may become desperate to keep clients (or leave the firm and take clients with them) so that they can feed their families," she predicts. "But we must always remember that lawyers are different, and we must maintain our professional standards regardless of what the rest of the world may be doing."

Missed Opportunity and Open Questions

Although the opinion is a "good general discussion" of many ethics rules, "it neglects to address the complex issue of confidentiality under ABA Rule 1.6 with respect to conflict checks, a rule that applies to everyone involved—the current firm, the lawyer, and the receiving firm," observes Huey. "Thankfully," she notes, "we have ABA ethics opinions to fill in the blanks," including ABA Opinion 455 (2009), ABA Opinion 471 (2015), ABA Opinion 480 (2018), and ABA Opinion 489 (2019).

Although the committee warns against one side unilaterally opining to the client about the other, LeBoff sees an interesting quandary. "Are you allowed to, and do you have an obligation to," posits LeBoff, "share negative information about the departing lawyer or the law firm, to the extent that the information would be relevant to a client's decision on whom to maintain as his or her attorney?" He adds, "Do you have to air that dirty laundry to the client? I'd be very hesitant to do that, but the opinion seems to suggest there may be an obligation."

Huey cautions both lawyers and firms to be prudent when making a pitch to the client. "If the firm and the departing lawyer both make it uncomfortable or difficult for the client to make a decision, or the client feels pressured to do something it may not really want to do because of relationships with the firm, both the lawyer and the firm may lose," she warns. LN

RELATED RESOURCES

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Intentional Spoliation Causes a Purple Rain of Sanctions

By Benjamin E. Long, *Litigation News* Associate Editor

A federal court has ordered monetary spoliation sanctions against a record label for its intentional failure to preserve text messages and the destruction of mobile phones in a copyright dispute with the estate of musician Prince. The court also awarded attorney fees and costs, and reserved judgment on additional sanctions such as an adverse-inference jury instruction. ABA Section of Litigation leaders urge companies to have clear policies regarding preservation of employees' texts when litigation is possible.

Rogue Music Alliance (RMA) and its two principals partnered with Prince's former sound engineer to publish some of the artist's unreleased music. One of the principals, Staley, sent an email on February 11, 2017, stating that he was going to release the music. That email also reflected the principal's recognition that the Prince estate might sue them over the release.

The Prince estate learned about the planned release and, as Staley had predicted, sued the engineer, RMA, and the principals, among others. The court issued a pretrial order requiring the parties to preserve all relevant electronically stored information (ESI). The court warned that failure to do so could result in fines, awards of attorney fees, and other relief.

The plaintiff sent document requests to the defendants for any communications relating to the music. The defendants revealed that the principals had not disengaged the autodelete function on their phones, thereby causing texts to be deleted. Further, one principal had wiped and discarded his phone in October 2017, and the other had wiped and discarded his phone twice—in January and May 2018. All of this occurred several months after the court had entered its pretrial order commanding the preservation of ESI, and no relevant data had been backed up.

The plaintiff moved for sanctions under Federal Rule of Civil Procedure 37. It argued that the defendants had intentionally deprived it of the text messages in violation of Rule 37(e)(2) and that it was prejudiced as described in Rule 37(e)(1). Additionally, the plaintiff alleged that the defendants had failed to follow the pretrial order in violation of that order and Rule 37(b).

The court first noted that Rule 37(e) requires parties to take reasonable steps to preserve relevant ESI when litigation is anticipated. In this case, the court found that the defendants' duty to preserve arose no later than February 11, 2017, when the principal sent the first email, as it showed his awareness that litigation was possible. The court stated that the usual course is for a party to "suspend its routine document retention/destruction policy and put in place a litigation hold," but that the defendants failed to suspend the autodelete function on their phones. The court found the most egregious aspect to be that the defendants had destroyed their phones after litigation began and, for one of the principals, after the court had ordered that ESI be preserved.

The court concluded that the plaintiff was now forced to piece together existing discovery to determine what information might be in the missing texts, and may be prevented from presenting relevant evidence. Therefore, the court found that the plaintiff was prejudiced and sanctions were appropriate under Rule 37(e)(1).

The court also determined that the defendants intentionally deprived the plaintiffs of the texts. Had the defendants just forgotten to turn off the autodelete function on their phones, that action may likely have been merely negligent. But because the defendants also purposely wiped and discarded their phones, their actions were intentional, and sanctions were appropriate under Rule 37(e)(2). The court ordered the defendants to pay a $10,000 fine, attorney fees, and costs to the plaintiff.

Section of Litigation leaders consider this sanction tough but warranted. "I would call $10,000 a significant Rule 37 sanction," says Robert K. Dixon, San Diego, CA, cochair of the Section's Diversity & Inclusion Committee. "Because of the intentional acts by the parties, the court likely perceived this as a cover-up. It is rare that a court recognizes that a party engaged in intentional acts, as it did in this case," observes Dixon.

Good data retention policies are key to avoiding a similar fate. "Companies should have defined policies when it comes to communicating by texts," advises Zachary G. Newman, New York, NY, cochair of the Section's Corporate Counsel Committee. "It is important to be able to search and secure subject-specific text messages when a legal dispute is reasonably foreseeable," he adds. While the best practice would be to preserve the actual devices being used to send text messages, this may be challenging for companies that allow employees to use their personal devices, recognizes Newman. In any case, the underlying data of texts relating to the business should be preserved, he cautions. LN

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Self-Serving Retainer Agreement Leads to Attorney Withdrawal

By Susan F. Dent, *Litigation News* Contributing Editor

A federal court ruling has provided new ethics guidance on contingency fee agreements, holding that when an attorney's pecuniary benefit comes at the expense of his or her client's recovery, such an agreement may present an impermissible conflict of interest.

In *Gamble v. Kaiser Foundation Health Plan, Inc.*, the U.S. District Court for the Northern District of California considered whether a retainer agreement that (1) characterized client recovery as property of an attorney, (2) expressly assigned negotiation rights for said fees, and (3) required clients to pay twice the attorney's Lodestar fee if attorney fees were waived as part of settlement presented an impermissible conflict of interest that runs afoul of California ethics rules.

In response to the defendant's allegations of ethical impropriety, the plaintiffs in *Gamble* brought a motion pursuant to Federal Rule of Civil Procedure 16 and the court's inherent power to control the conduct of the attorneys that appear before it. As the court described it, the plaintiffs sought an order "dictating in advance the parameters of any settlement negotiations with defendants," and asked the court to "give its imprimatur to plaintiffs' counsel's fee agreement and confirm that it poses no conflict of interest with the named plaintiffs or the class."

The court found the above provisions created an inherent conflict of interest between the attorney and his clients, thus necessitating his withdrawal and staying the entire proceeding pending retention of new counsel.

Under Rule 23 of the Federal Rules of Civil Procedure, the court has an obligation to evaluate putative class counsel, ensuring no conflicts of interest with class members. In order to evaluate an attorney's fitness, Rule 23(g) permits the court to "order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs" to determine if any potential conflicts exist.

In support of its finding that the three provisions presented an ethical conflict, the court relied on California State Bar Formal Ethics Opinion No. 2009-176, which provides that "[a] lawyer is ethically obligated to inform a client that the client possesses, and can waive, the right to seek an award of statutory attorney's fees as a condition of settlement even though it may result in the lawyer not receiving remuneration for services performed" and "[a] lawyer is ethically obligated to consummate a settlement in accordance with the client's wishes and cannot veto a settlement simply because it includes a fee waiver."

The court reasoned that, by these standards, the notion that the attorney may reject a settlement offer because the attorney fees are insufficient is contrary to California ethics rules.

The court further expressed that California recognizes an "inherent conflict of interest" when a plaintiff's attorney insists on negotiating the amount of damages payable to the plaintiff separately from the award of attorney fees.

As to the third provision, the court found the retainer agreement, requiring settlement of attorney fees to be negotiated separately from damages (and, thus, forfeiting the client's ability to pay fees on a contingency basis), would result in clients owing the attorney double his Lodestar rate (time spent on the case multiplied by hourly rate).

ABA Section of Litigation leaders find the *Gamble* ruling, despite its harsh outcome on plaintiffs' counsel, to align with standard practices. "Lawyers have been representing classes in Rule 23 cases for decades and have managed to avoid ethical conflicts over fees," opines John M. Barkett, Miami, FL, cochair of the Section of Litigation's Ethics & Professionalism Committee. "I do not see this opinion changing anything. To the contrary, this opinion should help class counsel design a fee agreement that is ethically compliant."

Further expanding on this point, Adam Polk, San Francisco, CA, cochair of the Section's Class Action & Derivate Suits Committee, adds: "The scrutiny courts give to fee requests in class action settlements under Rule 23(e) is, in my experience, a sufficient procedural safeguard that properly balances the interests of the class in not paying a windfall, against the fair compensation of class counsel, who have oftentimes invested in the case and borne the risk of litigation for the class's benefit with no guarantee of recovery."

Although the court in *Gamble* recognized the unusual nature of the motion, Barkett believes its order created a valuable tool for class action counsel when drafting retainer agreements. "Where statutory fees are awardable if a plaintiff prevails in a claim, lawyers need to know the applicable law and ethics opinions, then draft a retainer agreement that is consistent with the law and ethics opinions, that results in a fair and reasonable fee," concludes Barkett. LN

RESOURCES

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- Joel B. Rosen & R. Monica Hennessy, "Rule 16, the Litigator's Forgotten Ally," *Litig.* (Summer 2008).

Ethical Obligations When Seeking Advice and Counsel

By Josephine M. Bahn, *Litigation News* Associate Editor

A bar ethics committee has determined that attorneys must disclose consultations with other attorneys in certain circumstances. According to the State Bar of California Standing Committee on Professional Responsibility and Conduct, when attorneys have questions regarding ethical obligations, they should seek the advice of another attorney, but doing so does not create an ethical conflict with the client. However, each decision is fact based and depends on the individual consultation to determine if a material development requiring disclosure occurs.

ABA Section of Litigation leaders say the committee's rule interpretation serves as a reminder to lawyers to maintain compliance with professional conduct rules and that, during these consultations, lawyers should only disclose client-specific information that is necessary, to ensure compliance with the rules.

Finding that attorneys should seek ethical guidance from fellow attorneys, the opinion analyzes rules related to communication with and loyalty to clients. In the committee's Formal Opinion No. 2019-197, the committee described two hypothetical situations where a lawyer sought ethics advice from outside counsel on two issues. In the first issue, the lawyer sought guidance regarding ethical obligations in discovery, while in the second, the lawyer requested an opinion on whether a statute of limitations on a cross-complaint had run.

For the first scenario, the committee stated that the lawyer followed the advice of outside counsel and described next steps in discovery to the client. In the second scenario, the lawyer again followed the outside counsel's suggestion and informed the client of a missed statute-of-limitations date. Because of the missed date, a conflict of interest was created, thereby requiring the client to execute an informed written consent in order for the lawyer to continue representation.

The ethics committee discussed whether the lawyer had met ethical obligations, including the duty to disclose to the client that an opinion from outside counsel was sought. In analyzing the first scenario, the committee concluded that obtaining advice about ethical compliance with discovery requests does not create a conflict of interest with clients. In the second scenario, the committee found that when lawyers seek advice relating to how best to address a potential conflict with a client, they do not necessarily need to disclose the request to their client. However, in further analyzing the second scenario, the committee found that the lawyer was obligated to disclose the information once it was determined that the lawyer had committed a prejudicial error.

The committee provided lawyers with a road map to follow when they believe a prejudicial error has occurred: First, consider whether it is possible to ethically continue to represent the client or if withdrawal is necessary. Second, cease to represent the client unless it is possible to provide competent, diligent representation. Third, inform the client of the facts of the prejudicial error and the resulting conflict of interest. Fourth, advise the client to seek independent counsel regarding the lawyer's continuation of representation. And, finally, have the client execute an informed, written consent before continuing the representation.

Section of Litigation leaders applaud the committee's guidance on disclosing ethical consultations. By taking a moderate approach, the committee allowed lawyers to seek advice in making ethical determinations, notes Janice V. Arellano, Bridgewater, NJ, cochair of the Section's Minority Trial Lawyer Committee. The panel struck a reasonable balance by creating a road map for lawyers to follow, she adds.

"Certainly if a law firm consults outside counsel under an attorney-client relationship, the privilege would apply to those communications. But as a result of the advice rendered, the law firm may need to take actions like informing the client about the topic that was the reason for the outside counsel consultation," opines John M. Barkett, Miami, FL, cochair of the Section's Ethics & Professionalism Committee.

The ethics panel "permits lawyers to comply with ethical rules without needing to disclose any more client information than is necessary," observes Nicole M. Reid, Miami, FL, cochair of the Section's Professional Liability Litigation Committee's Attorneys' Liability Subcommittee.

The committee's opinion helps lawyers determine when disclosure is necessary and the steps needed to receive adequate informed consent. "[When] consulting outside counsel, there should be a formal engagement with an identified scope of representation that makes it clear that there is an attorney-client relationship, and then the discussions with outside counsel should be confidential and that confidentiality should be maintained," explains Barkett.

"When consulting with in-house general counsel, I would recommend, though it may not be necessary, to follow a protocol where a request for legal advice is documented by memoranda or email, and the response is treated by the firm as rendering legal advice by ensuring confidentiality and by limiting distribution within the firm to those with a need to know in order to manage the law firm," Barkett counsels. LN

Digital versions of all Ethics stories, including links to resources and authorities, are available at http://bit.ly/LN-ethics.

+ Justice Department Invokes Arbitration in Merger Dispute
+ Court Refuses Again to Extend *Bivens* Remedy
+ Congress Cannot Revoke States' Immunity in Copyright Suits

AND MORE . . . BY STEVEN J. MINTZ, *LITIGATION NEWS* ASSOCIATE EDITOR

EXECUTIVE BRANCH

Antitrust/Arbitration

The Antitrust Division of the Justice Department, for the first time, used its authority under the Administrative Dispute Resolution Act of 1996 (5 U.S.C. §§ 571 et seq.) to resolve a merger dispute by binding arbitration. The government filed a civil antitrust suit in the Northern District of Ohio to block the proposed acquisition of Aleris Corp. by Novelis, Inc., but also reached an agreement with the defendants to refer the matter to binding arbitration if the parties were unable to resolve the government's competition concerns within a specified time period. After fact discovery supervised by the court, the arbitrator held a 10-day hearing to resolve the issue of whether aluminum auto body sheet constitutes a relevant product market under the antitrust laws.

U.S. SUPREME COURT/ JUDICIARY

Age Discrimination/Federal Employment

The Court held that the federal sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633(a), requires that personnel actions "be untainted by any consideration of age." With respect to certain remedies, however, a plaintiff must show that age was a "but-for cause of the challenged employment decision." If age discrimination played a less than but-for part in the decision, forward-looking remedies like injunctive relief may be appropriate. *Babb v. Wilkie*, No. 18-882.

Bivens Actions

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court recognized an implied damages remedy under the U.S. Constitution to compensate persons injured by federal officers who violated the Fourth Amendment prohibition against unreasonable searches and seizures. The Court now holds that *Bivens* does not extend to claims based on a cross-border shooting. *Hernandez v. Mesa*, No. 17-1678.

Copyright

The Court held that the Constitution does not give Congress the power to revoke the states' immunity from suit for copyright infringement. *Allen v. Cooper*, No. 18-877.

Criminal Law/Plain Error

The Court held that the Fifth Circuit's practice—unique among the federal circuits—of refusing to review certain unpreserved factual arguments for plain error is not supported by Fed. R. Crim. P. 52(b) and has no other legal basis. *Davis v. United States*, No. 19-5421.

Criminal Law/Sentencing

The Court held that a defendant who requests a specific sentence during a sentencing hearing need not object to a longer sentence after its pronouncement in order to preserve a challenge to the sentence's substantive reasonableness on appeal. *Holguin-Hernandez v. United States*, No. 18-7739.

ERISA/Limitations

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1113(2), requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge. The Court held that a plaintiff does not necessarily have "actual knowledge" of the information contained in disclosures that he or she receives but does not read or cannot recall reading. To meet the "actual knowledge" requirement, a plaintiff must in fact have become aware of the information. *Intel Corp. Investment Policy Committee v. Sulyma*, No. 18-1116.

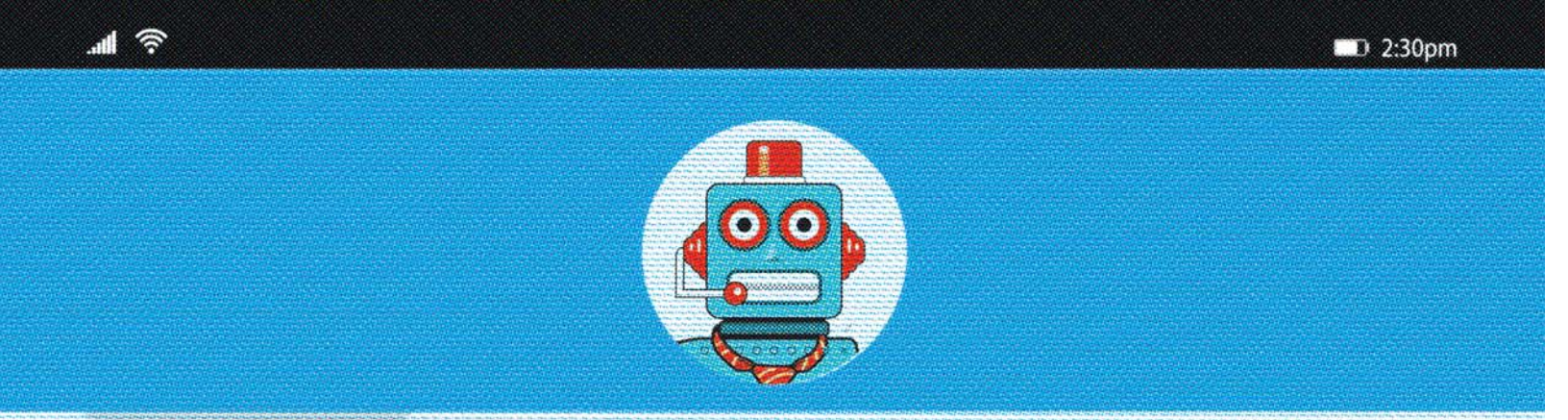
Immigration

The Court held that the phrase "questions of law" in 8 U.S.C. § 1252(a)(2)(D), which permits judicial review of a narrow category of issues in government orders directing the removal of aliens, includes the application of a legal standard to undisputed facts. As applied to this case, that holding means that a request for equitable tolling of the deadline to file a statutory motion to reopen deportation cases is judicially reviewable. *Guerrero-Lasprilla v. Barr*, No. 18-776.

Racial Discrimination

The Court held that a plaintiff suing under 42 U.S.C. § 1981 (part of the Civil Rights Act of 1866), which guarantees equal protection in contracting, bears the burden of showing that race was a but-for cause of its injury. *Comcast Corp. v. National Ass'n of African-American-Owned Media*, No. 18-1171.

Steven J. Mintz is leaving the Litigation News *editorial board after 16 years of dedicated service to the magazine. We are thankful for his many contributions, including the 12 years he diligently wrote* Keeping Watch. *We wish him well in the future.*



Courts Answer Call to Interpret TCPA's Autodialer Provision

But a circuit split leaves a mixed message.

By Onika K. Williams
Litigation News
Associate Editor

Receiving unwanted automated text messages can constitute a concrete injury for standing to sue under the Telephone Consumer Protection Act (TCPA), but a violation does not occur unless the equipment that sends the text messages actually violates the statute, according to the U.S. Court of Appeals for the Seventh Circuit. In *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit is another appellate court to weigh in on (1) standing to sue under the TCPA and (2) what equipment qualifies as an "automatic telephone dialing system," or autodialer, in violation of the TCPA. *Gadelhak* adds to existing circuit splits regarding standing and autodialer interpretation under the TCPA. ABA Section of Litigation leaders suggest that the TCPA standing and interpretation issues are now ripe for U.S. Supreme Court review.

Five Unwanted Text Messages Lead to Class Action

The conflict in *Gadelhak* began when Ali Gadelhak received five text messages from AT&T asking him to complete survey questions in Spanish. AT&T uses a device called "Customer Rules Feedback Tool" to send surveys to customers who have interacted with its customer service representatives. Gadelhak was not an AT&T customer and did not speak Spanish. Annoyed by the text messages, Gadelhak filed a putative class action suit against AT&T for violating the TCPA, which Congress enacted in 1991 to restrict, with some exceptions, telemarketing calls, use of an "automatic telephone dialing system," and artificial or prerecorded voice messages.

Under the TCPA, an "automatic telephone dialing system" is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." The defendants may have to pay damages of $500 for each negligent violation and $1,500 for each willful violation. The U.S. District Court for the Northern District of Illinois granted summary judgment in favor of AT&T, ruling that its system is not an autodialer under the TCPA because it lacks the capacity to generate random or sequential numbers.

Gadelhak and the class of consumers appealed to the Seventh Circuit, which affirmed the district court's judgment. Although it adopted a different interpretation of the statute, the Seventh Circuit agreed that the ability to generate random or sequential numbers is necessary for a system to be classified as an autodialer under the TCPA.

Circuit Courts Split over TCPA Standing

When the TCPA was passed, telemarketers mainly used systems that randomly generated numbers and dialed them. These systems are prohibited under the TCPA. However, AT&T's system does not randomly generate numbers. Instead, like others used today, it dials numbers from an existing database of customer information. AT&T contended that Gadelhak received messages because of a typographical error. Determining whether AT&T's system and others like it are prohibited under the TCPA has forced courts to grapple with the language of the statute. Specifically, courts must decide what the phrase "using a random or sequential number generator" modifies, and the interpretations of this provision have split the circuits.

Before analyzing the language of the statute, the Seventh Circuit examined Gadelhak's standing to bring suit under the TCPA. Article III, section 2 of the U.S. Constitution limits federal judicial power to "Cases" and "Controversies." To bring suit in federal court, a plaintiff must have Article III standing. In *Spokeo, Inc. v. Robins*, the U.S. Supreme Court stated that "Article III standing requires a concrete injury even in the context of a statutory violation." The Court explained that a "concrete" injury is "real" and not "abstract"; in other words, "it must actually exist."

This question of standing under the TCPA has brought division among the federal appellate courts. For instance, in *Salcedo v. Hanna*, the U.S. Court of Appeals for the Eleventh Circuit held that the receipt of an unwanted automated text message is not a "concrete" injury. On the other hand, the U.S. Court of Appeals for the Second Circuit in *Melito v. Experian Marketing Solutions, Inc.*, and the U.S. Court of Appeals for the Ninth Circuit in *Van Patten v. Vertical Fitness Group, LLC*, determined that receipt of unsolicited text messages is sufficient to demonstrate Article III standing.

The *Gadelhak* panel explained that it looked to history and Congress's judgment to determine whether AT&T's texts to Gadelhak caused concrete harm. The Seventh Circuit wrote that common law has long considered invading the privacy of another to be a tort of "intrusion upon seclusion." While the *Salcedo* court suggested the tort of intrusion upon seclusion pertained to acts like eavesdropping and spying, the Seventh Circuit disagreed. The *Gadelhak* court concluded that irritating intrusions, such as repeated and frequent telephone calls from a defendant to a plaintiff, would also qualify and that the harm caused by unwanted text messages is analogous to this type of invasion of privacy.

Irritating intrusions, such as repeated telephone calls, would qualify as an "intrusion upon seclusion." Unwanted text messages are analogous to this type of invasion of privacy.

As to Congress's judgment, the *Gadelhak* court explained that it followed *Spokeo* and looked for a close relationship in kind, and not degree, to analogize harms recognized by common law. The *Salcedo* court treated the receipt of unwanted text messages as abstract because common law courts generally require a greater imposition on privacy, such as receiving many calls, to find liability

Photo illustration by Elmarie Jara © Getty Images

for an intrusion upon seclusion. The *Gadelhak* panel disagreed and concluded that while several unwanted automated text messages may not be intrusive enough to be actionable under common law, unwanted text messages pose the same kind of harm recognized by common law courts, and Congress has chosen to make such harm actionable.

Definition of "Autodialer" Unclear

After determining Gadelhak had standing to bring suit under the TCPA, the Seventh Circuit turned to the merits of the case. That court had previously addressed the definition of "autodialer" in *Blow v. Bijora*. At that time, however, a 2015 order by the Federal Communications Commission (FCC) was in effect and provided interpretative guidance on several aspects of the TCPA, including a determination that equipment with the capacity to store or produce, and dial random or sequential numbers, met the TCPA's definition of an "autodialer." As a result, the *Blow* court was required to adopt the FCC's interpretation of an autodialer.

The FCC's 2015 order that *Blow* deferred to was later appealed to the U.S. Court of Appeals for the District of Columbia. In *ACA International v. FCC*, the D.C. Circuit ruled that the FCC's interpretation of an autodialer was too broad, as all smartphones could qualify as autodialers if certain mobile applications were downloaded. Because the D.C. Circuit struck down the FCC's interpretation of an autodialer, the *Gadelhak* court was not constrained by *Blow* and was able to interpret the TCPA's text.

> "It is rather amazing that four federal appellate courts—the second highest courts in the federal system—have all had to explain the definition of an 'automatic telephone dialing system.'"

The *Gadelhak* panel identified four ways to interpret the meaning of "automatic telephone dialing system," depending on what word or words the reader believed the phrase "using a random or sequential number generator" modified. Under the first interpretation, "using a random or sequential number generator" modified both "store" and "produce," which would mean a system must be able to store or produce telephone numbers using a random or sequential number generator to qualify as an autodialer.

This is the interpretation that AT&T advocated. This interpretation excluded AT&T's system because it is unable to store or produce telephone numbers using a number generator. AT&T's system only dials telephone numbers from its customer database. This interpretation of "using a random or sequential number generator" was also adopted by the U.S. Court of Appeals for the Third Circuit in *Dominguez v. Yahoo, Inc.*, and the Eleventh Circuit in *Glasser v. Hilton Grand Vacations Co.*

The *Gadelhak* court explained that when the conjoined verbs "to store or produce" share the direct object "telephone numbers to be called," the modifier that follows said object, "using a random or sequential number generator," modifies both of the verbs. The court thought this interpretation made sense because of the provision's sentence structure. The comma before "using a random or sequential number generator" suggested the modifier applies to the preceding clause—"to store or produce telephone numbers to be called."

However, the *Gadelhak* court also pointed out that this interpretation had some problems. Most notable was the question of how a number generator stores telephone numbers. AT&T argued that a device that generates random numbers to dial does store numbers for a short period of time before those numbers are called. The court pointed out that, at the time of the TCPA's enactment, devices with the capacity to generate random numbers stored them in files for a significant period before dialing. The capacity to store numbers was more central to that type of device.

Under the second interpretation, "using a random or sequential number generator" modified the "telephone numbers" dialed. This is the interpretation the district court in *Gadelhak* had adopted. Under this interpretation, "using a random or sequential number generator" described the way telephone numbers are generated. Because AT&T's system cannot generate random numbers, but rather dials existing customer numbers, the district court held that the system was not an autodialer.

The Seventh Circuit noted that this interpretation also had structural problems. The phrase "using a random or sequential number generator" described how something should be done and cannot modify a noun in this context. To decide upon this interpretation, the court concluded that the district court had read the word "generated" into the phrase "[generated] using a random or sequential number generator." The *Gadelhak* panel explained that while this interpretation is tempting, it is not the court's task to add words to the written statute; therefore, this interpretation was not a viable option.

The third interpretation of "using a random or sequential number generator" was that it modified only the verb "produce." Gadelhak himself advocated for this interpretation, which was also adopted by the Ninth Circuit in *Marks v. Crunch San Diego*. Under this construction, equipment that can randomly or sequentially produce telephone numbers qualifies as an autodialer, but so would any equipment that had the capacity to store and dial numbers. The *Gadelhak* court explained that this interpretation does not have the problems that the first interpretation has with the word "store," and it also does not add words to the statute like the second interpretation.

However, this interpretation has several of its own issues. Among them, it required an unnatural reading of the text to apply "telephone numbers to be called" to both "store" and "produce" but only apply "using a random or sequential number generator" to "produce" when the provision says "to store or produce." Additionally, the court observed, this interpretation

was so broad and far-reaching, "it would create liability for every text message sent from an iPhone." The court concluded this interpretation was too expansive.

Under the fourth interpretation, "using a random or sequential number generator" modified how the numbers are "to be called." The court explained that under this interpretation, devices that can store or produce telephone numbers that will be dialed by a random or sequential number generator is an autodialer. No party in *Gadelhak* advanced this interpretation, and no courts have accepted it. The court concluded that this interpretation is problematic for several reasons, including omitting the comma between "to be called" and "using a random or sequential number generator" when the comma indicates "using a random or sequential number generator" should "apply to all of the antecedents instead of only to the immediately preceding one."

After exploring all the options, the Seventh Circuit concluded that the first interpretation, while flawed, lacked the more serious problems of the other three and was the best reading of this seemingly confusing provision.

Supreme Court Review of TCPA Is Inevitable

Section of Litigation leaders agree that Supreme Court review of these issues appears to be inevitable. "It is rather amazing that four federal appellate courts—the second highest courts in the federal system—have all had to explain the statutory definition of an 'automatic telephone dialing system,'" observes Bradford S. Babbitt, Hartford, CT, cochair of the Section's Commercial & Business Litigation Committee. In fact, the Second Circuit recently entered the autodialer discussion with its ruling in *Duran v. La Boom Disco, Inc.*, declining to follow *Gadelhak* and instead agreeing with the Ninth Circuit's interpretation in *Marks*.

"Given the twin circuit splits on the standing and TCPA interpretation questions, these issues are ripe for Supreme Court review. The Court may, however, let the issues percolate in the circuit courts a bit longer before taking up either of these issues," predicts Mary-Christine "M.C." Sungaila, Costa Mesa, CA, cochair of the Section's Appellate Practice Committee.

Because standing and the definition of "autodialer" under the TCPA are current issues splitting the circuits, Section leaders suggest that practitioners examine standing in their cases and be familiar with the various circuit court rulings on these issues. "Since the Supreme Court's *Spokeo* decision, standing has become a 'hot issue' that all practitioners need to examine when faced with a claim involving a statutory violation," advises Sungaila. "In the context of claims arising under the TCPA's automatic telephone dialing system, for example, practitioners in the Eleventh Circuit can defend actions based on standing and the more limited reading of the TCPA.

"Given the twin circuit splits on the standing and TCPA interpretation questions, these issues are ripe for Supreme Court review. The Court may, however, let the issues percolate a bit longer before taking up either of them."

Practitioners in the Ninth Circuit, on the other hand, are bound by the Ninth Circuit's broader interpretations of both Article III standing and the scope of the TCPA's automatic telephone dialing system provision," concludes Sungaila. LN

RESOURCES

- Michael P. Daly & Mark D. Taticchi, "TCPA Takes Center Stage at the Supreme Court," *Consumer Litig.* (Feb. 11, 2020).
- Jason Kellogg, "Keeping Tabs on the Circuit Splits Post-*Spokeo*," *Class Actions & Derivative Suits* (Oct. 15, 2019).
- Mark E. Rooney, "The Evolving Definition of an Auto-Dialer under the TCPA," *Consumer Litig.* (Mar. 19, 2019).

HAVING YOUR ARBITRATION CLAUSE AND WAIVING IT, TOO

By Kelso L. Anderson,
Litigation News Associate Editor

Employers in service industries might reconsider class action waivers in arbitration agreements, or consider tailoring such agreements with employees or independent contractors to avoid paying costly arbitration fees, in light of the federal court decision in *Abernathy et al. v. DoorDash*. While employers have generally had success in limiting legal options for consumers and employees, according to ABA Section of Litigation leaders, the plaintiffs in arbitration may have found another way to make dispute resolution of class claims an expensive proposition for employers.

Contractual Terms Matter

In *Abernathy*, the plaintiffs were 5,879 employees or independent contractors who worked as couriers for the defendant, DoorDash,

Inc., a food delivery services company. To make deliveries for the defendant, the plaintiffs had to click through an online agreement that contained a "Mutual Arbitration Provision," which applied to "all disputes arising out of or relating to this Agreement, [including] a contractor's classification as an independent contractor." The parties who executed the agreement further agreed that "by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought … or participate in … a class action[,] collective action and/or representative action."

The agreement also provided that any party bound by its provisions would arbitrate disputes according to the terms of the Federal Arbitration Act (FAA), as administered by the American Arbitration Association (AAA). The AAA's commercial arbitration rules required that each individual plaintiff pay a filing fee of $300, and the responding company pay $1,900 per arbitration. The AAA imposed a deadline on the defendant to pay its portion of the filing fees based on the arbitration demands by the plaintiffs. However, the defendant argued that the plaintiffs' filings were deficient, and it was therefore not obligated to tender the $12 million in administrative fees resulting from the individual plaintiffs' arbitration demands.

Application of Arbitration Law

The plaintiffs filed a motion in the district court to compel arbitration of claims that they were improperly classified as independent contractors instead of employees, in violation of state and federal labor laws. The district court began its analysis by citing the FAA provisions that required the court to determine whether a valid arbitration exists and, if so, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

The court concluded that of the 5,879 plaintiffs who demanded arbitration, only 5,010 had valid claims because 869 of the plaintiffs did not submit declarations as required to support their position that they were hired by the defendant. Those plaintiffs merely submitted unsworn witness statements. Counsel for the defendant also raised the issue of whether the plaintiffs' counsel had requisite authority to represent each plaintiff in arbitration, but the court determined that resolution of that issue would be left to the AAA. The court concluded, however, that if the plaintiffs' counsel overstated her authority, or if the plaintiffs had not perfected their right to arbitrate, then counsel would have to fully reimburse the defendant for all arbitration costs and attorney fees.

Parties' Intent Enforced

The court noted that "the employer-side and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waiver upon them too, thus taking away their ability to join collectively to vindicate common rights." That employers have successfully enforced class action waivers in arbitration agreements is settled law, thereby making the court's grant of the plaintiffs' motion to compel arbitration unsurprising.

"I do not regard the plaintiffs' actions as an end run around the class action waiver," says Mitchell L. Marinello, Chicago, IL, cochair of the Section of Litigation's Alternative Dispute Resolution Committee. "DoorDash created an agreement that required its employees to arbitrate all disputes and that prohibited class actions. It initially tried to enforce its agreement, and then, when a large number of employees filed arbitrations, it tried to back off its own agreement. The plaintiffs were merely taking advantage of what was available to them—and enforcing DoorDash's agreement as written."

The court's order was not only consistent with the plain language of the arbitration agreement but also with U.S. Supreme Court precedent, and it may prod a change in arbitration clauses in the future. "The Supreme Court's 2018 decision in *Epic Systems v. Lewis* opened the floodgates to class action waivers in arbitration agreements. But in this case, that broad license ran head-first into DoorDash's decision to incorporate the AAA's rules into its arbitration agreements," opines Henry R. Chalmers, Atlanta, GA, cochair of the Section's Alternative Dispute Resolution Committee.

"Rule 43 of the AAA's Employment Arbitration Rules provides that 'AAA fees shall be paid in accordance with the Costs of Arbitration,' and that fee schedule requires employers to pay all but $300 of the standard $2,200 filing fee, even if it is the employee who initiates the proceeding," Chalmers observes. Because of the AAA's fee-shifting rules, Chalmers speculates that *Abernathy* "may prompt employers to incorporate other administrative bodies' rules into their arbitration agreements."

Class Action Arbitration Ahead?

Given the substantial administrative fees that DoorDash may incur once arbitration is resolved, Section leaders see changes to arbitration clauses in the future. One potential resolution to the en masse arbitration sought in *Abernathy* is "a type of reverse 'blow-up' provision, akin to what you see in some class action settlements. That is, if there are a certain number of opt-outs, the settlement can be made null and void," opines Theodore W. Seitz, Lansing, MI, cochair of the Newsletter Subcommittee of the Section's Consumer Litigation Committee. "The response to these cases will not be to jettison arbitration agreements but to revise them to make it less likely that the plaintiffs' bar can use individual fees to encourage aggregate settlements," predicts Michael P. Daly, Philadelphia, PA, cochair of the Class Action Subcommittee of the Section's Consumer Litigation Committee.

Since cost-efficient dispute resolution is the goal of arbitration and class action waiver provisions, consumer attorneys are sanguine about the prospect of class action mechanisms coming back into play. "As a plaintiff's lawyer, I would use this case as a basis to get a defendant to waive its own arbitration provision and agree to a class action rather than individual arbitrations," ventures Andre F. Regard, Lexington, KY, cochair of the Class Action Subcommittee of the Section's Consumer Litigation Committee. "Alternatively, I hope that those drafting these agreements will consider class action arbitration, if the actual intended purpose of selecting arbitration is to streamline dispute resolution and to try to get the dispute in front of a neutral with some knowledge of the industry. In addition, a class action would eliminate inconsistent outcomes," Regard concludes. LN

RESOURCES

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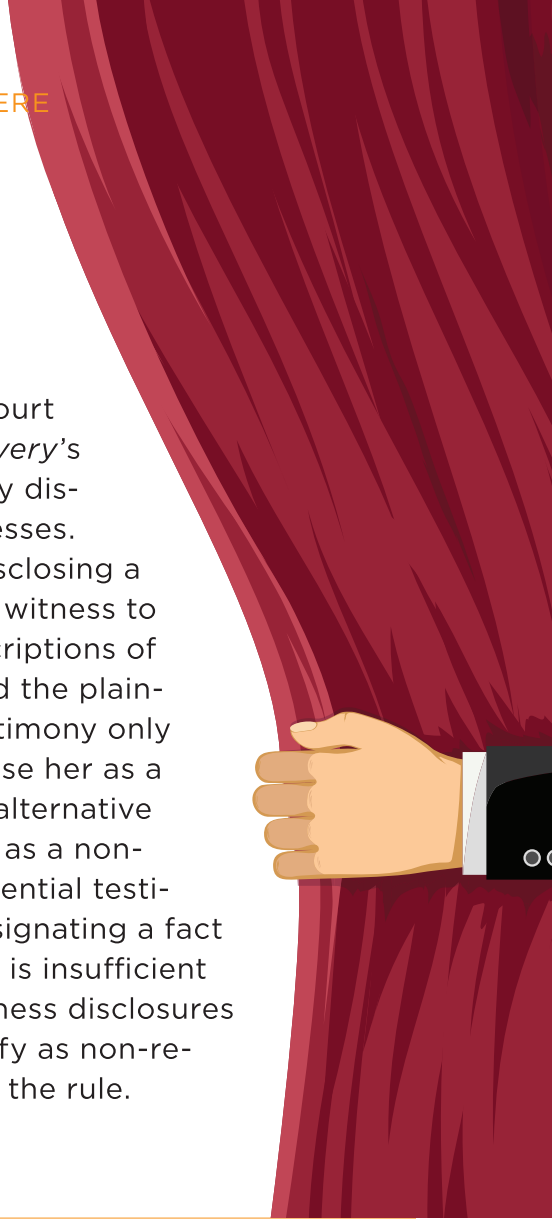
- Sara E. Costello, "Class Action Waivers Hang in the Balance," *Litigation News* (Feb. 12, 2017).

Explicitly Disclose Your Experts!



It pays to properly disclose experts. Reporting on the Utah Court of Appeals' decision in *Ghidotti v. Waldron*, *Compelling Discovery*'s Michael Lowry notes the plaintiffs argued they had adequately disclosed non-retained experts by identifying them as fact witnesses. The court disagreed: "This court has consistently held that disclosing a witness as a fact witness, by itself, is insufficient to allow that witness to also present expert testimony." The court delineated the descriptions of testimony required for fact versus expert witnesses and found the plaintiffs had produced a summary of their witness's expected testimony only as a fact witness. This was insufficient under Rule 26 to disclose her as a non-retained expert. Finally, the court rejected the plaintiffs' alternative argument that they had implicitly disclosed their fact witness as a non-retained expert when they disclosed the substance of her potential testimony through her deposition and financial documents. "[D]esignating a fact witness and also providing supplemental records or diagrams is insufficient to designate that witness as an expert." Lowry often sees witness disclosures with a generic paragraph noting fact witnesses may also testify as non-retained experts; he advises instead taking time to comply with the rule.

http://bit.ly/LN454-pn1

Judges' Affiliations Risk Threatening Impartiality

Federal judges should guard against even the appearance of compromised impartiality, according to an ethics opinion by the Committee on Codes of Conduct of the U.S. Judicial Conference. Covering the opinion for *Legal Ethics in Motion*, Tesneem Shraiteh reports the committee's determination that federal judges should refrain from becoming formally affiliated with the conservative Federalist Society or the liberal American Constitution Society. Such affiliations raise questions about judges' impartiality and are thus inconsistent with Canons 1, 2, 4, and 5 of the Code of Judicial Conduct. While the committee found that membership in the American Bar Association's Judicial Division does not necessarily raise the same questions, judges must remain vigilant in monitoring the division's activities in case the ABA takes a position that could necessitate recusal in a matter. The committee further clarified that judges may continue to accept speaking engagements with these organizations because speaking at an event does not equate to endorsement of an organization or its ideology. Judges must remain cognizant of their public comments, however, and avoid making statements that could call into question their impartiality. Finally, the committee advised these new guidelines should not apply retroactively to judges formerly affiliated with these organizations.

http://bit.ly/LN454-pn2

Lindsay Sestile, Litigation News *Associate Editor, monitors the blogosphere.*

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Don't Assume Privilege

Not everything exchanged between a lawyer and client will be protected by the attorney-client privilege. For *Presnell on Privileges*, Todd Presnell covers the Southern District of New York's decision in *Johnson-Harris v. United States*. In that case, the plaintiff prepared and forwarded to her lawyer a timeline of events. The lawyer then added some handwritten notes. When the plaintiff retained new counsel, the second lawyer found the timeline in the file but never identified it on a privilege log. During her deposition, when the plaintiff was asked whether she had notes about the events in the case, she identified the timeline. Importantly, she admitted her first lawyer had not asked her to prepare it; she thought it would assist him. The plaintiff moved for a privilege ruling without an affidavit supporting her claim. Instead, she argued defense counsel failed to elicit deposition testimony proving the absence of privilege. The court noted the party asserting the privilege has the burden to prove its existence and found the plaintiff had failed to do so. She had not listed the timeline on a privilege log, she did not support her motion by affidavit or other sworn document, and her deposition, standing alone, was "insufficient to carry the burden of the privilege." While the court permitted the plaintiff to redact her former counsel's marks and notes, it found the timeline itself contained only facts that were not themselves privileged. According to Presnell, this result could have been avoided had the plaintiff accepted her burden and proved through affidavit testimony that she provided the timeline to her lawyer as part of receiving legal advice.

http://bit.ly/LN454-pn3

Sixth Circuit Leaves *McDonnell-Douglas* Application Murky

Looking for clarity about whether the *McDonnell-Douglas* framework is procedural or substantive for purposes of *Erie* doctrine analysis? You won't find it in the Sixth Circuit's opinion in *Turner v. Marathon Petroleum Company, LP*, according to *Workplace Prof Blog*'s Sandra Sperino. Instead, the court held it did not need to resolve this question when analyzing a claim under the Kentucky Civil Rights Act because Kentucky courts have themselves long used the *McDonnell-Douglas* approach to resolve claims under state law. There was thus no conflict between federal and state law. Sperino counsels this issue may be less straightforward in some cases though, even where a state applies *McDonnell-Douglas* to its antidiscrimination statute. Because state and federal versions of *McDonnell-Douglas* have developed differently over time, some states apply a more restrictive or more expansive version of the analysis than used by federal courts. In fact, not only might there be conflict between state and federal versions, but there are circuit splits that have occurred over time on several different aspects of the test. Sperino advises being aware that "*McDonnell-Douglas* is not truly one unified test, but an umbrella term that describes many different tests."

http://bit.ly/LN454-pn4

Proposed Limited Practice of Law for 2020 Graduates

COVID-19 has disrupted life as lawyers know it, but what about for those on the precipice of entering our profession? *Excess of Democracy*'s Derek T. Muller reports the pandemic has generated calls for state bar licensing authorities to consider accommodations ahead of the scheduled July 2020 bar exam. Muller believes most state licensing authorities will offer a two-step approach. First, the bar exam may be delayed, perhaps into the fall or even as late as February 2021. Second, the state bar will offer more generous opportunities to engage in the limited supervised practice of law, at least until the applicant's first possible bar exam. This solution would extend the limited practice of law opportunities that already exist for recent law school graduates or those awaiting bar results to both in- and out-of-state graduates, JD and non-JD graduates, and even those already licensed in other jurisdictions. It would not, however, accommodate those who had previously failed the bar exam. According to Muller, this two-step proposal "is minimally disruptive to the status quo and allows recent graduates to quickly enter the working legal profession." Moreover, it still allows the state licensing authorities to measure minimum competence because the bar exam will remain in place, simply at a later date.

http://bit.ly/LN454-pn5

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Telephonic Hearings in a Pandemic

By Hon. Karen L. Stevenson, *Litigation News* Associate Editor

For weeks, in much of the country, lawyers have been under stay-at-home orders, where they have juggled ongoing legal work, family, kids, client needs, and their own health and well-being. It has not been easy. And despite the unprecedented disruptions, litigation does not stop. That means hearings have also not ceased entirely.

Federal courts around the country have had to quickly adapt to the disruption caused by the COVID-19 pandemic. Here in the Central District of California, judges, law clerks, and court staff are largely working remotely. The federal courthouse is closed to the general public but remains open for essential proceedings, including criminal and emergency civil matters. That said, many, but not all, civil deadlines and motion calendars have been continued. There are still occasions where civil hearings must be held, and those are going forward telephonically. Here are some tips to master oral argument in this unique setting during and *after* the pandemic.

Logistics, Logistics, Logistics

First priority: be clear about the logistics. Due to the COVID-19 pandemic, many federal judges, including myself, have modified our procedures for civil matters. These modified procedures, along with general orders of the district that set out special procedures during the pandemic, are available on the district's public website. Read them carefully. In my chambers, a few days before the hearing, my courtroom deputy will email all counsel of record with a secure conference call number and access code. If your judge notifies you that the court intends to hold a telephonic hearing and you have not received the dial-in information, contact the judge's courtroom deputy via the chambers email (also listed on the website) to seek clarification.

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Next, a telephonic court hearing is not at all like the many Zoom meetings you likely have attended during this time. There will not be video capability, just audio. Sorry, you cannot FaceTime with the court. Telephonic hearings are recorded, however. Either a court reporter will be on the line to take down the hearing or, in some instances, the judge may use an XTR recording system to make a record of the proceeding. In either case, the parties can later order a full transcript of the proceedings just as if they had been in the courtroom.

Before the judge joins the line, the courtroom deputy will confirm who is present on the call for each party, will call the case number and caption name, and will ask the parties to state their appearances. Typically, the court will then acknowledge the parties, confirm the nature of the proceedings (e.g., motion hearing, ex parte application, preliminary injunctions hearing), and ask the moving party to address the court first.

There are no visual cues to guide the discussion, so it can be challenging to know when to speak or when an objection or question may be interposed. Let the judge be the conductor. When I have telephonic hearings, I advise the attorneys to address all their comments only to the court—not each other. In addition, I let the lawyers know that I will hear out each side fully and will let opposing counsel know when they can speak.

For many lawyers, waiting to speak is the hardest part of a telephonic hearing. They want to jump in, interrupt, and object. Hold your fire.

For many lawyers, waiting to speak is the hardest part of a telephonic hearing. They want to jump in, interrupt, and object, especially if they believe their opponent has mischaracterized a fact or legal authority in their presentation to the court. Hold your fire. Interrupting while the opposing party is addressing the court annoys the judge and makes for a messy transcript. It also makes the person who interrupts look rude and unprofessional.

Finally, perhaps the most important logistical tip of all: plan ahead to be in a quiet place for the telephonic hearing. Lawyers sometimes try to participate by telephone while driving, or walking outside, or even from an airport lounge (remember when that was possible?). None of these situations makes for an effective telephonic hearing. The ambient noise is distracting and muddies the recording. Even if you are in a quiet home office for the hearing, remember to mute your line when you are not speaking. It avoids having the transcript include the sound of rustling papers, dogs barking, or your kids wanting to show you their artwork.

Prepare Just as if the Hearing Were in Person

To be effective in a telephonic hearing, prepare just as diligently and thoroughly as if you were appearing in person. Outline the key points of your argument in advance. But do not read from a prepared script. If you have out-of-district authorities that are essential to your argument, even if you included these as an appendix to your briefs, consider sending copies in advance of the argument to the chambers email and opposing counsel. Similarly, if you have graphics, charts, or other essential visual evidence that you plan to use in your argument, provide copies to the court *before* the hearing.

If you have not previously argued before this judge, do your best to get as much information as possible about his or her hearing style. Ask around by email if your colleagues have experience with the judge and solicit any tips they might offer. Use electronic legal databases to research how the judge has ruled on similar motions in the past.

If it is an especially important motion, you might want to try to moot the argument over FaceTime or Zoom with a trusted colleague to get feedback. If you have time to moot your argument, remember it is always helpful to prepare both sides of the issue. That way, you can anticipate the weaknesses in your side of the argument and be ready to address them on the call. This level of preparation is no different than if you were appearing in person.

Argue as if You Were in the Courtroom

Ask the court at the start of your argument if there are specific issues or questions that the court wants you to address. Start there. Answer the court's questions as directly as you can. If a point is a clear loser, concede as much and move on to stronger arguments. Use your time carefully. Indeed, the court may advise the parties at the beginning that they have only a specified amount of time for their argument. If so, the moving party needs to remember to reserve time for rebuttal.

Because you should not interrupt, be sure to take notes when opposing counsel is speaking so that when the court turns to your side to respond, you know precisely where you may need to correct the factual record or distinguish a legal authority. Remember to order a transcript of the proceedings.

Finally, even the best made plans can go awry. If circumstances are such that you really have not been able to adequately prepare for the hearing, seek a continuance. Reach out to opposing counsel and try to get stipulation for a continuance. For truly emergency situations, an ex parte application to continue the hearing may be the best approach. Carefully review the local rules on the format and procedures for ex parte applications. Lawyers and judges alike are working under difficult circumstances, both personal and professional these days. Better to seek a continuance than to perform poorly for your client because you were unable to adequately prepare.

Pandemic or no pandemic, litigation goes on. Despite disruptions and much uncertainty, with thoughtful preparation you can still bring your best advocacy skills to the fore—even if it is not in the courtroom but on the telephone. LN

RESOURCES

- "Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic," *U.S. Courts* (Mar. 31, 2020).
- "Pandemic Disrupts Justice System, Courts," *ABA News* (Mar. 16, 2020).

FRCP 1 and COVID-19: Litigating Through a Pandemic

By Brian A. Zemil, *Litigation News* Associate Editor

It is early April. The birds are chirping, the leaves are sprouting, and the grass is a vibrant green. Nature this spring looks just like springs in the past; meanwhile COVID-19 has changed everything else, including how we practice law. This pandemic has forced attorneys, clients, and many judicial officers out of their offices and into uncharted legal territory. These substantial disruptions and uncertainties have required a re-examination of the American legal system, including whether and when courthouses should remain open, litigants may access courtrooms, trials should proceed, and proceedings occur via remote technology.

COVID-19 has triggered a judicial watershed moment, and we are reevaluating how we do justice. Technology has empowered courts and parties to find new ways to cooperate, while attorneys' esprit de corps has breathed new life into the Federal Rules of Civil Procedure. When this column is published, many COVID-19–related changes will likely reflect our new normal and reveal our commitment, or lack thereof, to Rule 1 of the Federal Rules of Civil Procedure.

The December 2015 amendment to Rule 1 was prescient in emphasizing the principle of collaboration and creating an obligation for courts and parties to work together toward the goal of a just conclusion. The Rule 1 committee notes explain that the amendment seeks to emphasize the foundational charge that the court and parties now "share the responsibility to employ the rules" in order "to secure the just, speedy, and inexpensive determination of every action." The notes further explain that we cooperate to improve the "administration of civil justice" by avoiding "over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure," the notes conclude. The collaboration principle is more pressing now than ever and provides a lens through which the rules should be interpreted and applied during and after COVID-19.

Attorneys who fail to apply the fundamental principle of cooperation during COVID-19 will likely face censor or sanctions from a court system desperately trying to prioritize justice.

Judge Drummond's column in this issue (see p. 28) discusses a decision calling out an attorney's failure to appreciate the cooperation and reasonableness necessary during these challenging times. The decision highlights that, at least during COVID-19, Rule 1 requires and courts expect greater cooperation than ever before.

Parties must, therefore, carefully evaluate every court filing and litigation request based on the needs of the litigation, time remaining for discovery or motions practice, and expectations of the specific court in which their case is pending. Demanding that courts compel an opposing party to collect and produce particularly critical electronically stored information might be reasonable; trying to compel that same party to gather hard-copy documents from a currently shuttered office might not. Routine matters, such as scheduling, can be handled by telephone or videoconference.

While the U.S. Supreme Court is now conducting oral arguments telephonically, counsel should anticipate the same in other courts nationwide, even if the case appears not amenable to online judging. Before requesting a different method of argument, consider if the reasons are compelling and weigh them against the strain that COVID-19 has placed on the judicial system, acute demand for more critical in-person hearings, and threats that delay might pose to court-set deadlines. Working remotely at home heightens confidentiality-related concerns as basic attorney-client communications require care: the presence of family members or home smart speakers that can record your conversations could threaten the confidentiality of your advice.

You also should consult Federal Rules 28, 29, 30, and 32, as well as court-specific local rules and standing orders, to evaluate when depositions through remote means should proceed. If any problems arise, preserve your objection in the event future court intervention is necessary and subject to the requirements of the jurisdiction in which the deponent—not the questioner—sits. The remote administration of the oath also poses special considerations, as some jurisdictions require that a court reporter be a notary and physically present while a witness testifies. A stipulation to accept an oath administered remotely by a specific reporter or express waiver of any objections to such proceedings should address any concerns.

COVID-19 has changed how we fulfill our Rule 1 promise. Our present challenges force us to consciously put Rule 1 in the front seat of our calculus rather than in the backseat, as too frequently practiced in the past. Many disciplines—science, philosophy, psychology, faith—have much to say about what we should be doing in this unprecedented moment, and Rule 1 offers a lot of wisdom to help our practice during COVID-19. When we reach the other side of this pandemic, history will reflect how technology enabled the safe administration of justice and, hopefully, how well we respected the administration of justice and one another as sisters and brothers of the bar. LN

Digital versions of the Civil Procedure stories, including links to resources and authorities, are available at http://bit.ly/LN-civpro.

Federal Court Asserts Jurisdiction over State Securities Case

By Erik A. Christiansen, *Litigation News* Associate Editor

A U.S. circuit court of appeals has held that state law–based class actions can now proceed in federal court against trustees for imprudent discretionary investment decisions. In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit invoked the premature death of the Night King in the *Game of Thrones* HBO television series and ruled that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) does not deprive a federal court of jurisdiction over state law–based class actions involving trustee investment decisions.

The U.S. district court in *Banks v. Northern Trust Corporation* dismissed a putative state law–based class action filed by a beneficiary against a trustee of an irrevocable trust on SLUSA-preclusion grounds. SLUSA precludes plaintiffs from circumventing the stringent pleading requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA) by barring certain types of state law–based securities fraud class actions. The federal district court held that state law class action claims of trustee self-dealing, elder abuse, and excessive fees were covered securities fraud claims made "in connection with" securities transactions, which are barred by SLUSA.

The court of appeals in *Northern Trust* reversed. Relying on the U.S. Supreme Court case of *Chadbourne & Park LLP v. Troice*, the court held that where the trustee is both the buyer of securities and the fraudster, the trading misconduct is not "in connection with" a covered security. The court reasoned that the Supreme Court had interpreted SLUSA to require a misrepresentation that makes a significant difference in an investment decision. Beneficiaries of an irrevocable trust do not make trading decisions. Without an investment decision, there is no "connection with" a purchase or sale of a security. Accordingly, SLUSA preclusion did not apply.

Northern Trust argued that there was no difference for the purposes of SLUSA between an agent, like a stockbroker, and a trustee, like Northern Trust, as they are both fiduciaries. The court of appeals disagreed, stating that while "both agents and trustees are fiduciaries . . . there are significant differences between the two." An agent acts for his or her principal subject to the principal's control. A trustee in an irrevocable trust acts for beneficiaries, but are not subject to their control. Without control of the investments, there is no connection to securities necessary to implicate SLUSA preclusion.

Northern Trust also tried to rely on two pre-*Troice* cases. The court of appeals instead relied on the post-*Troice* decision of *Henderson v. Bank of New York Mellon Corp.* The *Henderson* case explained *Troice*'s modification of the Supreme Court's earlier decision in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*. *Troice* clarified *Dabit* and illuminated the "in connection with" requirement. The court of appeals explained that "[the Trustee] would like us to read *Dabit* without considering its clarification in *Troice*. But we will not render *Troice* meaningless in the way that *Game of Thrones* rendered the entire Night King storyline meaningless in its final season."

In the *Game of Thrones* television series, a threat from a White Walker Night King had been built up prominently, only to end abruptly halfway through the final season when Arya Stark killed the Night King. The court of appeals seemingly saves *Troice* from a similar fate at the hands of the earlier *Dabit* decision.

A question remains after *Northern Trust* about whether a beneficiary's unexercised ability to control a trustee invokes SLUSA preclusion. The court of appeals hinted at the potential outcome when it rejected the defendant's argument that there is SLUSA preclusion when a stockbroker is granted full discretionary authority to trade securities. The appellate court reasoned that with a discretionary trading account, "[u]nlike in the irrevocable trust context, a principal can revoke control from an agent in the course of their relationship. In the irrevocable trust context, by contrast, unless otherwise specified in the trust instrument, a beneficiary cannot alter the powers of a trustee or remove the trustee without petitioning a court of law."

Despite the contrast between irrevocable trustees and discretionary stock brokers, "it remains to be seen whether the ability to control is enough, even if it is not exercised in the case of a trustee and a beneficiary," offers John E. Clabby, Tampa, FL, cochair of the ABA Section of Litigation's Class Actions Subcommittee of the Securities Litigation Committee.

Part of the lack of clarity in recent SLUSA decisions is that "SLUSA jurisprudence is an incoherent mess. The statute is in the top five of the worst drafted statutes in history and is incomprehensible," laments Nicholas I. Porritt, Washington, DC, cochair of the Section of Litigation's Derivative Suits Subcommittee of the Securities Litigation Committee. LN

RESOURCES

- *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016).
- *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844 (9th Cir. 2017).
- *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009).
- *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122 (8th Cir. 2008).

Arbitrators Can Clarify Ambiguities in Final Awards

By Josephine M. Bahn, *Litigation News* Associate Editor

When an arbitration award is ambiguous or fails to address a contingency that later arises, arbitrators retain the legal power to clarify or alter that award. This rule reflects a formal exception to the doctrine of functus officio, which would otherwise prohibit an arbitrator from exercising any authority after he or she has adjudicated the issues presented. ABA Section of Litigation leaders say this exception is in line with current trends and will further arbitration's goals of settling disputes efficiently and avoiding expensive and protracted litigation.

In *General Re Life Corporation v. Lincoln National Life Insurance Company,* the U.S. Court of Appeals for the Second Circuit considered an appeal of a trial court's confirmation of an arbitration award that had been modified by the arbitrators after it was originally issued. The underlying arbitration involved a dispute over the calculation and payment of insurance premiums. The arbitration panel ordered that General Re was entitled to increased premiums, but that Lincoln National was entitled to "recapture" life insurance policies issued by General Re rather than pay those additional premiums. Lincoln National exercised this right, but General Re refused to repay certain categories of premiums to Lincoln National.

Notwithstanding that the arbitration panel had already issued its final award, Lincoln National advised the panel that the parties had a remaining dispute regarding which premiums General Re was required to repay, and asked the panel to resolve that issue. General Re opposed this request, arguing that Lincoln National was seeking a reconsideration and fundamental change to an unambiguous and final arbitration award. The arbitration panel sided with Lincoln National and issued a "clarification" specifying the circumstances under which General Re would have to repay the disputed premiums. The trial court confirmed that clarified award, and General Re appealed.

The court of appeals used a three-part test to determine when an arbitrator is permitted to alter a final award: (1) The award is ambiguous. (2) The change merely clarifies the award, rather than substantively modifying or rewriting it. (3) The clarification comports with the parties' intent as reflected in the agreement giving rise to the arbitration.

Section of Litigation leaders recognize that arbitrators need the freedom to correct an ambiguous award. "A truly ambiguous final award should not be the end result of all of the time and expenses the parties have invested, especially when the ambiguity may not have been evident until a later date when the parties' differing interpretations are put to the test," opines Henry R. Chalmers, Atlanta, GA, cochair of the Section's Alternative Dispute Resolution Committee.

The *General Re* decision aligns with numerous other federal courts that have held that an arbitrator may clarify or alter an otherwise final arbitration award when the award is ambiguous. "Overall, the Second Circuit's decision not only adopts a well-settled rule and provides a helpful three-part framework for analyzing the applicability of the rule/exception, it also furthers the Federal Arbitration Act's purpose of respecting the parties' agreement to arbitrate by leaving potential clarifications to the arbitration, as opposed to letting a court weigh in on a disputed issue about an ambiguous arbitration award," observes Mary-Christine "M.C." Sungaila, Costa Mesa, CA, cochair of the Section's Appellate Practice Committee.

While judicial efficiency may increase, concerns remain about how to define an ambiguity in an arbitration award and what constitutes a "clarification," as opposed to something more substantive. "Notwithstanding the court's effort to delineate a clear test for when the exception applies, there is an opportunity for mischief. An unhappy party may resist the confirmation of a modified award on the basis that the arbitral tribunal made a change to it instead of a clarification. This will elongate proceedings, instead of shorten them," warns Betsy A. Hellmann, New York, NY, cochair of the Section's Alternative Dispute Resolution Committee.

Attorney-Client Privilege May Extend to Investors

By Stephen Carr, *Litigation News* Associate Editor

A recent decision could significantly expand the attorney-client privilege in commercial litigation to include communications with outside investors with some stake in the litigation. The decision in *SecurityPoint Holdings, Inc., v. Transportation Security Administration (TSA),* involving a contentious patent dispute, finds that a nonparty "equity investor" still shared "a common legal interest in the validity of the patent-in-suit" so that communications between the investor and the plaintiff did not waive privilege.

"The court came to the conclusion that there was a common legal interest in the validity of the intellectual property at issue," explains Angela Foster, North Brunswick, NJ, cochair of the ABA Section of Litigation's Trial Evidence Committee. "Because both companies had a vested legal right in the patents, they would need to be able to speak confidentially about legal issues regarding the patents," adds Foster.

The dispute began with a claim by SecurityPoint Holdings, Inc., that the Transportation Safety Administration (TSA) violated the company's 2002 patent on using carts to move trays at airport security checkpoints. The TSA admitted that it violated the patent—it does, in fact, use carts to move trays—but claimed the invention was obvious.

The Court of Federal Claims disagreed with the TSA, finding the invention was not obvious. The parties then focused on SecurityPoint's damages.

In an effort to learn about the company's internal finances and valuation to help establish damages, the government sought many documents from SecurityPoint,

including communications between SecurityPoint and an outside equity investor called Raptor.

Raptor's interest in the case was based on a pre-existing equity agreement that gave it an ownership interest in the patents at issue as well as a "litigation funding agreement" that permitted SecurityPoint to receive financing for the case while giving Raptor a priority claim to the proceeds from the suit if SecurityPoint were to prevail.

SecurityPoint objected to the TSA's request for communications with Raptor, claiming that the communications were privileged because the two companies shared a common legal interest. SecurityPoint also argued the communications related to legal, not commercial, matters. While the TSA conceded that the documents related to privileged legal matters, the government contended that SecurityPoint waived its privilege claim by sharing the communications with Raptor.

The court explained that for the common interest doctrine to apply, the shared interest between the parties "must be a legal one, not merely commercial." And the communication must be made in "furtherance of that common purpose." The court also noted that the common interest doctrine protects only communications "regarding this lawsuit and other legal questions concerning the patent."

Applying these principles, the court found that Raptor, as an equity investor in SecurityPoint, had a legal interest in SecurityPoint's patents and thus a common interest "sufficient to protect its communications with SecurityPoint (and vice versa) regarding this lawsuit and other legal questions concerning the patent."

The decision was consistent with the basic goals of intellectual property (IP) law, according to Michael D. Steger, New York, NY, former cochair of the Section of Litigation's Intellectual Property Litigation Committee. "Various statutes dealing with intellectual property are based on the idea that protecting IP rights will promote the development of the arts and sciences. It makes sense then that the law would provide people who have aligned incentives in protecting their IP with the ability to discuss legal issues related to validity," Steger explains.

The decision highlights the importance of developing and implementing strategies to preserve privileged information, especially in complicated commercial litigation where the lines between third parties and insiders can be murky. Email communications can pose particular challenges in the context of complex commercial litigation where parties are discussing many issues and working in multiple roles. "If parties outside the privileged relationship need to be included in a conversation, begin a new email chain rather than simply forwarding an email that contains privileged information," counsels Foster.

Representing Yourself Can Generate Fees

By Mark A. Flores, *Litigation News* Contributing Editor

A state supreme court has approved an award of attorney fees for an attorney who defended herself in a lawsuit. In affirming the award of attorney fees to a pro se party, the court considered that doing so might deter future frivolous litigation. The decision divided the court, however. It also has divided ABA Section of Litigation leaders. Some agree with

its rationale, but others believe it might open the door for more demands for attorney fees.

The case began as a suit between two attorneys. In *McCarthy v. Taylor*, a grantor created a living trust naming his romantic interest as a secondary trustee. The trust named Gerald McCarthy, an attorney, as a secondary successor trustee. Following the death of the grantor, another attorney presented McCarthy with an amended trust document naming that attorney, Marvin Gray, as the successor trustee.

This led to litigation with McCarthy disputing the validity of the amendment. Gray won that litigation, and the Illinois Court of Appeals denied leave to appeal. Not deterred, McCarthy filed a second lawsuit against Gray, alleging breach of fiduciary duty and tortious interference and claiming that Gray made false statements and presented "misleading evidence" against McCarthy in the first case.

Following the dismissal of the second case, Gray filed a motion for sanctions, including a request for attorney fees and costs. The trial court awarded Gray almost $10,000 in attorney fees on the basis that McCarthy's filing violated Illinois's corollary to Rule 11 of the Federal Rules of Civil Procedure.

The Illinois Court of Appeals affirmed the second dismissal but vacated the attorney fees award. Gray appealed to the Illinois Supreme Court, which approved the award. It found that a pro se attorney plaintiff had filed a frivolous lawsuit, and this justified the award. The punitive nature of the award was pivotal to the court's rationale. But the decision was not unanimous. Two justices filed separate opinions that concurred in part and dissented in part.

Some observers agree with the majority decision. "There is no real reason that simply because you are an attorney, you should forgo the opportunity to obtain attorney fees," says Brian A. Berkley, Philadelphia, PA, cochair of the Section of Litigation's Business Torts & Unfair Competition Committee. "Our time is valuable, and simply because you are the client, that does not make it any less valuable."

One dissenting opinion agreed with this sentiment, but noted the pro se attorney defendant could receive reasonable expenses in the form of "loss of income attributable to the time he spent away from his practice defending against this frivolous lawsuit." Other Section leaders agree with the dissent's additional point that no attorney-client relationship was formed, and so no fees should be granted. "I would have never thought to go after my attorney fees," says Tracy A. DiFillippo, Reno, NV, cochair of the Section's Pretrial Practice & Discovery Committee. "I guess you charge yourself?" she asks.

Another dissent noted it was difficult to distinguish between the intention behind allowing attorney fees in the frivolous lawsuit context versus other fee-shifting regimes. DiFillippo agrees, observing that the majority opinion opens the door for attorneys to seek more novel ways to earn attorney fees in cases in which they would not otherwise receive compensation for work they perform.

For Berkley, it comes down to a party's right to choose its own representation for specific litigation and not lose remedies as a result of the selection. In Berkley's view, "If I start getting penalized for doing that, it becomes problematic."

NOTE: The Supreme Court of Illinois made minor revisions to its original opinion following a motion for rehearing in October 2019. The final opinion, therefore, has yet to be released, and the opinion remains subject to revision or withdrawal.

Patent Agent Privilege Expands Its Reach

By Laura W. Givens, *Litigation News* Contributing Editor

A U.S. district court has expanded the reach of the patent agent privilege, which protects some communication between non-attorney patent agents and their clients. However, the court held that a robust privilege log is necessary when a party asserts the patent agent privilege. ABA Section of Litigation leaders warn litigators that they should pay careful attention to the contours of the patent agent privilege in their privilege logs or risk waiver.

In *Luv N' Care v. Williams Intellectual Property*, Luv N' Care sought an order from the U.S. District Court for the District of Colorado to compel a patent agent, a nonparty to the suit, to produce documents and a privilege log responsive to a subpoena. The underlying litigation involved a patent dispute between Luv N' Care and Eazy-PZ, LLC. Eazy-PZ hired the patent agent to prosecute two patents, and Luv N'Care subpoenaed the patent agent.

In response to the subpoena, the patent agent produced a privilege log and, shortly before a hearing on a motion to compel, an amended log. At the hearing, the court ordered the patent agent to amend its log for a third time to match the categories sought in Luv N' Care's subpoena.

The court noted that the patent agent privilege was first recognized in 2016 in *In re Queen's University at Kingston*, decided by the U.S. Court of Appeals for the Federal Circuit. That decision is rooted in the U.S. Supreme Court's ruling in *Sperry v. Florida ex rel. Florida Bar*. There, the Court found that the preparation and prosecution of patent applications constitutes the practice of law, even when conducted by nonattorneys.

"Over 50 years ago, in *Sperry*, the Supreme Court had established that patent agents have a unique role in American law," explains Angela Foster, North Brunswick, NJ, former cochair of the Section of Litigation's Intellectual Property Litigation Committee. "Patent agents are not attorneys but are authorized to practice before the United States Patent and Trademark Office (USPTO)," Foster adds.

The Colorado district court noted that the patent agent privilege applies to communications that are reasonably necessary and incident to the preparation and prosecution of patent applications or other proceedings before the USPTO. The court noted that, since *Queen's University*, every federal court that

has considered whether to recognize the patent agent privilege has agreed with the Federal Circuit's determination. The court assumed, without deciding, that the privilege applies.

The patent agent privilege is narrower in scope than the attorney-client privilege. It does not protect communications with a patent agent who is opining on the validity of another party's patent in contemplation of litigation, or for the sale or purchase of a patent, or on infringement.

Although the Colorado district court recognized the patent agent privilege, it ruled that the documents in dispute were not protected. In some cases, the privilege log failed to identify the author and recipient of communications. As to other documents, the agent listed the names of people with whom the documents were shared but did not specify whether those people were attorneys, patent agents, or clients.

The court was also substantively critical of the privilege log. "[M]erely soliciting advice of a patent agent does not satisfy the burden of showing that the privilege applies," it reasoned. This shows a critical difference from the attorney-client privilege. "The court denied protection to documents where patent agent privilege was claimed because it only applies to communications that are 'reasonably necessary and incident to the preparation and prosecution of patent applications and other proceedings before the USPTO,' and the privilege log merely described the subject matter of the document as 'Communications re advice of patent agent and/or advice of patent agent,'" explains Michael P. Padden, Chicago, IL, cochair of the Section's Intellectual Property Litigation Committee.

Use of Website Not Necessary to Sue It for Discrimination

By Onika K. Williams, *Litigation News* Associate Editor

A state supreme court has held that a person does not have to use a website's services to have standing to sue the website for its alleged discriminatory terms and conditions. The court held that the plaintiff merely had to show an intent to use the website's service, not actually use it. Accordingly, the decision opens the door to discrimination claims by potential customers. The case has divided experts. Some see the decision as significantly opening the door to more discrimination claims, while others believe it modestly extends current law.

The conflict in *White v. Square, Inc.,* began when a bankruptcy attorney visited a website for Square, Inc., an internet service that allows individuals and merchants to process electronic payments. Square does not charge its users a registration fee; rather, the company collects a percentage of every transaction and a flat fee for each transaction. The attorney visited Square's website to register for its services. However, Square's user agreement asks users to confirm that they "will not accept payments in connection with the following businesses or business activities: . . . bankruptcy attorneys or collection agencies engaged in the collection of debt."

The attorney sued Square in the U.S. District Court for the Northern District of California, alleging that Square's user agreement discriminated against bankruptcy attorneys in violation of the Unruh Civil Rights Act.

The district court dismissed the attorney's complaint with prejudice, holding that he lacked standing under the act. The court reasoned that the attorney had not attempted to use Square's services and only had awareness of its discriminatory terms of service. The attorney appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit certified questions to the Supreme Court of California about standing under the Unruh Civil Rights Act.

The California Supreme Court concluded that a person who visits a business's website with the intent to use its services and encounters discriminatory terms or conditions has standing to sue under the Unruh Civil Rights Act. The high court discussed cases that were brought under the act involving brick-and-mortar establishments. For example, the court explained that the act does not require a black plaintiff to make use of a blacks-only facility, or use a whites-only facility in violation of a segregation policy, in order to have standing.

In light of the California Supreme Court's answers to the certified questions, the Ninth Circuit ruled that the bankruptcy attorney had standing under the Unruh Civil Rights Act and reversed and remanded the matter to the district court.

ABA leaders are split about how influential the *White* decision will be. One leader views the decision as an extension of public accommodation cases under Title III of the Americans with Disabilities Act and the Fair Housing Act. "I do not see the *White* decision as having a significant impact," states H. Rowan Leathers III, Nashville, TN, member of the Tort Trial & Insurance Practice Section. While "the standing 'door' is now a little wider, an actual intent to use the business's services must exist for there to be standing. Simple awareness of a discriminatory policy or practice is not enough," explains Leathers.

Other leaders believe that *White* will be influential because website accessibility, specifically for people with disabilities, is a growing concern for the courts. "I suspect that this decision will be nationally influential," predicts Cassandra B. Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section of Litigation's Civil Rights Litigation Committee. "A very large proportion of commerce (and even employment) now occurs online. Ensuring that people with disabilities are fully able to engage in commercial activities requires ensuring that websites are accessible, and courts have been increasingly likely to apply the Americans with Disabilities Act to online merchants and service providers," Robertson notes. LN

Digital versions of all News & Analysis stories, including links to resources and authorities, are available at http://bit.ly/LN-nas.

The Pandemic's Dramatic Effect on the Business of Law

By Daniel S. Wittenberg, *Litigation News* Associate Editor

COVID-19 has had a massive impact on the legal industry. Since the pandemic resulted in shutdowns across the country, law firms have rolled out various cost-cutting measures, including layoffs, pay cuts, furloughs, and shortened summer programs. Given the generational influence of this circumstance, it behooves us to take a closer look at where things stand in the business of law.

Shrinking Demand for Legal Services

Overall, law firms have seen a sweeping decline in new matter creation. According to a recent report from Clio, the number of legal matters opened each week from surveyed firms has declined over 30 percent since the start of the year. The report also revealed that 56 percent of law firms saw a significant decrease in requests for legal assistance. According to Jeff Grossman, head of business development at Citi Private Bank Law Firm Group, "one in five firms said demand for their services dropped 20% or more in April."

Per the Clio survey, one reason firms are seeing a slowdown has to do with consumer attitudes toward legal problems. Roughly half of the respondents stated that if they had a legal issue, they would very likely delay reaching out for legal help until after the coronavirus pandemic has subsided, while 22 percent reported that they were under the impression that lawyers have ceased offering legal services completely.

"We've seen no indication that the need for legal services has subsided during the pandemic, but for many people, dealing with them right now isn't top of mind," said Jack Newton, chief executive officer (CEO) and co-founder of Clio, in a press release. "Law firms concerned about cash flow should be focused on understanding what barriers currently exist for clients, and be sure they are prepared to adapt their services to current and future needs of clients."

Legal Job Losses

According to the U.S. Bureau of Labor Statistics (BLS), the legal sector had lost approximately 64,000 jobs through April, bringing the total number of jobs in the industry down to 1,097,006. This included attorneys, paralegals, legal secretaries, and others. The figure is down by 50,000 jobs from the same point last year. The April Employment Situation Summary had updated statistics for March, showing 1,700 legal sector jobs lost during that month.

For perspective, there were immense job losses across the nation in all industry sectors. The BLS estimated 20 million

jobs lost nationwide in April. Unemployment rose by 10.3 percent during that month, which was the largest monthly increase since January 1948.

Law Firms' Reactions

The last time the legal industry went through an economic calamity, during the 2008–2009 Great Recession, layoffs were common. In the current environment, law firms have been adopting progressively drastic measures, in some instances, to shore up their finances and mitigate the economic impacts of the coronavirus pandemic. Below is a look at what some major law firms have done in response to COVID-19 to achieve cost-saving objectives.

Scott Meyers, Akerman's chairman, said the firm planned to "control costs by reducing compensation payments across all levels of the firm and resizing our workforce." Arent Fox made cost-cutting moves, including 25 percent pay cuts for associates and staff and a 60 percent reduction in equity partner distributions. For a three-month period beginning in May, Baker Botts announced it would reduce salaries by 20 to 30 percent for counsel, 20 percent for associates, and up to 25 percent for staff. The temporary pay cuts will not affect any employee making less than $70,000 a year. Additionally, Baker Botts has deferred the start date for its incoming class of associates until 2021.

Pepper Hamilton reduced distributions to partners and stated that all other attorneys would see their salaries decreased by 12 percent on an annualized basis. Staff with salaries of $60,000 or more will see their salaries cut by 3 to 9 percent, on an annualized basis, on a graduated scale. In a statement, the firm said it wants to avoid layoffs and is still planning to merge with Troutman Sanders. Pepper Hamilton also deferred the start date for its new associates to January 2021.

Law firms have been adopting progressively drastic measures to shore up finances and mitigate the economic impacts of the coronavirus pandemic.

Reed Smith originally indicated it would reduce monthly draws by 40 percent for a period of five months for equity partners and 15 percent for three months for nonequity partners globally. More recently, the firm announced that its owners would bear the greatest amount of financial pain and, in addition to reducing partner draws, pay cuts for lawyers would be implemented on an annualized basis with 14 percent reduction for nonequity partners, 12.5 percent for counsel, and 12 percent for associates. Most of the firm's professional assistants and select paraprofessionals will move to a four-day work week with compensation reductions.

Seyfarth Shaw indicated it would reduce equity partner draws, cut salaries, and furlough 10 percent of its U.S. workforce. Starting May 1, all nonequity lawyers in the U.S. would see their pay reduced by 10 percent. The firm also cut salaries for staffers, with the first $60,000 being unaffected, but earnings between $60,000 and $150,000 cut by 5 percent. Moreover, anything a staffer made above $150,000 would be cut by 10 percent. Equity partners saw their monthly draws reduced by 20 percent.

Shearman Sterling offered all its staff and fee-earners sabbaticals on reduced pay. The voluntary leave program allowed participants to take between three and six months off work at 30 percent pay. That amount would be increased to 40 percent if they engage in pro bono work during their voluntary leave.

Squire Patton Boggs noted its owners would take the biggest hit by way of reduced profit distributions. Associates would see salaries cut by 20 percent, but bonuses would not be affected. Support staff would see cuts ranging from 10 to 20 percent. Staff who were underused or unable to do their jobs remotely would be furloughed. The firm also canceled its 2020 summer associate program. Thomson Hine slashed non-compensation expenses and reduced quarterly partner draws by 15 percent and staff compensation by 1.7 percent on an annual basis. Womble Bond Dickson temporarily cut U.S. pay for attorneys and staff by 10 percent or less, furloughed "some selected employees," and laid off "another small group."

Glimmers of Hope

In a recent report, McKinsey noted that law firms weather downturns better than the overall economy. Of the past three downturns, only the Great Recession resulted in a decline in aggregate Am Law 100 revenue. The McKinsey report also predicted there will be a wide spectrum of demand across various legal sectors and practice areas. Elliot Portnoy, CEO of Dentons, noted in an interview that one of the challenges he sees is "to make sure we focus not only on how we respond to the pandemic, but what we're positioned to do as we emerge from the crisis."

Ralph Baxter, former chair of Orrick Herrington, pointed out that "law is essential to commerce and justice—so it is not going away." He further stated that this pandemic is going to accelerate the modernization of legal service. "We're in a totally unprecedented time—there's never been anything like this." Portnoy sounded a hopeful note that his firm would be "positioned for success when we emerge [from the pandemic], effectively stronger than even when we entered the crisis." Baxter, likewise, is optimistic: "We are in the law business, and law is never going out of fashion." Let's hope he's right. LN

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Advocating Through the Computer Screen: Best Practices for Effective Remote Advocacy

By Hon. Mark A. Drummond (Ret.), *Litigation News* Associate Editor

I am writing this column in my "home office," which is our dining room table. The world outside has changed. Keeping my social distance, I can jaywalk across Fifth Avenue at almost any point and not worry about getting hit by a cab.

Our legal world also has changed. The pandemic has accelerated our turn to technology. During the past two weeks, I have reviewed administrative orders from federal and state courts throughout the country. To a one, they encourage judges to embrace technology to provide access to justice.

I also have been working with an ABA Section of Litigation partner, the National Institute for Trial Advocacy (NITA), on best practices for remote hearings and trials. NITA partners with us each year to provide the case file and many of the instructors for our legal services training program.

My wife and I have been "sheltering at home." She has 30 years of experience in television news. She is an expert at looking into a camera and communicating. She joined me for two NITA webinars on remote advocacy. Here are the highlights.

Be Reasonable

The case I will start with has traveled far. I heard about it from an advocacy trainer in York, England, who had received it from a justice in Tasmania who might have read it in the *ABA Journal* online. The case was in Chicago. It involved allegedly counterfeit "unicorn drawings."

The plaintiff's counsel filed a temporary restraining order. Due to the pandemic, the court moved the hearing out a "few weeks." Counsel filed a motion to reconsider the scheduling order and another motion with an "emergency judge," which then caused the chief judge to get involved.

The motion to reconsider was denied with this admonition: "The filing calls to mind the sage words of Elihu Root: 'About half of the practice of law of a decent lawyer is telling would-be clients that they are damned fools and should stop.'"

The definition of "emergency" has narrowed drastically for all courts. We do owe a duty to our clients to advance their cases. So get your client's case in line to be resolved. But trying to cut in line at this time for a non-emergency matter is not in the client's best interest. Pick your battles and be reasonable.

Be Prepared

Your home has become your office. Whatever table you are using at home is counsel table in your virtual court. Attorneys do themselves and their clients a disservice if they

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think they can just grab the laptop off the couch, pop it open on the kitchen table, and argue the case. Setting yourself up for a professional appearance takes time and effort.

My in-house communications consultant is amazed by the amount of people who webcast with their backs to a window. She says, "They look like they are in a witness protection program or want to be incognito on *60 Minutes*." Poor computer placement can give your audience the dreaded "up the nose" view, or you may appear to be looking down on the audience from on high. Neither is a good look to a judge.

Whatever table you are using at home is counsel table in your virtual court. You do yourself and your clients a disservice if you don't take the time and effort to set up a professional appearance.

Both you and your clients must test your equipment, stage your area so the judge can see you, eliminate distractions, elevate the computer to eye level, and look into the camera instead of the computer screen. I learned of a criminal defense attorney who filed a virtual background motion. It asks the court to order the same virtual background for everyone participating in the hearing. This eliminates any potential problems with the court or opposing counsel "seeing" into clients' or witnesses' homes. My consultant advises an additional 15 tips for presenting yourself and your witnesses online.

Be Helpful

Put yourself in the court's position. Everything except for true emergencies has been continued. So as courts turn to technology and start handling cases other than emergencies, ask yourself, "What can I do that might help the court?"

I suggest you consider offering the court four stipulations: (1) I will send the court a prehearing submission; (2) I will agree to a time limit; (3) I will not interrupt and will agree to save any objections until the end; and (4) I will send the court a proposed order. These stipulations may seem unusual. But these are unusual times calling for innovative solutions.

In our most recent webinar, more than 90 percent of the 742 attorneys polled responded "Yes" to the question of whether their courts had suspended speedy trial deadlines, statutes of limitations, or any other deadlines. If the other side balks, offer these stipulations anyway. My guess, from the perspective of a former judge, is that they will be welcomed.

First, your pretrial or prehearing submission should be one page, giving the court the view from 30,000 feet. It should succinctly outline your position and the authority for it. The only attachments should be aids to the court such as a timeline, docket entries, or maps and diagrams. It is a rifle shot, not a blunderbuss.

Second, offer the court time limits. If your prehearing submission is well crafted, I would suggest each side get four minutes, then two minutes each to respond, plus three minutes for questions from the judge. A lot of persuasion can be packed into that time if your words are chosen with care. After all, the Gettysburg Address lasted around two minutes.

Third, agree you will not interrupt. In certain cases, you might agree to save all objections to sort out at the end. This generates the most controversy. I admit this will probably work best for argument-only hearings or bench hearings with limited testimony.

Here is my argument. Most videoconferencing platforms involve lag time between speakers. The usual back-and-forth with outright interruptions and objections results in a choppy, hard-to-understand hearing. With multiple counsel on the call or video, it is even worse as some platforms defer to the microphone with the most noise. Some platforms allow the judge, as host, to mute microphones. In order to object, you would have to raise your hand. This also assumes you have video. Some courts will be able to do only audio hearings.

The advantage to you is that you don't get interrupted. Subsequent events may cure your objection—and wouldn't you rather have time to think and formulate your argument? Finally, isn't this the way we always have done depositions? Don't you find that you or the other side withdraws most objections when sorting them out before the judge?

Finally, help judges with their case backlog by drafting a proposed order. Each side submits one. Grant yourself the relief you are seeking, include any findings of fact in support, and cite the law for the judge. It gives the court a jumpstart on an opinion.

How Can I Help?

Many of you do pro bono work that has been affected by the pandemic. If you are interested in how you or your firm can help a legal services attorney secure a two-hour coaching session on remote advocacy at no charge, log on to NITA's One-on-One Coaching page, select "VIEW DETAIL" and scroll down to "NITA's PRO-BONO INITIATIVE." LN

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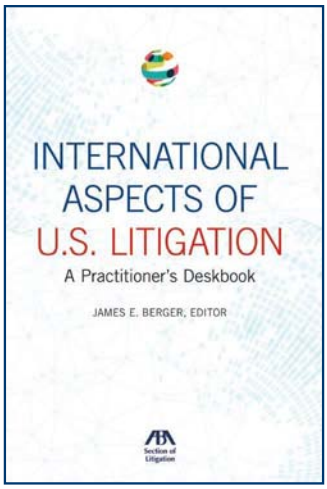
BOOK REVIEW

The Brains and Brawn of Cross-Border Disputes



By Daniel P. Elms, *Litigation News* Managing Editor

In the era of splintered and diffuse information, a comprehensive and reliable desk reference is a valuable asset. *International Aspects of U.S. Litigation, A Practitioner's Deskbook* (American Bar Association 2017), edited by James E. Berger, is precisely that kind of resource. This book is a comprehensive, thoroughly-researched, and user-friendly reference guide that will strengthen the library of lawyers involved in cross-border disputes or who have non-U.S. clients that may find themselves involved in U.S. litigation proceedings.

Berger's book is an elegant combination of brains and brawn, containing over 1,000 dense pages in two volumes. It includes a detailed Table of Contents and an epilogue List of Cases that permits the type of targeted information search normally reserved only for electronic resources. And the seemingly page-by-page Table of Contents makes up for the puzzling absence of a word or topic index.

The book has an intuitive and logical flow. It starts with a discussion on the conceptual underpinnings of U.S. litigation (e.g., personal and subject matter jurisdiction, forum selection, venue), transitions to the practical aspects of a lawsuit (e.g., service of process, choice of law, discovery), and then discusses the effect and enforcement of judgments. All of this discussion is appropriately contextualized to international disputes.

The content is heavily footnoted with citations and substantive parenthetical descriptions of relevant cases and commentary, although the appearance of legal decisions from outside the U.S. is sparse. As to certain topics, the book features hypothetical scenarios (or summaries of actual case facts) to illuminate the applicable rules and teachings, in a manner similar to what is found in the various Restatements of Law. The book is also populated with "Practice Pointers," which highlight practical aspects of a particular issue or caution against hidden pitfalls. Again, Berger's core achievement is the presentation of legal information in a way that is usable and real.

Berger and his contributors dig deep into sticky and recurring challenges in cross-border litigation, including service of process on non-U.S. parties, obtaining discovery from non-U.S. parties, and the varied treatment of attorney-client communications in non-U.S. jurisdictions. On these issues, Berger includes a fulsome analysis of the Hague Convention (both as it relates to service of process and to discovery), the Inter-American Convention, and the elements of a proper letter of request or letters rogatory. Berger follows with a comprehensive discussion about determining the best mechanism for taking non-U.S. discovery in a particular case, and includes commentary on several jurisdictions where cross-border discovery might be most frequent (e.g., France, United Kingdom, China, Japan). In this regard, the book meets its promise of being a "deskbook" for a lawyer's use as a practical tool.

The penultimate section of the book covers state and federal arbitration law, with a focus on the Federal Arbitration Act, and includes separate discussions about proceedings under the New York Convention and the Panama Convention. This section also includes content on how to compel arbitration and the use of judicial proceedings to enforce an arbitration award. Appropriately, the book does not discuss the rules and processes of the various administrative arbitral groups, such as the ICC or ICSID, focusing instead on the legal and procedural paths to get to that point.

The final section is devoted to three common types of international disputes: lawsuits against sovereign entities, cross-border bankruptcy proceedings, and international trade claims. This section focuses primarily on the statutes that counsel involved in such disputes should know and understand. And as with the other topics covered, this section includes extensive citation to the key legal decisions and commentary that explain how those statutes operate.

Any litigator involved in cross-border disputes should have Berger's book handy. But it is essential for U.S. litigators who need to understand the impact of U.S. procedures on litigants residing elsewhere. Berger's book may have its greatest value in the hands of non-U.S. lawyers who find their non-U.S. clients litigating in U.S. courts. That lawyer now has a reference guide for potentially confusing (and arguably arcane) concepts in federal court jurisdiction and procedure, choice of law, discovery, and alternative dispute resolution, among numerous other topics. The book offers a primer on the basics of these legal issues, but also delves into aspects that might be entirely new to a non-U.S. litigator, such as abstention, comity, and the methods of and limitations on enforcing a judgment.

Berger has enlisted high-quality and experienced contributors to create a rare find: An immediate and comprehensive resource for real-world international litigation matters. And one that can sit on a bookshelf within an arm's reach, rather than exist only as a computer shortcut icon. For cross-border litigators who want a reference guide that might obviate the need and cost of hours of online searching, Berger's book should be at the top of the list. LN

International Aspects of U.S. Litigation, A Practitioner's Deskbook is available at http://bit.ly/LN454-berger.

Reflections During a Time of Uncertainty

By Joseph P. Beckman, Section of Litigation Mental Health & Wellness Task Force Member

The law moves fast, and it doesn't care about magazine production schedules. Over the years, I've written about legal developments that were "yesterday's news" by the time the article was published. The evolution of litigation practice marches on, and it will change again between the time I write these words and the time you read them.

This became less of an issue, however, when I started writing about lawyer wellness and mental health. This is because "lawyer mental health" is a more subjective topic. Moreover, and although our knowledge is constantly evolving, the likelihood of the U.S. Supreme Court overruling the "holding" of a particular lawyer wellness article is roughly equivalent to say . . . the accuracy of my predicted number of COVID-19–related deaths in Minnesota during 2020.

So, permit me to amend my "keeping a mental health piece timely is easy" and add "until COVID-19." By the time this story is published, we hopefully will have returned to "normal," or at least some semblance of "life before COVID-19." Who am I kidding? We are more likely to be looking at a "new normal."

Writing against the backdrop of a wave of uncertainty complicates the undertaking. To stand metaphorically "naked before the mirror," I have to begin by acknowledging I have *zero control*. But isn't that precisely the confession we need to make right now? If we make that admission, is there a way for us to turn lemons into lemonade? (Will drinking lemonade cure COVID-19?)

Well, That Was Quick

In early February, people were still booking spring break vacations or perhaps a late spring ski weekend with a special someone. The pandemic shutdown orders were probably the last thing on the mind of the vast majority of lawyers. Next thing you know, Vail resorts are CLOSED and "someone's" spring ski trip was abruptly canceled!

Less than six weeks later, our world had changed, perhaps permanently. Many of us spent countless (likely non-chargeable) hours reading portions of the Payroll Protection Act, related bailout legislation, and orders on both the state and local levels. Huge firms announced pay cuts for partners and associates. The proverbial bottom dropped—at least temporarily—out of the market.

Those of us with significant outside family responsibilities—whether children still in the nest or older relatives for whom we care—received a double dose of this new reality. It is not easy by any report. Find me a parent who sincerely enjoys his

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or her unexpected role as homeschool dean of students, and my response may well be "I'll have what that person is having."

Relax, It's Just an FFT

Brené Brown, PhD, is a Texas-based professor of social work and the author of five No. 1 *New York Times* best sellers. In January, she announced *Unlocking Us*, a podcast intended to premiere in March at the South by Southwest (SXSW) festival and drop weekly on Wednesdays thereafter. According to her self-titled website, Brené Brown, the podcast intends to "unpack[] and explore[] the ideas, stories, experiences, books, films, and music that reflect the universal experiences of being human, from the bravest moments to the most brokenhearted."

Brown's plans, like many of ours, were sidelined by COVID-19. SXSW was canceled, but Brown "Brav[ed] the Wilderness" and launched her podcast on March 20 anyway, noting that she was "[s]omewhere at the intersection of maybe scared and excited, which is an intersection that I visit often." It seems an apt metaphor, as we are arguably all in precisely that place.

Although three podcasts had been recorded by the time the series launched, in the first episode Brown covered what she calls "FFTs" (or "effing first times"). She points out that "[b]eing new at something is the epitome of vulnerability." Brown adds, however, that most people learn (typically no later than middle age, which she defines as beginning in your late 30s–early 40s) that "[t]he only way to get to the other side of the discomfort of being new is to push right through the middle."

"Being new at something is the epitome of vulnerability. [However,] the only way to get to the other side of the discomfort of being new is to push right through the middle."

Brown identifies an FFT as a process. First you need to identify and name the FFT. This is important, according to Brown, because "[n]aming it gives you power." She then borrows Martin Luther King Jr.'s definition of power: "the ability to effect change and achieve purpose."

Three Steps to Push Through an FFT

Once you have named the FFT, you follow a three-step process, according to Brown. Specifically, you (1) normalize it, (2) put it in perspective, and (3) reality-check your expectations.

Normalize the FFT. This gives you the psychological space to address it. This is important because "if you don't own those feelings and feel them, they will eat you alive," Brown says. Normalizing may be more difficult for those of us in the law because we are used to what Brown calls "armoring up" and, in the process, pushing our feelings aside. It's okay to accept the prospect that "this is a heavier lift than we expected," Brown counsels. "It may prove to be 'twice as hard and 10 times as long,'" she adds, and that's fine.

Put it in perspective. The fact is "this too shall pass" is more often where things will land as opposed to "this was the beginning of the end of my world," notes Brown. That written, it is perfectly acceptable according to Brown to acknowledge, "This is going to suck for a while. I'm not going to crush this right away."

Reality-check your expectations. One risk is that we get sucked into an "expert" prediction that matches our unmet emotional needs. Brown cautions to beware of false prophets. This is exacerbated by YouTube and Facebook videos from self-appointed experts (and, perhaps, bots). We all can see the wide range of theories from how long the virus will last, how long "social distancing" is necessary, to even where and how the virus spread to humans.

Good news here! The reality check step should be simple for litigators. Thinking about it, this is no different than how we treat any expert witness, right? Just be sure to follow the steps in order and normalize the situation by identifying and owning your feelings about it. This way you check your legal skills at the door and won't fall victim to an "expert" who is "peddling certainty" to you.

Why Not Seize the Opportunity to Make a Better Future?

Why not practice a new skill? What that is does not necessarily matter, as long as it gives you an opportunity to establish some flow for yourself for a brief period each day. Consider investing 15 minutes a day to learn the "old country" language your grandparents spoke to your parents when you were little, and they didn't want you to know what they were saying. Or maybe learn the language spoken in the country that's at the top of your bucket list!

Sit down at that keyboard at the same time each day and learn one new song a month. Or "gift" yourself a few minutes every other morning to do that Ab Ripper X video and rediscover (or create) your "rock hard core." (Your back will thank you, too, I'd bet!)

Motivational speaker and author Steve Maraboli exhorts, "Incredible change happens in your life when you decide to take control of what you do have power over instead of craving control over what you don't." We have a choice, and how we react to these new times may say a lot about how we pass through them. Brown opines that when a "crisis highlights all of our fault lines, we can pretend that we have nothing to learn, or we can take this opportunity to own the truth and make a better future for ourselves and others."

Amen. LN

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countdown

BE CAUTIOUS CONTACTING CLIENTS WHEN LEAVING YOUR FIRM

01 A firm departure frequently results in acrimony or contentiousness between the departing lawyer and the firm about client ownership and control.

02 It is a fundamental principle that a client is not the property of any lawyer or law firm.

03 The client's interest must come first during all phases of a lawyer's departure from a firm, and the client has the right to counsel of his or her choice.

04 The lawyer and law firm should inform relevant clients about a lawyer's departure as soon as reasonably practical to allow those clients to make informed choices in counsel and to avoid prejudice.

05 A departing lawyer should not be forced to wait to notify relevant clients until after leaving the firm, but the lawyer should notify the firm of the planned departure before telling any clients.

06 Ideally, the law firm and departing lawyer should attempt to agree upon and provide a joint written notice to relevant clients.

07 Notice to clients should include information regarding the timing of the lawyer's departure, where he or she is going, the ability and willingness on both sides to continue the representation, the client's options, and the location of the client's file.

08 Limitations on the departing lawyer's appropriate solicitation and fair competition with the firm can undermine a client's right to counsel of choice.

09 The former law firm cannot try to keep a client by imposing conditions on how or when the client can leave the firm, transfer matters, or receive files.

10 Firms should create or update policies and procedures to address when either a lawyer or a client leaves the firm and ensure that all employees understand and follow those procedures.

Each issue of *Litigation News* features 10 tips on one area within the field of litigation. This list complements the article by Anthony R. McClure on page 4.