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The Latest Developments in Litigation
Driving Factors of Autonomous Vehicle Discovery

By Christina M. Jordan, Litigation News Associate Editor

Autonomous vehicle and automated driving technology is advancing rapidly, as evidenced by the increased number of vehicles on the road with these capabilities. More than 50 companies are testing vehicles with automated driving technology that can operate without interaction from the driver, including Tesla vehicles that have the hardware needed for limited or full self-driving under certain conditions. While the artificial intelligence of autonomous vehicles provides enhanced safety features for drivers, accidents will continue to happen as a result of driver error, vehicle error, or both.

Although some states have enacted legislation related to autonomous vehicles, consistent laws and regulations governing them are lacking. When litigating cases involving autonomous vehicle accidents, lawyers should be prepared to assess who, or what, is liable, and manage discovery of the plethora of electronic information that autonomous vehicles generate.

What Is an Autonomous Vehicle?

There are six levels of automation defined by the Society of Automotive Engineers and the National Highway Traffic Safety Administration:

- Level 0 – no automation
- Level 1 – driver assistance
- Level 2 – partial automation
- Level 3 – limited self-driving (conditional automation)
- Level 4 – full self-driving under certain conditions (high automation)
- Level 5 – full self-driving under all conditions (full automation)

Automated driving system (ADS) vehicles are those with the capability of driving without driver intervention under certain conditions, such as those classified as Levels 3–5. All autonomous vehicles include software that controls aspects of driving functions. Currently, most autonomous vehicles on the road are semiautonomous, which is any vehicle classified lower than Level 5 and which requires human operation in certain conditions. Semiautonomous vehicle features include parking assistance, emergency brake application, lane drift detection, and self-driving in certain conditions.

One of the benefits of autonomous vehicles is the data generated to monitor traffic and detect and respond to problems. Examples of data produced by autonomous vehicles include information about the operations of the vehicle itself, images generated from on-board cameras, data generated from sensors that identify where the vehicle is in relation to other objects, and the vehicle’s speed and direction.

Federal Framework for Autonomous Vehicle Laws

As the number of autonomous vehicles on the road grows, there is an increased interest in generating autonomous vehicle policies and laws across the states. Currently, a federal framework for autonomous vehicle law does not exist, as the technology is advancing more quickly than the legal system can adapt. There is also a lack of state and federal codified standards and best practices to aid in responding to litigation claims involving autonomous vehicles.

The National Highway Traffic Safety Administration has provided guidance in support of automated vehicle technology, including technical assistance to states for consideration...
in drafting policies and legislation relating to ADS. As of June 2018, 37 states and the District of Columbia had enacted legislation or issued executive orders relating to autonomous vehicles. Some of the aspects being regulated include testing and deploying autonomous vehicles and whether a human operator must be present in the autonomous vehicle.

Each feature of autonomous vehicles brings potential discovery issues when an accident occurs and litigation ensues. For example, as a driver may disengage from an autonomous driving function, or the autonomous vehicle may not be familiar with local driving practices, an accident could be caused by driver error, vehicle error, or both. This aspect of discovery will help determine where liability should be attributed. In addition, the plethora of data created by autonomous vehicles provides more potentially discoverable electronic information, which may require expert interpretation. Lawyers should consider not only driver and vehicle behavior in autonomous vehicles as it relates to products liability lawsuits but also strategies for discovering electronic information to support those claims.

Assessing Liability in Claims Involving Autonomous Vehicles

As most of the autonomous vehicles on the road require driver operation in certain conditions, accidents can be caused by driver error or vehicle error, alone or in combination. For example, drivers can disengage the autonomous driving functions or input commands to the vehicle that may violate traffic laws or otherwise disengage the safety features of the autonomous vehicle. Autonomous vehicle technology may also lead to drivers under- or over-trusting the vehicle’s capabilities, and confusion regarding whether the vehicle or the driver should be monitoring or engaging functions at a given point in time. This aspect of discovery will help determine where liability should be attributed and whether a plaintiff is pursuing claims of negligence against the driver of the vehicle or strict liability against the manufacturer.

When considering theories of liability in an autonomous vehicle case, lawyers should consider driver behavior in addition to the vehicle’s particular features. Increased trust in autonomous driving functions may lead a driver to neglect the driver’s monitoring responsibilities, resulting in the driver being unprepared to take control of the vehicle when necessary to avoid an accident. Autonomous vehicle driving systems can fail or become disabled. Thus, accidents involving autonomous vehicles may involve theories of liability relying on driver behaviors and vehicle factors, such as potential software or mechanical errors.

Discovery of Electronic Information

Autonomous vehicles generate an enormous volume and range of data relating to the operations of the vehicle, including images and videos recorded by sensors and cameras, speed and direction of the vehicle, and whether any software or mechanical systems were not functioning properly. With this volume of data comes potentially discoverable electronic information.

In cases involving autonomous vehicle accidents, the data is the vehicle’s version of the incident. Data generated by the autonomous vehicle’s sensors should be sought in discovery because it may be used to reconstruct precrash events and elucidate the cause of an accident without the use of an eyewitness. The data generated by the autonomous vehicle may qualify as self-authenticating, computer-generated information under Federal Rule of Evidence 902, if the record is concurrently submitted with a written certification from a qualified person. The data from autonomous vehicles may also streamline litigation by providing an easier method to authenticate key evidence.

Parties should anticipate having to deal with the struggles associated with understanding complicated technology. Expert discovery in areas of computer technology may be useful in litigation proceedings to explain the technology, the data, and the various components that work together to enable autonomous driving functions.

As autonomous vehicles become more available and widely used, so will the number of accidents involving them. Lawyers able to navigate the plethora of data autonomous vehicles generate will successfully litigate cases on behalf of their clients.

Each feature of autonomous vehicles brings potential discovery issues when an accident occurs and litigation ensues.

RESOURCES

- Peter Moomijan, “A Road Map to Autonomous Vehicle Discovery,” Pretrial Prac. & Discovery (May 24, 2019).
Federal Court Renews Hostility Toward Anti-SLAPP Laws

By Amy Mattson, Litigation News
Associate Editor

Defendants who face lawsuits filed in retaliation for exercising their First Amendment rights may obtain a speedy dismissal under anti-SLAPP laws on the books in 30 states and the District of Columbia. The laws aim to prevent the use or abuse of strategic litigation against public participation (SLAPP) that would chill protected speech. But circuit courts are divided as to whether those laws apply in federal court.

In Klocke v. Watson, a three-judge appellate panel unanimously held that the protections of the Texas Citizens Participation Act (TCPA), the Lone Star State’s anti-SLAPP statute, are not available to litigants in federal diversity actions. The U.S. Court of Appeals for the Fifth Circuit found the TCPA conflicts with Federal Rules of Civil Procedure 12 and 56 governing summary judgment and dismissal motions and therefore cannot be applied in federal court.

ABA Section of Litigation leaders say the Klocke holding is significant because it provides a way for plaintiffs to avoid dismissal of their lawsuits subject to anti-SLAPP challenges by filing suit in federal court, thereby increasing the likelihood that litigants will engage in forum shopping. Yet, they add that the decision is but the latest in a growing canon of case law that highlights the intersection of free speech safeguards and federal civil procedure. While the opinion in Klocke resolved “an issue that has brewed for several years” in the Fifth Circuit, it magnified a split that pits the Fifth, Tenth, Eleventh, and D.C. Circuits against the First, Second, and Ninth Circuits which have applied anti-SLAPP statutes in federal actions.

Fifth Circuit Reverses TCPA Dismissal

The case arose when Thomas Klocke, a University of Texas at Arlington student, committed suicide after he was refused permission to graduate following allegations by classmate Nicholas Watson that he had engaged in homophobic harassment. Klocke’s estate sued Watson for defamation and defamation per se, and the university for Title IX due process violations. Watson moved to dismiss the claims under the TCPA.

Klocke’s estate responded that the TCPA was inapplicable in federal court and did not address the case on its merits. The U.S. District Court for the Northern District of Texas overruled that objection, granted Watson’s motion to dismiss, and awarded Watson attorney fees and sanctions pursuant to the TCPA.

Klocke’s estate appealed the case to the Fifth Circuit, arguing that the TCPA’s provisions levied evidentiary weighing requirements not found in federal procedural rules, and should therefore not apply. The Fifth Circuit agreed, reversing the district court’s judgment and remanding the case for further proceedings. Klocke’s case against the university did not survive summary judgment and appeal.

Burden-Shifting Framework

The Texas legislature enacted the TCPA in 2011 to discourage meritless lawsuits intended to silence protected speech by providing a means for quick dismissal. Under the statute at the time Klocke’s case was adjudicated, defendants could seek dismissal within 60 days of service of any claim that was broadly “related to” the exercise of the right of free speech, petition, or association. A defendant need only show “by a preponderance of the evidence” that the action infringed on his or her First Amendment rights. The statute shifts the burden to the plaintiff to establish by “clear and specific evidence a prima facie case for each element of the claim in question.” It also provides several procedural benefits to movants, including a stay of most discovery while a motion to dismiss is pending and a mandatory award of attorney fees and costs to the movant if he or she prevails.

But this framework impermissibly “imposes additional requirements beyond those found in Federal Rules 12 and 56,” the appellate court said. Rule 12(b)(6), under which a federal court may dismiss a case for failure to state a claim, is not an impossible barrier to overcome and requires no evidentiary support, the court noted. Similarly, Rule 56, addressing summary judgment, does not necessitate evidentiary evidence to determine the truth of a matter, but rather asks a judge to decide whether there is a genuine issue for trial. In contrast, the TCPA demands judicial weighing of evidence using a standard that “lies somewhere between the state’s pleading baseline and the standard necessary to prevail at trial,” all while circumscribing predecisional discovery, the appellate court said.
Substantive Right or Procedural Mechanism?
In siding with Klocke, the appellate court determined that the TCPA’s framework creates no substantive rights but “merely provides a procedural mechanism for vindicating existing rights.” The decision settled a split among Texas federal district courts over how to construe the statute under the Erie doctrine, which prescribes that federal courts must apply state substantive law but federal procedural law in diversity cases.

The appellate panel found persuasive a 2015 D.C. Circuit opinion, Abbas v. Foreign Policy Group, LLC, authored by now-Justice Brett Kavanaugh, ruling that the District of Columbia’s anti-SLAPP law was inapplicable in federal court. The Abbas court determined the anti-SLAPP statute conflicted with the federal rules by “setting up an additional hurdle” for a plaintiff to reach trial. It also followed the U.S. Supreme Court’s reasoning in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., which held that a federal court exercising diversity jurisdiction should not apply a state law if a Federal Rule of Civil Procedure answers the same question as that law.

Applying those same principles to the TCPA, the Fifth Circuit declined to uphold it as binding on federal courts. It found that the burdens the statute imposed collided with Rules 12 and 56 and answered the same question as those rules: under what circumstances must a court dismiss a case before trial? The court rejected Watson’s argument that the TCPA’s framework neither displaced the federal rules nor caused them to “cease to function,” as the First Circuit had previously determined in upholding Maine’s anti-SLAPP statute.

Watson’s reliance on the First Circuit’s opinion erroneously implied that the federal rules impose only minimum procedural requirements that state rules may build upon, the Fifth Circuit said. The appellee’s argument was also out of tune with an Eleventh Circuit decision that found Georgia’s anti-SLAPP statute inapplicable because the federal rules in question were “sufficiently broad to control the issue before the court,” the appellate panel noted.

Uncertain Future for Anti-SLAPP Laws in Federal Courts
The ruling in Klocke broke with the Fifth Circuit’s practice of declining to decide whether, and to what extent, the TCPA applied in federal court. It also ran counter to its own 2009 decision in Henry v. Lake Charles American Press, L.L.C., in which the court applied a “nominally procedural” Louisiana anti-SLAPP statute. However, the court concluded it was not bound by Henry because the TCPA imposed “higher and more complex preliminary burdens” and more “rigorous procedural deadlines” than did Louisiana’s law. Moreover, the Henry court did not have the benefit of the Shady Grove decision, the appellate court said.

But the Texas legislature amended the TCPA while Klocke’s case was pending, and Section of Litigation leaders note that it is now uncertain how its revised construction or that of other anti-SLAPP statutes like the one at issue in Henry may be treated in federal court. “There are a lot of open questions,” says Laura L. Prather, Austin, TX, executive director of the ABA Forum on Communications Law. “Does the Fifth Circuit’s decision in Klocke impact the Henry precedent? Is Texas’s amended legislation precluded in federal court?” she asks.

The amended version of the TCPA does not contain a “preponderance of the evidence” requirement, instead stating a movant need only “demonstrate” the statute’s applicability. And while the previous version of the TCPA allowed defendants to seek dismissal of lawsuits “related to” an individual’s exercise of the right of free speech, petition, or association, the new statute requires the challenged lawsuit to be more narrowly “based on” or “in response to” the exercise of those rights.

But whether the changes constrain the TCPA’s scope remains to be seen. “Because the reforms include changes to the weighing of evidence, which the Fifth Circuit heavily relied on in its ruling, there is a big gray area going forward in terms of whether some of the problems that existed under the original act will persist,” says Ashley J. Heilprin, New Orleans, LA, cochair of the Section’s Pretrial Practice & Discovery Committee’s Distance Learning Subcommittee. “Presumably, the Fifth Circuit knew the Texas legislature revised the statute but chose not to address that in their opinion,” she adds.

Opening the Door to Forum Shopping
For practitioners, the most pressing issue seems to be the opportunity for forum shopping that the Klocke decision creates. Klocke effectively bars federal court defendants from moving for early dismissal under the TCPA, including those defendants that remove a case to federal court on the basis of diversity jurisdiction. “The Klocke decision has the adverse impact of increasing the type of forum shopping the Supreme Court’s Erie decision sought to avoid,” Heilprin observes.

That is a “big concern,” notes Prather, observing that it points to a potential need for a federal law addressing the matter. “Although the U.S. Supreme Court has had two opportunities to take up the issue of whether anti-SLAPP statutes apply in federal court, it has denied certiorari in both instances,” she states. “The law is inconsistent across the country and it will take a long time to work itself out. Each state’s statute is so unique that the Supreme Court will have to evaluate whether it is worth considering the issue globally,” Prather concludes.

RESOURCES

- Klocke v. Watson, 936 F. 3d. 240 (5th Cir. 2019).
- Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).
- Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015).
Firms May Force Lawyers to Sign Non-solicitation Contracts

By Onika K. Williams, Litigation News Associate Editor

A firm can fire a lawyer who is an at-will employee and who refuses to sign an agreement for non-solicitation of the firm’s customers. According to the Supreme Court of Kentucky, a non-solicitation agreement that makes an exception for legal work does not violate Kentucky Supreme Court Rule 3.130 (ABA Model Rule of Professional Conduct 5.6), which prohibits a lawyer from agreeing to restrict his or her practice following cessation of employment.

The conflict in Greissman v. Rawlings and Associates, PLLC, began when Rawlings and Associates, a law firm that practices health care subrogation, terminated one of its licensed attorneys. Before dismissing the attorney, the firm presented an agreement that included a provision not to “solicit, contact, interfere with, or attempt to divert” any of the firm’s current or potential clients for three years after ceasing employment. The firm typically presented a similar agreement to attorneys and non-attorneys at termination. The attorney and non-attorney versions of the agreement used the same language, except the attorney agreement included a savings clause that said “except to the extent necessary to comply with the rules of professional responsibility applicable to attorneys.”

After consulting with her personal lawyer, the attorney refused to sign the attorney version because she believed the non-solicitation provision violated Rule of Professional Conduct 5.6. That rule states that “a lawyer shall not participate in offering or making a partnership, shareholdings, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.” After the attorney refused to sign, the firm terminated her.

Under Kentucky law, an employer can fire an at-will employee “for good cause, for no cause, or for a cause that some may view as morally indefensible” as long as the employee is not terminated for an unlawful reason that violates statutory or constitutional provisions. However, an employee can establish a wrongful termination claim if the employee can show that the firing was contrary to public policy or that the termination was a direct result of the employee’s refusal to violate the law while employed.

After her dismissal, the attorney filed suit alleging she had been wrongfully terminated in violation of public policy. The firm filed a motion to dismiss on the grounds that Rule 5.6 was not a public policy and that, therefore, the complaint failed to state a claim upon which relief could be granted. The circuit court denied the firm’s motion to dismiss and concluded that the attorney’s case could proceed because a rule of professional conduct falls within the public policy exception. Subsequently, the parties filed cross-summary judgment motions. The circuit court ruled that the attorney’s claim was cognizable but now dismissed her complaint, concluding that the agreement did not violate the Rules of Professional Conduct because the savings clause would have protected the attorney from any violation if she had signed it.

The attorney appealed. The Kentucky Court of Appeals upheld the circuit court’s decision to dismiss the attorney’s complaint but concluded that the circuit court should have granted the firm’s motion to dismiss because Rule 5.6 did not provide the public policy to support the attorney’s wrongful termination claim. The attorney petitioned the Supreme Court of Kentucky.

Kentucky’s highest court held that the court of appeals erred in holding that the attorney’s complaint should have been dismissed but affirmed the dismissal on other grounds. The court explained that section 116 of the Kentucky Constitution vests the Kentucky Supreme Court with the exclusive rulemaking power over attorney discipline and that the Rules of Professional Conduct qualify as public policy for purposes of a wrongful discharge claim. However, the court concluded that the attorney had failed to establish a genuine issue of material fact about her reasonable belief that signing the agreement would result in a violation because the plain language of the savings clause was unambiguous and excluded any interpretation conflicting with ethics rules.

ABA Section of Litigation leaders caution that the Greissman opinion highlights the importance of understanding the implications of non-solicitation agreements. The purpose of these agreements is to protect “confidential information about clients, trade secrets, and other proprietary information,” explains Janice V. Arellano, Bridgewater, NJ, cochair of the Section’s Employment & Labor Relations Committee.

Practitioners who are “presented with such provisions should be extremely cautious about signing them, as doing so may expose all lawyer signatories to charges that they have violated their state’s ethics rules,” advises Gevertz.

RESOURCES

- Comment on Am. Bar Ass’n Model Rule of Prof'l Conduct 5.6.
Lawyers may compensate fact witnesses in professional fields for their time in assisting with a case and discovery preparation, so long as this work is “directly related” to giving testimony in a proceeding, the Florida Supreme Court ruled. In Trial Practices, Inc. v. Hahn Loeser & Parks, LLP, the Florida court held that although it would not permit compensation for all “assistance with case and discovery preparation,” this type of preparation was compensable if it was directly related to the witness preparing for, attending, or testifying at proceedings. ABA Section of Litigation leaders say that even though the decision opens the door wider for fact witness compensation, attorneys should take care when deciding what expenses are and are not compensable.

In 2006, Trial Practices, Inc. (TPI), sued an attorney for breach of a litigation consulting agreement related to an earlier lawsuit against the attorney’s former business partner. The attorney had engaged TPI to help him with the case, but the case ended in a mistrial and a dispute arose over TPI’s fees. When the case went to trial in 2011, the attorney presented seven fact witnesses who testified as to the issue of alleged damages. Three of these witnesses were attorneys who had been involved in the first lawsuit, one was the attorney’s longtime accountant, and three were attorneys from another law firm.

The jury returned a verdict in favor of the attorney, and he moved for attorney fees and costs under a fee-shifting provision in the consulting agreement. The fees included approximately $236,000 for fees paid to the seven fact witnesses’ professional firms, including the attorneys who testified. TPI protested that the fee request was improper on the grounds that the attorney had secretly paid the fact witnesses at their professional billing rates rather than the Florida statutory rate of $5 per day for “actual attendance.” But the trial court awarded the attorney $2 million in attorney fees, which included some of the fact witnesses’ professional fees.

TPI appealed, and Florida’s Second District Court of Appeal rejected TPI’s arguments but certified the following question to the Florida Supreme Court: “Does Rule 4-3.4(b) of the Rules Regulating the Florida Bar permit a party to make certain payments for fact witnesses?”

As a backdrop to the certified question, the Florida Supreme Court outlined Rule 4-3.4(b), which permits payments to witnesses if they fall within one of three categories: (1) “reasonable expenses incurred by the witness in attending or testifying at proceedings”; (2) “a reasonable, noncontingent fee for professional services of an expert witness”; or (3) “reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.”

The court declined to conclude that “assistance with case and discovery preparation” would always be part of “preparing for, attending, or testifying at proceedings.” The more appropriate inquiry was whether the “assistance with case and discovery preparation” is directly related to the witness “preparing for, attending, or testifying at proceedings.” Here, the case was highly complex and required the attorney to depend on professionals. The court concluded that these professionals had the necessary knowledge to help defend the suit, and it would be unfair for them not to be reasonably compensated for any assistance regarding these complex matters.

However, the court emphasized that because the trial court’s cost award was not itemized, a line item review would be necessary to determine which expenses were directly related to “preparing for, attending, or testifying at proceedings.” Therefore, the court quashed the Second District’s decision and remanded the case with instructions that the case be further remanded to the trial court for further proceedings.

“This is an unusual situation in which the essential fact witnesses were attorneys, and attorneys’ professional rates are not insignificant,” notes John M. Barkett, Miami, FL, cochair of the Section of Litigation’s Ethics & Professionalism Committee. “But if you need someone to testify as a fact witness, and their professional rates are high, you need to pay them fairly,” he adds. “It takes time and effort to be a fact witness, but it’s also important not to improperly influence witnesses via compensation,” notes Susan L. Saltzstein, New York, NY, cochair of the Section’s Expert Witnesses Committee.

“This opinion means lawyers will look closely at whether a fact witness’s work is directly related to preparing for, attending, or testifying at proceedings,” Saltzstein predicts. “As an attorney, always be mindful of your time entries,” cautions Barkett. “That way, if you are later called as a fact witness, a court can determine whether your tasks are directly related to preparing for, attending, or testifying at proceedings, and therefore compensable.”

Resources

A U.S. court of appeals has ruled that generalized concerns about privacy in the internet age are not enough to prevent public disclosure of juror names and addresses. It held that unless a district court made particularized findings concerning privacy, a district court would be required to publicly disclose juror names and addresses immediately following trial. Observers suggest that the decision potentially undercuts juror safety.

In Chin v. Trustees of Boston University, a public radio station in Boston, WBUR, sought to obtain jurors’ names and addresses after a criminal trial involving Glenn Chin. The defendant, a pharmacist, had been charged with 25 predicate acts of second-degree murder after he distributed contaminated medications causing a deadly fungal meningitis outbreak. Chin was found guilty of mail fraud and other lesser offenses but not guilty of murder.

The U.S. District Court for the District of Massachusetts ordered the release of juror names and hometowns but not addresses. It had refused to publicly release juror addresses as “a necessary precaution in an age in which traditional boundaries of personal privacy are under assault.” It also delayed the release of juror names until after Chin’s sentencing, three months after the guilty verdict.

The U.S. Court of Appeals for the First Circuit noted that the case raised three competing interests: “the press’s First Amendment right of access to criminal trials[,] the defendant’s Sixth Amendment right to a fair trial[,] and] the jurors[‘] interest in having their privacy protected.” With respect to the First Amendment, knowledge of juror identities “allows the public to verify the impartiality of key participants in the administration of justice,” the court reasoned. “[P]ublic disclosure of juror identities serves many of the same purposes of ‘open justice’ that are protected by the First Amendment of the Constitution.”

Although the court of appeals mentioned these competing arguments, it did not reach them. Instead, it relied on the District of Massachusetts Plan for Random Selection of Jurors (Jury Plan), which the district adopted pursuant to the U.S. Jury Selection and Service Act. The Jury Plan was adopted in 1982 and interpreted in the 1990 decision of In re Globe Newspaper Co. Neither the act nor Jury Plan prevents disclosure of juror names and addresses.

In re Globe construed the Jury Plan to require the court to release juror identities after a verdict is released, unless the court makes particularized findings reasonably justifying nondisclosure. Such particularized findings might include “a credible threat of jury tampering, a risk of personal harm to individual jurors, and other evils affecting the administration of justice.”

The court of appeals held that the Jury Plan required the court to release jurors’ names and addresses immediately following a verdict unless the trial court makes particularized findings to the contrary. The district court did not make particularized findings to justify not releasing juror addresses, so the court of appeals reversed and remanded to the trial court to reconsider the issue.

The court also declined the invitation to “revisit the holding in light of changes in technology over the past thirty years.” Even though “In re Globe” was decided decades ago and thus well before the first tweet was tweet(ed), the court of appeals held, “these technological changes have by no means diminished the need for accountability and transparency in our system of justice.”

This decision concerned ABA Section of Litigation leaders. The court of appeals “ducked the privacy issues” and “ignored the larger juror safety concerns,” observes John M. Barkett, Miami, FL, cochair of the Section of Litigation’s Ethics & Professionalism Committee. While the flexible approach of In re Globe works in “999 out of 1000 trials,” Barkett reasons, “in a high-profile case, it might be worth rethinking the result, especially in a world where information travels so quickly.”

Other Section leaders agree. “This opinion is not necessarily the best vehicle to address concerns with intrusion into jurors’ privacy and the potential adverse consequences in this social media era,” says Darryl A. Goldberg, Chicago, IL, cochair of the Trial Subcommittee of the Section’s Criminal Litigation Committee. On the other hand, “as a criminal lawyer,” says Goldberg, “emanating anonymous juries generally puts the defendant at a serious disadvantage by sending an unavoidable message that the defendant is dangerous.”

The court of appeals held that “the proper way for concerns about juror privacy to be addressed is through the process of amending the Jury Plan itself.” Section leaders embrace this holding. “Courts should discuss an amendment of the local Jury Plan,” says Goldberg, “insofar as it would be unlawful, to potentially address the privacy considerations raised by the district court and bring the plan in touch with the modern era.”

**Resources**

- In re Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990).
Executive Order restricts agency enforcement actions
Court will address scope of Bivens suits
Court may clarify injury requirements of ERISA actions

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

EXECUTIVE BRANCH

Agency Enforcement and Adjudication

President Trump issued an executive order, “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,” which requires, in part, that “[w]hen an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequences for a person, it must establish a violation of law by applying statutes or regulations,” not agency guidance documents. Executive agencies “may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise.” The order also requires that agencies, before taking certain enforcement actions, and subject to limited exceptions, “must afford . . . an opportunity to be heard, in person or in writing, regarding the agency’s proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.”

CONGRESS

Antitrust

The Senate passed the bipartisan Criminal Antitrust Anti-Retaliation Act, which would increase protections for whistleblowers who report criminal antitrust violations. The act provides that employees who experience retaliation for providing information to supervisors or federal prosecutors related to violations of sections 1 or 3 of the Sherman Act, 15 U.S.C. §§ 1, 3, may file a grievance with the Department of Labor that, if successful, would require the employer to pay attorney fees. The Senate passed similar bills in 2013, 2015, and 2017, but the House did not take them up.

U.S. SUPREME COURT/JUDICIARY

Bivens Actions

In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), the Court recognized an implied damages remedy under the Constitution itself to compensate persons injured by federal officers who violated the Fourth Amendment prohibition against unreasonable search and seizure. The Court granted certiorari to decide, as stated by the petition, “[w]hether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under Bivens[.]” Hernandez v. Mesa, No. 17-1678.

Criminal Law/Habeas Corpus

The Court granted certiorari to decide, as stated by the Court itself, “[w]hether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under Gonzalez v. Crosby, 545 U.S. 524 (2005).” Banister v. Davis, No. 18-6943.

ERISA

The Court granted certiorari to resolve circuit splits on two questions: “May an ERISA plan participant or beneficiary seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof?” and “May an ERISA plan participant or beneficiary seek restoration of plan losses caused by

Immigration

The Court granted certiorari to resolve circuit splits on two related issues of appellate procedure: (1) whether a federal court of appeals has jurisdiction to review the denial of a “criminal alien[‘s]” (see 8 U.S.C. § 1252(a)(2)(C)) request for equitable tolling of the time to file a statutory motion to reopen under 8 U.S.C. § 1229a(a)(7), Guerrero-Lasprilla v. Barr, No. 18-776 (consolidated with Ovalles v. Barr, No. 18-1015), and (2) whether “the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief” notwithstanding the so-called “criminal bar” of 8 U.S.C. § 1252(a)(2)(C), which provides in part that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [a listed] criminal offense.” Nasrallah v. Barr, No. 18-1432.

Arbitration

The Court granted certiorari to resolve a circuit split on whether, as stated by the petition, “the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits a non-singatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.” GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, No. 18-1048.
How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?
New state laws expand workplace protections for sexual harassment victims

By Erik A. Christiansen, Litigation News Associate Editor

Harvey Weinstein, Matt Lauer, Senator Al Franken, Les Moonves, Brett Kavanaugh, and President Donald Trump all have at least one thing in common: they have accelerated the #MeToo movement and inspired a new focus in state legislatures. This environment has triggered new state laws intended to address sexual harassment and assaults in the workplace. While some ABA Section of Litigation leaders are skeptical about whether this legislation will effectively reduce workplace harassment, plaintiffs clearly have additional statutory tools and claims to seek redress in the courts.

Since 2017, as a reaction to the publicity surrounding these and other high-profile cases, 15 states have passed new laws protecting against sexual harassment in the workplace. New York, California, and Illinois have led the way with new laws focusing on mandatory sexual harassment training, softening the federal “severe or pervasive” standard to make it easier to sue in state courts, and banning the nondisclosure agreements that predators have used to silence victims and protect their careers. New state laws also prohibit mandatory predispute arbitration clauses, lengthen statutes of limitations, and expand workplace harassment protections to apply to independent contractors.

For some Section of Litigation leaders, state legislative action to address these issues was necessary. “The pendulum has swung, and confidentiality provisions have been abused by powerful people with deep pockets who can afford to buy silence,” says David Gevertz, Atlanta, GA, cochair of the Section’s Employment & Labor Relations Law Committee. “The courts, however, were too slow and legislation was the quickest way to address the issue, so we will have to wait and see the long-term impact of the new laws,” Gevertz notes. “I would have preferred courts to have been more liberal in permitting discovery, rather than enacting legislation,” he adds.

Other Section leaders have concerns that the new laws will do more to increase litigation than to actually reduce workplace harassment. “People are upset, and we all want less harassment. I am just not sure these new laws get us there,” opines Jeff Brodin, Phoenix, AZ, cochair of the Section’s Employment & Labor Relations Law Committee. “It is anyone’s guess about whether the laws will be effective,” agrees Shira Forman, New York, NY, cochair of the Programming Subcommittee of the Section’s Employment & Labor Relations Law Committee. “In the near term, making employees aware of the new laws simply just might lead to more claims,” she adds.

Mandatory Sexual Harassment Training for Almost All Companies

California, Delaware, Maine, and New York have enacted new training requirements concerning sexual harassment. In California, for example, the Fair Employment and Housing Act now requires employers with five or more employees to provide at least two hours of interactive sexual harassment prevention training to all supervisory employees and at least one hour of such training to all nonsupervisory employees.

New York now requires all employers to provide annual interactive sexual harassment prevention training to employees. At the local level, New York City requires all employers with 15 or more employees or independent contractors to provide annual, interactive, anti-sexual harassment training to all employees and independent contractors. Delaware requires employers with 50 or more employees to provide interactive sexual harassment training to all employees. Maine now directs employers to use a checklist prepared by the Maine Department of Labor to develop their sexual harassment training programs and requires such training for all employers with 15 or more employees.

These new laws demand heightened employer vigilance to ensure compliance. “It is important to understand in this environment that workers need education and training to understand the costs of harassment claims,” says Darryl G. McCallum, Baltimore, MD, cochair of the Programming Subcommittee of the Section’s Employment & Labor Relations Law Committee. “These new laws make it easier to bring a claim and ultimately make it more expensive for employers,” observes McCallum.

But more training may not be a complete answer for eliminating workplace harassment. “They somewhat missed the ball. Sexual harassment training has not worked. It is much more important for employers to teach respect in
the workplace than it is to know how to report a harassment claim,” opines Brodin. “Employers who create an environment of dignity and respect in the workplace will avoid harassment claims,” he notes, “while employers who maintain a problematic culture will not, regardless of the amount of training a legislature requires.” An employer’s best course is to take the high road. “Employers should do their best job to take the law seriously in terms of training,” says Brodin, “and treat their employees right.”

**Softening the Federal “Severe and Pervasive” Standard**

New York, California, Delaware, and Washington have also enacted new laws to make it easier to bring workplace sexual harassment claims in state court. Under Title VII of the Civil Rights Act of 1964, actionable conduct must be “severe or pervasive.” The new state laws soften this standard, which has frequently resulted in employer summary judgments in federal court. Washington, workplace or create a prohibited environment of harassment,” says McCallum. Employers in California also may be held liable for harassment committed by nonemployees if the employer knew, or should have known, of the offending conduct. Individuals in California also may be held personally liable, along with their employer, for harassment.

Some state laws now impose heightened reporting and disclosure requirements to regulatory authorities. Illinois, for example, requires employers to disclose to the Illinois Department of Human Rights by July 1, 2020, and each July 1 thereafter, the total number of final adverse sexual harassment administrative rulings against them and whether any equitable relief was ordered.

Defenses to sexual harassment claims are also evolving with the #MeToo legislation. For example, in New York, an employer may defend against a sexual harassment claim by establishing that the “harassing conduct does not rise above the level of a reasonable

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for example, now defines “sexual harassment” as unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature. Such conduct is prohibited if submission to that conduct is made a term or condition of employment, if it affects the recipient’s employment, or if it interferes with one’s work performance or creates an intimidating, hostile, or offensive work environment. The behavior does not have to be severe or pervasive to give rise to a claim.

Similarly, in California and New York, “a single instance of harassment can unreasonably interfere with the victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.”

Although states are free to enact legislation that is more restrictive than federal statutes, some Section leaders question whether changing the burden of proof is necessary. “Weakening the substantive legal standard to require less than the federal ‘severe or pervasive’ standard in state court will not change the results,” says Gevertz. Plaintiffs’ lawyers can already avoid the federal “severe or pervasive” standard by pleading state law claims for assault, battery, negligent hiring, and negligent supervision.

The publicity associated with high-profile harassment cases has created a new awareness among potential juries of the effect of workplace harassment. “Jurors are sensitive to the news about celebrities, and during moments like the present, juries tend to become more liberal in their verdicts, regardless of whether the standard is ‘severe or pervasive’ or not,” opines Gevertz. “Jurors will fine-tune the standards in ways that outstrip the laws,” he adds, “and jury justice is much more efficient than legislative justice. Changing the laws is an inefficient way to get the same result.”

**Eliminating Nondisclosure Agreements to Hide Harassment**

In response to reporting about Harvey Weinstein (among others) using confidentiality agreements to silence victims, Congress in December 2017 amended section 162(q) of the tax code to prohibit “ordinary and necessary” business expense deductions for “any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement.” Attorney fees related to such a nondisclosure agreement also are not deductible as a business expense. To further curb abuse, state legislatures in California, New Jersey, New York, Tennessee, Vermont, and Washington have also adopted different approaches to curtail the use of nondisclosure settlement agreements.

California passed three new laws that impact nondisclosure provisions. First, a claimant cannot be silenced in California from disclosing factual information concerning actionable behavior, but a claimant may elect to keep his or her identity confidential. Second, California law voids contracts that prevent a party from testifying about actionable conduct when compelled to do so by lawful process. Finally, California makes it an unlawful employment practice to require an employee to sign a nondisclosure agreement that denies the claimant the right to disclose information about actionable conduct.

New Jersey similarly declares confidentiality agreements that conceal the details of a harassing behavior to be against public policy and unenforceable, while also protecting a claimant’s identity. New York likewise provides that employers may not include non-
disclosure provisions in settlement agreements resolving sexual harassment claims, unless confidentiality is requested by the complainant, and prohibits nondisclosure agreements that prevent employees from communicating “factual information related to any future claim of discrimination” to government agencies. New York does permit, however, the amount of a settlement to remain confidential.

Although states are free to enact legislation that is more restrictive than federal statutes, some Section leaders question whether changing the burden of proof is necessary. Plaintiffs’ lawyers can already avoid the federal “severe or pervasive” standard by pleading state law claims for assault, battery, negligent hiring, and negligent supervision.

Illinois passed the Workplace Transparency Act, which prohibits any “contract, agreement, clause, covenant, waiver or other document” that restricts an employee from reporting allegations of unlawful conduct to federal, state, or local officials for investigation. Tennessee provides that an employer shall not require an employee to execute or renew a nondisclosure agreement concerning sexual harassment claims. Vermont similarly prohibits its concealment of sexual harassment facts by agreement. Finally, Washington voids any nondisclosure agreement that prevents an employee from disclosing sexual harassment or sexual assaults as a condition of employment.

“People are upset,” observes Brodin, “so I agree that there is a need to limit confidentiality provisions.” Other Section leaders, however, anticipate negative consequences from the new antagonism to confidentiality. “I don’t like the laws because now clients will wonder whether they should fight instead of settle because there is no way to obtain confidentiality,” suggests Gevertz. “It might lead to attempts to circumvent the statutes by, for example, dropping the sexual harassment claims and then settling,” he adds.

The Death of Predispute Arbitration Provisions and Waivers
Maryland, New Jersey, New York, Vermont, and Washington have also passed laws prohibiting pre-arbitration agreements, class action waivers, and jury trial waivers in sexual harassment cases. Maryland, for example, makes null and void any agreement that waives any substantive or procedural right regarding sexual harassment or retaliation. New Jersey makes unenforceable contracts that waive any substantive or procedural right or remedy related to discrimination, retaliation, or harassment. New York prohibits employers from including predispute arbitration clauses for sexual harassment, declaring such clauses null and void. Vermont similarly prohibits agreements that waive a substantive right or remedy related to sexual harassment, and makes such provisions void and unenforceable. Finally, Washington provides that an employment agreement is null and void if it requires an employee to waive rights under state or federal antidiscrimination laws or to litigate in a confidential forum.

Counsel who advise employers on human resources and antidiscrimination issues should keep abreast of these evolving state statutory schemes. “The big risk I see is that many people are unaware of the changes in the laws and will keep doing things the same way with the same templates,” says Gevertz. “Perhaps it will take one or two well-publicized malpractice cases for the uneducated lawyers to understand the risks of not staying current,” he suggests.

RESOURCES

< Illinois: Illinois Public Act 101-022; 710 ILCS 5/1; 775 ILCS 5/2-101; 820 ILCS 96/1-10; 820 ILCS 96/1-15; 820 ILCS 96/1-20; 820 ILCS 96/1-25(b); 820 ILCS 96/1-25(c); 820 ILCS 96/1-30; 820 ILCS 96/1-45.
< Nevada: 2019 OR S.B. 726.
Imagine you represent the plaintiff company in a civil lawsuit for theft of trade secrets. A corporate officer of your client tells you he has been approached by a former employee of the defendant company who claims the company is withholding important documents from discovery. This former employee further claims to have a copy of data that shows the defendant’s possession and use of your client’s trade secrets. Your client asks you to meet with this former employee and take possession of the data. At first glance, your situation may seem enviable. But the Los Angeles County Bar Association (LACBA) cautions that the lawyer in this position “is faced with competing public policy considerations and difficult ethical and legal issues.”

Lawyer Must Consider Potential Criminal Issues and Privilege Concerns

The LACBA Professional Responsibility and Ethics Committee considered the scenario described above, and the resulting Opinion No. 531 advises attorneys to answer two key questions in this situation. First, the lawyer must determine whether the former employee is lawfully in possession of the data. If the answer is no, and the lawyer nevertheless takes possession of the data or encourages his client to do so, the lawyer may be either engaging in unlawful conduct or advising his client to do so—both of which violate applicable ethics rules.

Second, the lawyer must consider whether the data includes information he “knows or reasonably should know [is] privileged or subject to a claim of work product.” If it does, even though it was “transmitted by a person other than the holder of a privilege,” the lawyer should comply with the ethics rule requiring that he refrain from further examining the data and promptly notify the privilege holder (Rule 4.4 in California).

Opinion Tracks Ethics Rules, but Leads to Tough Calls

“The LACBA opinion is consistent with what the ethical rules require when you receive evidence from a third party and what you are allowed to do with it,” says Michael S. LeBoff, Newport Beach, CA, cochair of the ABA Section of Litigation’s Professional Liability Litigation Committee. Because the ethical rules...
regarding receipt of information “tend to be pretty uniform, I would think most jurisdictions would be similar, if not identical,” he adds.

But that does not make the lawyer’s job easy or the determinations clear-cut. A legal analysis of the relevant privilege rules should be the first step. “An attorney should not jump the gun to review the documents before understanding the privilege implications,” cautions John M. Barkett, Miami, FL, cochair of the Section of Litigation’s Ethics & Professionalism Committee. If necessary, counsel should get guidance from ethics counsel or from the court, Barkett adds.

The next step is to figure out exactly what the documents are, but do so cautiously. “You really have to review documents to understand what they are,” LeBoff explains. “But by reviewing the documents, you are now running the risk of violating the ethics rules laid out in the opinion. The attorney should start with a very preliminary review to determine what you have received,” LeBoff advises, “and that determination will then dictate what it is you need to do.”

If you determine that you cannot use the documents or information, the particular facts of the situation will dictate whether—and what—you must disclose to opposing counsel. If you did not accept the documents from the third party, you may not have to disclose that you were approached, says LeBoff. On the other hand, if you have the documents in your possession, in most situations the better practice is to disclose that fact to opposing counsel. However, you must “be careful to preserve your client’s confidences,” LeBoff cautions. “If your client obtained the documents, you must counsel your client—by disclosing the documents, you don’t want to also disclose client confidences,” he explains.

Finally, while it is one of the later-mentioned rules in the opinion, the Rule 1.4 obligation to discuss the matter with the client is important. “The client may want to take advantage of the offer from the defendant’s former employee and may even invoke the lawyer’s duty of diligence under Rule 1.3,” Barkett warns. In that situation, “the lawyer has to explain why great care needs to be taken in how to respond—not just because of the criminal law aspects discussed in the

LACBA opinion, but also because of Rule 4.4’s prescriptions regarding potentially privileged information,” Barkett advises. Because ethical rules do not read the same in every state, lawyers confronting a similar factual setting in another jurisdiction should be mindful of that and consult their governing ethics rules, he adds.

Opinion Creates Risk for the Receiving Attorney
Despite overall consistency with the ethical rules, there are some unexpected aspects of the LACBA opinion. “The absence of consequences for the party withholding the documents” was surprising, LeBoff says. “It is striking that whether the documents were properly or improperly withheld did not change the recipient’s obligations, analysis, or burdens,” he adds.

Ironically, the party that has withheld information from production may not bear the greatest risk of an ethical misstep. “The opinion really puts the onus on the attorney who receives the information to determine how it was obtained and whether it is privileged, and there are consequences flowing to the receiving attorney if that attorney gets it wrong,” LeBoff explains.

“Concealment did not seem to impact the opinion and what the receiving attorney’s duties were,” observes LeBoff. Rather, those duties appear to be the same whether the information was withheld from production, not requested in discovery, or obtained before filing suit. “The non-producing party’s misconduct doesn’t alter the duties, burden, and risk of the receiving attorney to verify how the documents were received and their privileged nature,” he notes.

Practitioners Should Proceed with Caution
The best advice to practitioners is to tread carefully and be particularly careful before you accept the documents, Barkett says. “As an attorney, you have to make a risk assessment every time you get documents from a third party,” LeBoff observes. “Generally, the better practice is to notify the other side if you come across documents potentially unlawfully obtained or privileged,” he advises.

Many of the issues involved in these situations are unclear, particularly when a party intends to claim that the disclosed documents are confidential. For example, “whether something is a trade secret at all may not be determined until after significant litigation,” LeBoff explains. “This uncertainty is one reason the best practice is to disclose it, because you put the opposing counsel in the position of having to explain it,” he adds.

Notifying opposing counsel may often be the best first step and court involvement may ultimately be appropriate or necessary, Barkett advises. If the defendant company indeed withheld “material information that goes to the essence of the claim of theft of trade secrets,” and if defense counsel knew about the failure to produce the “hot documents,” he or she will face both legal and ethical consequences, Barkett cautions. Thus, approaching that lawyer may be appropriate, “depending upon the lawyers’ relationships and defense counsel’s past conduct in the litigation,” he suggests. “But approaching the court for guidance may be a preferable practical first step, again depending upon the circumstances,” he adds.

Unfortunately, notifying opposing counsel or seeking court guidance may not always be practical. For example, an attorney may be in a difficult spot if he or she receives such documents on the morning of a hearing or deposition. “If you can get the documents at issue to the other side a day or two in advance, it will help,” LeBoff advises. If you cannot, as in the case of a deposition, be prepared for the other side to object to the use of every questionable document, he notes. “If that happens, and the attorney cannot get immediate access to the court or discovery referee, the attorney should not use the document but reserve the right to recall the witness once the privilege issues have been resolved,” LeBoff suggests.

RESOURCES

You’re Invited to Attend (in Person)

It’s 2020, and technology allows remote witness appearance and discovery, right? Not so in the Eleventh Circuit, according to Arbitration Nation’s Henry Allen Blair, who reviewed the court’s decision in Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc. The court found arbitrators are limited in how they may subpoena nonparties and their documents. Section 7 of the Federal Arbitration Act allows an arbitrator to “summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case.” Interpreting this language narrowly, the court held: (1) arbitrators may only compel non-parties to attend in-person hearings in the same room as the arbitrator (not by video conference); and (2) arbitrators may not compel pre-hearing discovery from non-parties—their documents may be obtained only when they physically arrive at a hearing. Calling the opinion radically anti-arbitration, Blair notes it could even mean arbitrators lack authority to compel non-parties to produce any form of electronically stored information (ESI), at least to the extent they cannot physically deliver ESI to a hearing.

http://bit.ly/LN452-pn1

No Unpaid Wages for Private Plaintiffs

Employers chalked up a big win thanks to the California Supreme Court’s decision in ZB, N.A. v. Superior Court. Reporting on the decision for Employment Law and Litigation, Julia Riechert, Stephanie Lee, and Annie H. Chen note the court resolved a split of authority over whether an employer may compel arbitration of an employee’s Private Attorneys General Act (PAGA) claim seeking unpaid wages under California Labor Code section 558. The court went a step further and held section 558, which outlines the civil penalties private plaintiffs may seek under PAGA, does not include as such penalties the “amount sufficient to recover underpaid wages.” Because only the Labor Commissioner may recover those wages, PAGA plaintiffs do not have a private cause of action for unpaid wages under section 558 and may not seek them in any forum. According to the bloggers, this decision reduces potential PAGA exposure for employers.


Legal Blogging Is Part of Being a Lawyer

Overworked lawyers may struggle to see value in some of their soft marketing, but according to Kevin O’Keefe of LexBlog, legal blogging is part and parcel of being a lawyer. Widely defined as a “regularly updated website, typically one run by an individual or small group, that is written in an informal or conversational style,” blogs were originally called weblogs because their authors were logging their reading from the internet with their observations and analysis of what they had read. O’Keefe believes there is no better way than blogging for lawyers to share their thoughts on what they read and observe in their niche areas. Legal blogs enable peers, clients, and potential clients to see lawyers’ observations and analyses, which helps establish their analytical skills and expertise. Rather than considering such content marketing as hard work, O’Keefe encourages lawyers to view legal blogging as part of being a lawyer.


Lindsay Sestile, Litigation News Associate Editor, monitors the blogosphere.
U.S. Supreme Court to Decide Reach of Title VII

The nation eagerly awaits the U.S. Supreme Court’s decision in three cases that will decide whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against gay and transgender persons. Following oral argument in the cases in October, Adam Lamparello sets forth the two basic arguments before the Court in Appellate Advocacy Blog. On the one hand, had Congress intended to prohibit discrimination on the basis of sexual orientation and gender identity, it would have included such language in Title VII, and it is solely within Congress’s purview to amend that statute. On the other hand, discrimination on the basis of sexual orientation and gender identity is arguably predicated on the gender stereotyping proscribed by Title VII and is therefore discrimination on the basis of sex. According to Lamparello, the justices appeared to struggle with these issues, particularly regarding whether the legislature—rather than the judiciary—should amend the legal definition of sex to include sexual orientation and gender identity and the impact of any ruling on sincerely held religious beliefs. Lamparello expects an opinion from the Court in June 2020.

Redacting for Good

Claiming that 2019 may well be remembered as the year of redaction, LawSites blogger Dean Sappey reviewed DocsCorp’s industry report, The Ultimate Guide to Redaction: What Works, What Doesn’t. The report analyzed why legal professionals continue to make redaction errors, including leaving in documents sensitive information that can later be retrieved by savvy recipients. Importantly, masking is not redacting—the report concluded most people mask confidential information in Word and PDF documents with markup tools, believing what cannot be seen cannot be read. However, PDF documents are constructed in pieces, with text and images existing on different layers. Simply masking leaves the text layer below untouched so that copying and pasting from the PDF into a new Word document will expose the hidden text. According to Sappey, lawyers making redactions need a PDF application with a native redaction tool. These tools remove or “burn out” information from a document once a redaction is applied, ensuring it cannot be undone or exposed later, because it is no longer in the file. These tools also allow users to convert Word documents to PDF without carrying over metadata to the PDF, further ensuring sensitive information does not exist in the PDF.
Discovery disputes do not always have to result in a motion to compel. Pre-motion conferences with a magistrate judge can be an efficient and cost-effective way to resolve nondispositive discovery disputes and keep the case moving forward on the merits. In fact, some magistrate judges, myself included, require that the parties participate in a pre-motion conference with the court before it will allow any party to file a discovery motion. In such cases, if you file a discovery motion without first having the informal conference, the court will likely strike the motion entirely and require that it be refiled (if at all) after the court’s conference.

Motion practice is expensive and usually creates weeks of delay in resolving discovery issues. The parties must prepare and file their briefs, the court may want to hear oral argument, and then the court will typically need time to issue its ruling. After all that, even more time is needed for compliance with the court’s decision.

Magistrate Judges Can Resolve Discovery Disputes Without Formal Motion Practice

Pre-motion conferences are within the discretion of the individual magistrate judge as part of his or her inherent authority to manage court proceedings. The advisory committee notes to the 2015 amendments to Federal Rule of Civil Procedure 16 expressly acknowledge the court’s authority to resolve discovery matters without formal motions where appropriate, stating: “Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens...”
attending a formal motion, but the decision whether to require such conference is left to the discretion of the judge in each case.”

**Tips for Effective Pre-motion Discovery Conferences**

If the magistrate judge in your case holds pre-motion discovery conferences, how can you make the most of that opportunity for your client? First, read the court’s procedures for pre-motion conferences carefully. These are usually available on the court’s public website under a drop-down menu such as Judges’ Procedures. They might also be spelled out in the case management order.

My procedures require that the parties submit a joint discovery status statement (1) summarizing the nature of the dispute; (2) confirming the parties’ prior efforts to meet and confer about the specific issues; and (3) including a brief statement of each party’s position on the issues. I also require that the joint statement include three mutually agreed dates when the parties are available for the conference.

The joint statement is submitted to my chambers via email, and my deputy clerk then confirms which date works for me to hold the conference, and she circulates a conference call number for all parties to join on the call. Allowing the parties to appear telephonically saves valuable time and expense right at the outset. Even though the call is conducted from my chambers, every call is recorded. The case is called and all counsel state their appearances just as if they were in the courtroom. Afterwards, I issue a minute order summarizing any rulings I make during the call. Any party that wishes to can also order a transcript of the conference.

Second, stick to the issues. The conference is not an opportunity to hurl invectives about the bad behavior of opposing counsel. Even if it is all true, the court is not really interested. I sometimes have counsel on the discovery calls who want to have a “food fight” about how badly the other side has behaved. My concern is to identify and address the specific discovery problems that are impeding the substantive progress of the litigation. Focus on that with the court—it will enhance your credibility and respectability quotient, valuable currency that may come in handy down the road.

Third, identify the specific discovery requests at issue, not just general concepts. The court cannot order production or assess objections in the abstract. If there are particular requests for production or admission in dispute, include with the joint discovery statement a PDF file of those requests and the opposing party’s objections or responses. This will greatly assist the court in addressing the dispute.

Fourth, do not raise new issues on the call that were not presented to the court in the joint discovery statement.

Fifth, conduct yourself on the phone call just as if you were in the courtroom. Direct all comments to the court, not opposing counsel. Do not interrupt, either the court or opposing counsel. Because the parties are on the phone, they cannot take visual cues for when to interject. Therefore, it is important to wait until the judge directs you to address what opposing counsel has said or respond to a question from the court. This should not need emphasis, but it unfortunately does. It is not only respectful to do so, but it also ensures that you will get a “clean” transcript of the conference if you need one later, rather than a garbled transcript where the parties are talking on top of each other.

Finally, do not wait until just days before the discovery cutoff to contact the court for a pre-motion conference. A magistrate judge cannot arbitrarily extend the discovery cutoff set in the presiding district judge’s scheduling order. More importantly, review the district judge’s scheduling order before setting the pre-motion conference. Many district judges require that the discovery cutoff is not just the last date to bring discovery motions, but the last date to have all motions and any compliance with discovery orders completed.

The informal discovery conference can be especially useful to resolve disputes about issues such as the appropriate time frame for discovery, the scope of relevant documents, locations for depositions, search term protocols for collection and review of electronically stored information, and topics for Rule 30(b)(6) depositions. Even when I conclude that full briefing is necessary on an issue—and I often do, particularly when privilege issues are in dispute—the pre-motion conference has usually narrowed the issues to be briefed.

Federal Rule of Civil Procedure 1 requires that the court and the litigants construe and administer the civil rules in a manner that will secure the just, speedy, and cost-efficient resolution of matters on the merits. The informal conference can be a powerful tool in achieving that goal.

**Federal Rule of Civil Procedure 1**

- requires that the court and the litigants construe and administer the civil rules in a manner that will secure the just, speedy, and cost-efficient resolution of matters on the merits.

The informal conference can be a powerful tool in achieving that goal. With preparation and attention to the judge’s procedures, you will be prepared to take full advantage of the discovery conference.

**RESOURCE**

Navigating “Control” in a Matrix of ESI Discovery

By Brian A. Zemil, Litigation News Associate Editor

My last column discussed whether the recent amendments to Federal Rule of Civil Procedure 37 displaced the federal courts’ inherent authority to impose sanctions for lost electronically stored information (ESI). A related issue is whether a party has control of, and potential liability for sanctions for loss of, ESI possessed by a third party. Rule 37 does not, however, refer to “control”—a term that the rules and advisory notes do not define.

This ambiguity has led courts to bootstrap Rule 34’s control standard onto Rule 37 and use different tests to resolve control-related disputes. The inquiry is fact-specific and the legal standard varies by and even within jurisdictions. To minimize the risk of potentially case-ending sanctions, attorneys should proactively identify potential control-related disputes and tailor their litigation plans to account for the applicable legal standard.

Rule 34 refers to a party’s responsibility to preserve and produce ESI in its “possession, custody, or control.” Discoverable ESI resides in many different places, including network servers, websites, and the cloud. The advisory committee acknowledged that, when storing ESI in multiple places, parties face the specter of sanctions if their discoverable ESI is not preserved by nonparties.

To avoid sanctions, counsel needs to know who controls discoverable ESI. Courts have adopted three different tests to determine when a party “controls” documents outside its possession and custody: the Legal Right Standard, the Legal Right Plus Standard, and the Practical Ability Standard. Although distinct, each test focuses on the relationship between parties and nonparty in the context of possession and control.

The three prevailing tests are not uniformly applied across circuits, and they even experience some crossover within the same jurisdiction. For example, courts in the Sixth and Tenth Circuits apply both the Legal Right Standard and the Legal Right Plus Standard, while various jurisdictions adopt the Practical Ability Standard.

Federal courts in the Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the Legal Right Standard. This test imposes the narrowest requirements relating to a party’s ESI preservation and production obligations. These courts find “control” where a contract provides that a party owns the requested ESI or can access it upon request. Courts have also found that a legal right to obtain ESI exists by virtue of a principal-agent relationship (e.g., employer-employee, client-attorney, company-director).

Courts adopting the Legal Right Plus Standard are the First, Fourth, Sixth, and Tenth Circuits. Similar to the Legal Right Standard, this test additionally requires a party to disclose the identities of third parties that possess that party’s discoverable ESI. Such disclosures enable adverse parties to subpoena the ESI they seek directly from the third-party custodian.

The Practical Ability Standard is the broadest application of control. It is used by courts in the Second, Fourth, Eighth, Tenth, Eleventh, and District of Columbia Circuits, but has been rejected by the Seventh Circuit. This pragmatic yet nebulous standard centers on whether a party has the “practical ability” to obtain the ESI, without requiring its legal ownership or possession. Under this standard, a party’s access to ESI typically is sufficient to establish control. The decisions applying this test develop a body of control-type relationships between a party and nonparty in the context of employer and employee; service provider and account holder; principal and agent; client and customer.

Courts consider multiple factors when determining whether a party has the “practical ability” to produce documents in possession of a third party, including the relationship between the party and the custodian, how the custodian has handled the ESI in the past, and any other relevant circumstances impacting the custodian’s willingness to give the documents to account holders in service provider relationships. Rosehoff, Ltd. v. Truscott Terrace Holdings involved the most common form of ESI—emails. There, a federal court found that a party had the practical ability to obtain ESI from the third-party server company because it previously cooperated with the subpoenaed party, voluntarily producing emails when requested.

Litigants should prepare early to navigate a legal landscape that lacks a uniform standard for determining control. The differing court approaches require counsel to conduct a jurisdiction-by-jurisdiction analysis, and in certain circuits a court-by-court assessment, to determine what standards apply. Be prepared by understanding the issues and starting early in a case to assess the scope of any control-related ESI obligations. Then prepare your client’s Rule 26 initial disclosures, which require production of ESI in a party’s possession, custody, or control supporting a claim or defense. Early preparation will help frame discovery-related control disputes and reduce the risk of case-ending sanctions.

If you find yourself litigating the issue, remember that courts will seek to balance the burden and cost of production with the relevance and importance of the requested ESI. Also, counsel should work with the client’s corporate representatives to ensure that the Rule 30(b)(6) witness is knowledgeable about information under the corporate party’s control, even if the ESI is in a nonparty’s possession.

A digital version of all Civil Procedure Updates, including links to resources and authorities, is available at http://bit.ly/LN452-civpro.
Supreme Court Rejects Service on Foreign State via Embassy

By Geoff A. Gannaway, Litigation News Associate Editor

The U.S. Supreme Court has narrowly construed the requirements for proper service of a Foreign Sovereign Immunities Act (FSIA) lawsuit, holding that the statute requires a mailing sent directly to a foreign minister’s office in the foreign state. In Republic of Sudan v. Harrison, the Court reversed a $314 million default judgment obtained by victims of the bombing of the U.S.S. Cole because the plaintiffs had served Sudan through its embassy in the United States. The Court explained that delicate diplomatic relations implicated by FSIA suits justify prioritizing strict construction over equitable considerations.

As a general rule, foreign states enjoy immunity from suit in U.S. courts under the FSIA unless a statutory exception applies. When an exception applies, a plaintiff may establish personal jurisdiction over a defendant foreign state by serving the complaint and summons pursuant to the FSIA, 28 U.S.C. § 1608. Section 1608(a)(3) permits service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” Victims of the U.S.S. Cole bombing and their family members sued the Republic of Sudan under FSIA in 2010, alleging the country contributed to their losses by providing support to al Qaeda. The plaintiffs attempted to comply with section 1608(a)(3) by requesting that the clerk of the court send the service packet to Sudan’s minister of foreign affairs at the Sudanese Embassy in Washington, D.C. The U.S. District Court for the District of Columbia entered a $314 million default judgment obtained by victims of the bombing and their family members.

The plaintiffs then registered their judgment in the U.S. District Court for the Southern District of New York and obtained orders directing multiple banks to turn over Sudanese assets. Sudan appealed those turnover orders, arguing that the underlying default judgment suffered from a lack of personal jurisdiction. Section 1608(a)(3), Sudan contended, requires that the plaintiffs send the service packet to the foreign minister at his principal office in Sudan, not to the Sudanese Embassy in the United States. The Second Circuit rejected Sudan’s argument, concluding that mail to the embassy could reasonably be expected to be delivered to the foreign minister and, accordingly, service was proper. Sudan appealed to the Supreme Court, which granted certiorari.

The Supreme Court emphasized the sensitive diplomatic implications inherent in FSIA cases, placing them in a category in which “the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction.” Accordingly, the opinion scrutinized FSIA section 1608(a)(3), focusing on the words “addressed” and “dispatched.” Because the foreign minister does not “reside” or keep his usual “place of business” at an embassy, the Court reasoned that service there fails to satisfy the dictionary definition of “address.” Similarly, according to the opinion, to have “dispatched” a letter implies sending it directly to a recipient, and so indirect service on the foreign minister at an embassy fails short of the statutory requirement.

ABA Section of Litigation leaders agree with the Court’s analysis. “The Court looked to the plain language of the statute and followed the only reading that makes sense,” says Rudy R. Perrino, Los Angeles, CA, cochair of the Section of Litigation’s Products Liability Litigation Committee. “You can’t assume that an emissary in an embassy will take the service packet and hand it over directly to the foreign minister,” explains Perrino.

The outcome also avoids jeopardizing the United States’ diplomatic relationships, notes Tracy A. DiFillippo, Las Vegas, NV, cochair of the Section’s Pretrial Practice & Discovery Committee. She points to an amicus brief submitted by the U.S. State Department that reveals that U.S. embassies do not accept service of process when the United States is sued in another country.

Perrino emphasizes that the plaintiffs could have avoided their procedural problems by relying on what he calls the FSIA’s “failsafe service mechanism,” which explicitly permits service within the United States. Under section 1608(a)(4), if service cannot be accomplished within 30 days under section 1608(a)(3), then a plaintiff may complete service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia,” for transmittal “through diplomatic channels to the foreign state.”

The opinion offers a lesson that applies to service of process more broadly, not just to FSIA claims. “When you are trying to serve any lawsuit, go overboard so that you do not open yourself to arguments about technicalities. In this case, I would have served both ways, in the embassy and in Sudan,” explains DiFillippo.

RESOURCES

German Heirs Allowed to Sue in U.S. for Nazi Art Seizures

By Onika K. Williams, Litigation News Associate Editor

A party need not exhaust all available foreign remedies before suing a foreign entity in the United States under the Foreign Sovereign Immunities Act’s (FSIA’s) expropriation exception. In Philipp v. Federal Republic of Germany, the U.S. Court of Appeals for the District of Columbia Circuit rejected Germany’s argument that the heirs of Jewish art dealers must assert claims related to Nazi seizures in German courts.

ABA Section of Litigation leaders agree this decision will likely impact many other litigants filing suit under the FSIA’s expropriation exception, which creates jurisdiction for claims against foreign governments that might otherwise enjoy immunity from suit.

The conflict in Philipp began in 2014, when the heirs of several Jewish art dealers sought to recover the Welfenschatz, a collection of rare medieval art their German ancestors were forced to sell to the Nazis in the 1930s. The heirs first submitted a claim against the Stiftung Preussischer Kulturbesitz (SPK), a German agency that oversees the museum displaying the Welfenschatz, through the German Advisory Commission. The advisory commission, which acts as a mediator between current possessors and former owners of property seized through Nazi persecution, concluded that the sale of the Welfenschatz was not a compulsory sale due to persecution.

Instead of seeking further relief through German courts, the heirs filed suit against the Federal Republic of Germany and the SPK in the U.S. District Court for the District of Columbia. The heirs sought return of the Welfenschatz and/or $250 million. Germany moved to dismiss, arguing, among other things, that it enjoyed immunity from suit under the FSIA and that international comity required the court to decline jurisdiction until the heirs had exhausted their remedies in German courts.

When the district court denied Germany’s motion to dismiss, Germany immediately appealed the FSIA immunity portion of the decision. The D.C. Circuit largely affirmed the district court.

Under the FSIA, 28 U.S.C. § 1604, foreign sovereigns and their agencies enjoy immunity from suit in the United States unless an exception applies. The heirs asserted jurisdiction under the FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), which has two requirements: (1) rights in property taken in violation of international law are at issue; and (2) there is an adequate commercial nexus between the United States and the defendant. The party challenging jurisdiction—in this case Germany—bears the burden of proving that the exception does not apply.

In Philipp, the D.C. Circuit ultimately concluded that the expropriation exception applied to create jurisdiction over the heirs’ claims. Consequently, the heirs were not required to exhaust available remedies in German courts before suing in the United States. The court declined to allow the heirs’ claims to move forward against Germany, however. Relying on two prior decisions involving the Republic of Hungary, the court dismissed Germany as a party because the property at issue, the Welfenschatz, is located in Berlin and not the United States. In contrast, the court found that the SPK could remain a defendant because the commercial nexus requirement can be satisfied.

Section of Litigation leaders agree the case raises several interesting questions, creating circuit splits as to multiple issues. For one, the case “splits from the Seventh Circuit with regard to what extent plaintiffs must exhaust domestic remedies before pursuing a claim under the FSIA in U.S. courts against an instrumentality of a foreign government,” explains Brian A. Berkley, Philadelphia, PA, co-chair of the Section’s Business Torts & Unfair Competition Committee.

The D.C. Circuit allowed the case to proceed against the SPK, a German agency, because of its commercial activity in the United States. However, “the opinion does not say what commercial activity the SPK conducts in the U.S.,” observes Chad S.C. Stover, Wilmington, DE, who also serves as co-chair of the Section’s Business Torts & Unfair Competition Committee.

Adjusting to Expanding Exemptions in the FLSA

By Mark A. Flores, Litigation News Contributing Editor

At least one appellate court seems to be following the U.S. Supreme Court’s lead in the increasingly expansive interpretation of the Fair Labor Standards Act’s (FLSA’s) overtime pay exemptions, according to ABA Section of Litigation leaders. This emerging trend is not necessarily favorable for employees, leaders say, given recent outcomes in Munoz-Gonzalez v. D.L.C. Limousine Service, Inc. and Flood v. Just Energy Marketing Corporation.

Congress established the FLSA approximately 80 years ago to regulate wage, hour, and overtime standards and to create employer exemptions for overtime pay. The exemptions vary covering salespersons to certain executives to taxicab drivers. In Encino Motorcars, LLC v. Narvarro, the Court advised lower courts not to interpret overtime exemptions narrowly. The U.S. Court of Appeals for the Second Circuit has followed the Court’s lead in two recent cases.

The FLSA expressly exempts “any driver employed by an employer engaged in the business of operating taxicabs” from overtime pay requirements. In Munoz-Gonzalez, the U.S. District Court for the Southern District of New York interpreted this language after chauffeur Alejandro Munoz-Gonzalez filed suit against his former employer D.L.C. for failure to pay overtime. D.L.C. argued Munoz-Gonzalez fit under the “taxicab exception” and was not entitled to overtime. The district court agreed and held that, based on definitions from
dictionaries and other statutes passed at or near the time of the FLSA, D.L.C. engaged in the business of operating taxicabs.

The appellate court affirmed the district court, evaluating whether the FLSA’s definition of “taxicab” conformed with the statute as a whole. Ultimately, the district court held that a “limo” driver in a chauffeured car service should be classified as a taxicab driver under the FLSA and thus is not entitled to overtime.

Meanwhile, according to U.S. Department of Labor guidance, the FLSA’s “outside sales” exemption requires an employer to show that an employee’s primary duty is making sales or obtaining orders for services and that the employee customarily works away from the employer’s business office.

In Flood, the district court considered whether Kevin Flood fit within the “outside sales” exemption. Flood spent more than three-quarters of his time with Just Energy making door-to-door solicitations (not sales), wearing a company badge, and following a company script. The district court applied the “outside salesman” exemption to the FLSA in disposing of Flood’s claims against Just Energy for unpaid overtime.

The appellate court affirmed, applying the Court’s holding in Encino Motorcars that courts should not interpret the exemptions narrowly. Specifically, the appellate court found Flood conducted sales and obtained orders for his former employer, which qualified him for treatment under the “outside salesman” exemption despite the fact that he did not have sole authority to complete those sales.

The Court’s directive that district courts should stop interpreting FLSA overtime exemptions narrowly will expand the application of these exemptions, believes David Gevertz, Atlanta, GA, cochair of the Section of Litigation’s Employment & Labor Relations Law Committee.

The extent of the impact of Encino Motorcars remains to be decided, according to Jason Kairalla, Miami, FL, cochair of the Section’s Appellate Practice Committee. These recent opinions show it is important to involve an appellate lawyer at the trial level, Kairalla notes. “The way you frame your arguments and how you deal with putting your case forward in the best position to be upheld on appeal is really important,” he says.

“Until you get some guidance from the circuit courts in your jurisdiction, there is some guesswork involved,” he adds. The best way to deal with issues involving a substantial change of law is to present multiple arguments, according to Kairalla. “A good rule of thumb is to prepare your argument using the best case interpretation for your situation while being prepared to make another argument that would prevail under a different interpretation,” he concludes.

Employers May Be Liable for Harassment by Nonemployees

By C. Thea Pitzen, Litigation News Associate Editor

An employee harassed by a client, customer, or other nonemployee in the workplace may have a claim against his or her employer under antidiscrimination laws, according to the Washington Court of Appeals.

The facts in LaRose v. King County involved a public defender who received 10–20 phone calls a day from a client making “disturbing sexual and offensive comments.” The attorney reported the behavior to her supervisor but was not taken off the case. Ultimately, the court permitted the attorney to withdraw from the representation, but the harassment continued. The client called his former attorney more than 1,000 times over 10 months, jumped out at her in a parking garage, left lingerie on her car, hid in her backyard, and appeared at her bedroom window in the middle of the night. He was eventually arrested, while the attorney was diagnosed with major depressive disorder, generalized anxiety, and post-traumatic stress disorder. She was terminated from her employment when she could no longer continue working as a public defender.

Considering an issue of first impression under Washington law, the court held that a nonemployee’s harassment of the plaintiff can be imputed to an employer when the employer “(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.” ABA Section of Litigation leaders note that this case is in line with the trend in federal law and emphasize the importance of training for employers and employees.

“This case is illustrative of the way the courts are looking at federal law throughout the nation,” explains Darryl G. McCallum, Baltimore, MD, cochair of the Programming Subcommittee of the Section of Litigation’s Employment & Labor Relations Law Committee. In addition to cases from the U.S. Courts of Appeals for the Seventh, Ninth, and Eleventh Circuits cited in LaRose, McCallum notes that the Court of Appeals for the Fifth Circuit undertook the same sort of analysis this year in Gardner v. CLC of Pascagoula, L.L.C., explaining that nonemployees can be the source of actionable harassment. While the Third Circuit has not addressed the question, the U.S. District Court for the Eastern District of Pennsylvania similarly held that a nonemployee’s harassment of an employee can subject the employer to liability, observes Shira Forman, New York, NY, editorial board member of the Section’s Employment & Labor Relations Law Committee.

In addition, McCallum and Forman note that current Equal Employment Opportunity Commission regulations specify that an employer “may be responsible for the acts of nonemployees with respect to sexual harassment of employees in the workplace, where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”

In this legal environment, training for both employers and employees is key. McCallum identifies three key responsibilities for employers. First, “have a written policy on harassment that specifically covers clients, contractors, customers, and other nonemployees,” he says. The policy should clearly prohibit both employee harassment of nonemployees and vice versa, he explains. The policy should also
Privilege Waived for Email Copied to Unrepresented Third Party

By Peter J. Murphy, Litigation News Contributing Editor

Common interest agreements allow separate parties pursuing a common legal interest to share information protected by the attorney-client privilege without waiving that privilege. But a common legal interest requires that both parties be represented by counsel at the time of the communication, according to the U.S. District Court for the Southern District of California. A common business or commercial interest is not sufficient to protect otherwise privileged communication from disclosure.

It is well settled that attorney-client privileged communications that are disclosed to third parties are no longer privileged. A narrow exception to that rule is the “common interest” doctrine. But, according to the court in Regents of University of California v. Affymetrix, Inc., a party seeking to protect communications made under a purported common interest agreement must demonstrate that there was “a common legal, as opposed to commercial, interest” between the parties, and the communications were “designed to further that legal effort.”

In Regents, one company’s scientist sent an email seeking legal advice to the company’s in-house attorneys. The scientist copied another scientist, who was employed by a second company, on the email. At the time, the first company was using the second company to design and manufacture products, and the parties were negotiating a license and supply agreement.

A competitor subsequently sued the first company and sought disclosure of this email. The first company argued that the email was protected from disclosure by the common interest exception. The competitor argued there was no evidence that the second company was represented by counsel or that there was a common legal interest between the parties at that time.

The Regents court identified no Ninth Circuit precedent requiring both parties to be represented by counsel for the common interest exception to apply or extending the exception to an unrepresented third party. Nevertheless, the court identified several nonbinding authorities, including the Restatement (Third) of Law Governing Lawyers, which suggest that unrepresented parties cannot participate in a common interest agreement.

According to the court, these authorities were persuasive because the whole intent of the common interest exception is “to permit attorneys to develop a joint legal strategy; the development of legal strategy requires the participation of lawyers.” The court refused to apply the exception because there was no evidence that the second company was represented by counsel at the time of the email, or that there was an actual, nonspeculative common legal interest between the parties at that time.

This decision causes concern because of its impact on how lawyers treat their client privileges. “Courts appear to be eroding the attorney-client privilege in various ways in the discovery process, finding more reasons to disclose what otherwise is clearly an attorney-client communication, which is having a chilling effect on lawyers and clients alike in communicating in candor for fear of later disclosure,” observes Robert J. Will, St. Louis, MO, a division director in the ABA Section of Litigation and immediate past chair of the Section of Litigation’s Pretrial Practice & Discovery Committee.

Although the common interest privilege is premised on a communication between a client and an attorney, courts might “try to find a way to include a pro se party within the circle of privilege,” hopes Edna Selan Epstein, Chicago, IL, member of the Section’s Attorney-Client Privilege Task Force. The Regents court cited a case finding an email between two parties, without counsel being copied, to be protected by a common interest agreement, which was inconsistent with its holding, notes Epstein.

Clarity and client instruction are important keys to ensuring that appropriate privileges are preserved. “Attorneys must make sure that all privileged communications are clearly and conspicuously marked and train employees and agents that they should never send privileged communications outside of the organization without first clearing such disclosures with counsel,” advises Will.

State Overhauls Criminal Discovery Rules

By Laura W. Givens, Litigation News Contributing Editor

The New York State Senate passed new discovery laws that will require prosecutors to turn over critical evidence to the accused at earlier stages of the criminal process. Bill S1716 is expected to be signed by Governor Andrew Cuomo and will take effect 90 days thereafter. ABA Section of
Litigation leaders believe this is a step in the right direction for fairness and efficiency in criminal proceedings.

New York’s new procedures will eliminate the need for sending discovery requests and require certain automatic discovery. At the defendant’s first court appearance, the prosecution will be required to disclose to the defendant any law enforcement reports and written witness statements, electronic recordings, and exculpatory information. The prosecution must perform its initial discovery obligations within 15 days after the defendant’s arraignment on an indictment.

Initial discovery includes all items and information that relate to the subject matter of the case, including statements, transcripts of grand jury testimony, names and contact information of persons with relevant information, designation of witnesses, police reports, and expert witness information. If the information is unavailable within the specified time, it must be provided no later than 60 days before the trial date.

The prosecution may request a hearing if it believes any portion of the materials to be disclosed is non-discoverable. Information relating to a confidential informant or undercover personnel may be withheld without a motion, but the prosecution must inform the defendant that such information is being withheld.

The new laws are broader and mandate earlier discovery deadlines than the current rules. The bill’s sponsor memorandum states that it will “eliminate unfairness and inefficiencies of current discovery practice and facilitate the prompt and accurate disposition of criminal cases.”

“In civil cases, you generally are entitled to receive from the opposing party anything relevant that is not privileged. In criminal cases, you receive less information from the government, and the defendant’s liberty is at issue,” observes Michael T. Dawkins, Jackson, MS, chair of the Ethics Subcommittee of the Section of Litigation’s Criminal Litigation Committee.

New York’s new laws improve the discovery process by mandating that the prosecution turn over witness statements to the defense at the beginning of the case. “Under Brady v. Maryland, the defendant is entitled to exculpatory materials. However, you may not get that material until right before or even during trial. This may not leave enough time for the defense to find witnesses who will support the evidence. The revised New York rules make this information available at the initial appearance,” adds Dawkins.

The new rules also improve the procedures for getting important discovery materials from law enforcement. “Under the new New York rules, the defense gets police reports and law enforcement reports. Under the federal rules, a defense attorney may need a Federal Rule of Criminal Procedure 17 subpoena to get the report, and then make a Rule 17(c) motion to get it in advance of trial. The New York rules get ahead of that and don’t require attorneys to rely on Rule 17,” says Dawkins.

The new criminal discovery rules may also change the landscape for guilty pleas. “Open discovery will allow defendants and their counsel to make more educated decisions throughout the process, whether related to guilt, innocence, punishment, investigation, or the prosecution’s ability or lack thereof to meet its burden of proof,” says Darryl A. Goldberg, Chicago, IL, chair of the Trial Evidence Subcommittee of the Section’s Criminal Litigation Committee.

For some Section leaders, the rationale for limiting discovery in criminal cases is no longer defensible. “Historically, there has been opposition to providing witness-related discovery to defendants at the earliest opportunity because it would expose witnesses to intimidation or worse. As a defense lawyer, I’ve always considered fears of witness harassment overblown in the context of providing discovery and its timing, and commend New York lawmakers for passing the act,” adds Goldberg. ☛
The Vaping Market Is Igniting
By Daniel S. Wittenberg, Litigation News Associate Editor

The multibillion-dollar vaping market has taken a hit. The recent outbreak of vaping-related illnesses is sure to ignite litigation. The Centers for Disease Control (CDC) promptly initiated an investigation preliminarily identifying an additive ingredient associated with products containing tetrahydrocannabinol (THC) as a common thread. The reaction by states to ban vaping products in response to the issue was swift. Additionally, the deadline for e-cigarette market approval submissions to the Food and Drug Administration (FDA) was recently moved up by two years. Vaping products are at the center of a storm, and lawyers are busy.

Vaping 101
Vaping is the act of inhaling aerosolized liquid from an electronic battery-powered device. Electronic cigarettes—or e-cigarettes—are also called vapes, e-hookahs, vape pens, and electronic nicotine delivery systems (ENDS). ENDS are non-combustible tobacco products. The liquid in vaping products can contain nicotine, THC, cannabinoid (CBD) oils, and additives like propylene glycol, vegetable glycerin, and varying compositions of flavorings. THC is the psychoactive compound of marijuana that produces the “high.”

E-cigarettes hit the U.S. market over a decade ago and were promoted as a safer alternative to traditional tobacco cigarettes. They gained significant traction over the last few years when USB-sized vaporizers were introduced. Correspondingly, a spike in vaping occurred, especially among teens and young adults. Until then, this was a segment of the population, according to the CDC, that had been using fewer tobacco products.

By the Numbers
The number of vapers has been increasing rapidly, from about 7 million in 2011 to 41 million in 2018. Market research group Euromonitor estimates that the number of adults who vape will reach almost 55 million by 2021. The global market is estimated to be worth $19.3 billion, up from $6.9 billion just five years ago. According to the Business Research Group, the market is expected to grow to $29.39 billion through 2022. The United States, United Kingdom, and France are the biggest markets. Vapers in these three countries spent more than $10 billion on smokeless tobacco and vaping products in 2018.

FDA Regulation
In 2009, the FDA acquired regulatory oversight of vaping products when the Family Smoking Prevention and Tobacco Control Act became law and classified them as tobacco products. The FDA did not publish proposed rules to begin formally regulating ENDS until 2014. The proposed rules, which were adopted in May of 2016 and effective in August of that year, required ENDS to undergo a “premarket” review process for New Tobacco Products, and required a prominent warning on packaging stating that the products contain the addictive chemical nicotine.

In 2017, the time allowed for submission of applications was extended from three to six years from the 2016 effective date of the rule. However, in July 2019, a federal judge moved that deadline back from 2022 to May 11, 2020. Reaction from the industry was mixed. San Francisco–based JUUL Labs, Inc., said it was supportive of the application process and had been preparing research on its products and how they are used by smokers. “We’re confident in the content and quality of the materials we will submit with our application,” said spokeswoman Lindsay Andrews in an interview with Bloomberg.

However, Fontem US Inc, the marketer of blu e-cigarettes, voiced concern about the pushed-up deadline. “We are disappointed with the court’s decision imposing an accelerated timeline on the premarket review process. This will undoubtedly
hamper the ability of manufacturers to conduct the scientific research needed to ensure that potentially less harmful products are available to adult smokers seeking to make the switch from combustible tobacco products,” the company said in a release.

The Outbreak
In August 2019, the CDC advised of health concerns related to reports in 22 states of vaping-related respiratory issues. At the time, the CDC had not identified a cause. On November 8, 2019, however, the CDC stated that vitamin E acetate, an additive in some THC-containing products, could be the cause of the reported lung illnesses. The announcement did not officially rule out other possible ingredients as a cause of the lung injuries, but a report from the CDC said no other potential toxins were detected in its tests. The CDC stated that anyone who uses vaping products “should not buy these products off the street (e.g., e-cigarette products with THC, other cannabinoids) and should not modify e-cigarette products or add any substances to these products that are not intended by the manufacturer.”

As of November 5, 2019, 2,051 cases of lung injury associated with vaping product use had been reported to CDC from 49 states (all except Alaska), the District of Columbia, and one U.S. territory. Thirty-nine deaths were confirmed in 24 states and the District of Columbia.

The Ban
In response to the vaping-related lung illnesses and concern over increasing youth use of vaping products, governors and health departments of the following states have acted to implement state-wide bans on e-cigarettes or vaping-related products: Massachusetts, Michigan, Montana, New York, Oregon, Rhode Island, and Washington. San Francisco, the home of JUUL Labs, Inc., was the first major U.S. city to implement a ban on nicotine e-cigarette products.

The Lawsuits
The litigation involving vaping companies comes in a variety of forms including lawsuits against businesses for their marketing practices, personal injury claims, and actions by governmental entities and school districts.

In October 2019, the U.S. Judicial Panel on Multidistrict Litigation (JPML), in MDL 2913, In re JUUL Labs, Inc. Marketing, Sales Practices and Products Liability Litigation, ordered the consolidation of 10 lawsuits in the Northern District of California. Those lawsuits involve allegations that JUUL targeted young people when marketing its products, created products with sweet flavors specifically to attract minors, and promoted nicotine addiction. The legal actions include both individual personal injury cases and class action lawsuits.

JUUL, however, has long disputed that it has marketed to kids. Ted Kwong, a spokesman for JUUL, said in a statement, “We have never marketed to youth and do not want any non-nicotine users to try our products. These suits largely copy and paste unfounded allegations previously raised in other lawsuits, which we have been actively contesting for over a year. These cases are without merit, and we will defend our mission throughout this process.”

States are also getting in on the action, with New York and California recently suing JUUL in November 2019, claiming the company engaged in deceptive marketing practices. About the New York lawsuit, JUUL said in a statement, “[W]e remain focused on resetting the vapor category in the U.S. and earning the trust of society by working cooperatively with attorneys general, regulators, public health officials, and other stakeholders to combat underage use and convert adult smokers from combustible cigarettes... Our customer base is the world’s 1 billion adult smokers, and we do not intend to attract underage users.”

Vaping product companies should no doubt expect a significant number of lawsuits arising from the outbreak of vaporizer-related illnesses, and plaintiffs’ attorneys are certainly viewing the “vape panic of 2019” as beneficial to business. Ned McWilliams, a plaintiffs’ attorney based in Florida, stated in an interview, “I’ve been a lawyer for about 13 or 14 years now, and of all the projects I’ve worked on, I’ve never seen an outpouring of people seeking help. I’m not exaggerating when I say that I talk to at least 10 families a day.” Scott Schlesinger, also a Florida-based plaintiffs’ attorney, stated that he’s suing e-cigarette manufacturers “all over the place... and suing the vape shops, too.”

As with any situation that produces a lot of litigation, however, there will be a variety of suits, and the credibility of claims will come into question. For instance, in Florida, one plaintiff claims she had to undergo a double-leg amputation due to complications associated with respiratory failure purportedly related to vaping CBD oil. In response to that allegation, the manufacturer stated that it “has sold hundreds of thousands of cartridges and is not aware of a single complaint that even remotely resembles that of the plaintiff.”

Regarding the potential for lawsuits involving vaping-related illnesses, personal injury attorneys “smell blood in the water,” said Greg Conley, president of the American Vaping Association, in an interview with Courthouse News. Litigators get ready.
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The Demise of the Civil Jury Trial, Part II: Judicial Tinkering

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

In my last column, I wrote about a medical malpractice case involving the death of a little boy. The jury returned a verdict of $10 million in favor of the parents and his two siblings. The appellate majority of three, after ordering the parties to brief settlement negotiations and after “substantial collegial discussion,” decided to reduce the award to $3 million. The parents were also given the option of a new trial.

The majority opinion referenced Averroes’ Commentaries on Aristotle, the spire atop the Great Cathedral in Salisbury, England, Hamlet, and a footnote to Scientific American magazine. Two justices dissented. This column addresses those dissents.

Let’s begin with the spire. The majority noted that the spire is “exactly 3.2 feet off dead center in the direction of the southwest prevailing winds.” This adjustment has allowed the spire to survive for hundreds of years. The majority then wrote, “Greatness in architecture is not achieved by creating a good structure from superb materials; it is achieved by creating a superb structure from mediocre materials.”

The majority applied this analogy to the “imperfect” judicial system, referencing the “unbridled discretion” of a jury on one end of the scale versus plaintiffs having to put up with “outrageous expense, incalculable inconvenience, and inordinate delay.” What is most curious about the last part of this balancing is that the majority also stated that, without years of pretrial motions and discovery, “...defense law firms cannot build a file to justify fees, and large fees are necessary to sustain the overhead of large firms.”

The majority then stated, “Without the occasional jury award that is at least ten times greater than what the parties would have settled for immediately after the tragedy, there would be no incentive on the part of clients to temper the file building, anti-settlement proclivities of their lawyers by urging quick payment of just claims.”
One wonders whether any party to this suit knew that the appeal would involve an analysis of what it takes to sustain the overhead of large firms juxtaposed against the effect of large jury verdicts. In a footnote, the majority stated that $300,000 would have been an appropriate settlement amount if paid within 60 days of the child’s death. Evidently, neither of the lawyers who was actually handling the case agreed with this footnote since the last settlement demand was $5 million and the last offer, after years of litigation, was $220,000.

The majority’s analogy then comes full circle: “The similarities between the legal system and Salisbury, then, become apparent: Judges understand the imperfections in the materials with which they must work and attempt to achieve some structural balance by offsetting one imperfection against another.” The majority stated that tort law should not be a “Las Vegas game of chance . . . [or] a lottery where everyone pays high insurance premiums so that enormous windfalls can be allocated randomly.”

It is this type of judicial second-guessing that undermines the sanctity of a jury verdict. The only safe jury verdict is the “not guilty” verdict in criminal cases. When it comes to establishing an amount for loss of society, how are we, as single judges, any more qualified than 12 jurors who are mothers, fathers, sons, daughters, sisters, and brothers? So what say the dissenters?

“The Great Cathedral in Salisbury, England, . . . is not as far ‘off dead center’ as the legal architecture of the majority opinion on the issue of . . . remittitur in a case involving indeterminate damages,” begins the first dissent. The justice then explored a long line of precedents establishing that the fixing of damages, especially for loss of society, is exclusively a jury function to be tinkered with only if it is a clearly excessive amount fueled by passion or prejudice. The justice then cited the constitutional underpinnings of the right to a trial by jury in a civil case. The first dissenter stated that no amount of money could compensate for “the inconsolable grief” and further noted that the award would be divided among the four remaining family members.

The second dissenting justice dove deeper into the numbers and into the majority’s analysis of the economics of litigation. The jury’s verdict was $10 million. The available insurance coverage was $10.25 million. Amazing, isn’t it? The second dissenter noted that the insurance companies had set the limit of $10.25 million as the maximum amount “for the most harmful acts of malpractice anticipated by the insurance companies.” The jury then, without knowing the policy limits, returned a verdict remarkably close to those limits.

In the book The Wisdom of Crowds, the author tells the story of the recovery of U.S. submarine Scorpion. Simply stated, the premise of the book is that a group is smarter than any one individual in that group. The Scorpion sank on its way back to port, but no one knew why the submarine sank, how fast it was traveling, or its rate of descent. The area where it could have sunk was 20 square miles and thousands of feet deep.

The naval officer in charge came up with a novel plan. He assembled teams from different professions including mathematicians, submarine specialists, and salvage operators. He had them work independently and then put each of their location estimates into a theoreum. None of the individual estimates was close to where the sub was found, but their collective estimates were within 220 yards of the submarine. Isn’t this what juries do every day?

The second dissent then took direct aim at the majority’s Salisbury Cathedral analogy. “Thus, according to the majority, jurors are ‘mediocre materials,’ who operate not on reason, but ‘on largely emotive principles,’ particularly in comparison to judges, who are ‘educated in law as a science.’ Never has a more arrogant statement been uttered by this Court in support of blatant judicial fiat.”

The justice concluded by reaching back to the early 1900s to G.K. Chesterton. All citizens of the town of Battersea with last names beginning with C were summoned, and Chesterton was among them. Chesterton recounted snippets of the cases he sat on, with one being a woman accused of neglecting her children. He noted that it appeared that someone had also neglected her. He wrote, “Never had I stood so close to pain; and never so far away from pessimism.”

The justice ends with a lengthy quote from Chesterton that is one of the most eloquent statements on the sanctity of the collective wisdom of a jury verdict. “Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.”

RESOURCES

- Gilbert K. Chesterton, Tremendous Trifles: The Twelve Men (1922).
A New Resource for the Fractured Class Action

By Stephen Carr, Litigation News Associate Editor

Any assessment of the U.S. Supreme Court’s most important (and most controversial) procedural decisions in recent years would have to include a large number of class action decisions. Cases such as Walmart v. Dukes and Comcast v. Behrend have been widely recognized as revolutionary (by their critics and supporters alike) and spawned volumes of follow-on cases interpreting their contentious holdings.

On top of changes to the case law, the Class Action Fairness Act (CAFA)—despite being more than a decade old—continues to be an endless source of circuit splits. Just last term, the Supreme Court resolved a challenging question about CAFA’s removal provisions in Home Depot USA v. Jackson.

This complex and ever-evolving landscape presents serious challenges to even the most expert class action lawyer. Attempting to meet that challenge, the ABA Section of Litigation’s Class Actions & Derivative Suits Committee has published its Survey of Federal Class Action Law: A Circuit-by-Circuit Analysis. True to its title, the book breaks down class action law in each of the 11 circuit courts of appeal, as well as the D.C. Circuit, the Federal Circuit, and the U.S. Supreme Court in separate chapters.

Each chapter is written by a team of litigators who practice in the circuit (with the exception of the federal circuit, which is described by a law professor). These impressively credentialed attorneys walk the reader through the practical issues that may arise in litigating class actions: from jurisdictional and pleading issues to settlement and appellate concerns.

Undoubtedly the most interesting section of each chapter is the introduction, which provides an overview of some of the most important recent class action decisions in the circuit and a taste of the circuit’s personality. These descriptions lend flavor to the legal analysis that follows and give outsiders a feel for the personality of each circuit.

For instance, we are informed that decisions in the Tenth Circuit “tend to take on the Midwest and Western sensibilities of the region, where common sense, pragmatism, and basic fairness are often the preferred guideposts for decision making over intellectualism, idealism, and judicial activism.” While in the Ninth Circuit, we learn the circuit’s reputation as a “‘cowboy’ court is mostly undeserved.” And the judges are known for their “collegial—and comparatively informal—approach . . . to deciding cases.”

The meat of the book—and its raison d’être—is the practical advice that follows. Each chapter includes sections on jurisdictional issues, including recent decisions on CAFA issues, standing, and mootness, and other issues currently dividing the circuits. The chapters also include detailed discussion of each subsection of Rule 23, including certification issues for each type of class, and general case management issues of interest to many practitioners.

Additional sections of the book discuss class notice and opt-out provisions, interlocutory appeals, and settlements. While all these topics might merit a treatise on their own, in every instance the authors helpfully distill the arguments to a few pithy paragraphs that overworked litigators will appreciate.

As might be surmised from this overview, the book is not aimed at those looking for dense, academic treatments of any of these issues—rather, it is aimed at anyone feeling overwhelmed by recent developments in this fractured area of the law. That said, even experts in the area of class action may be surprised to learn of the variations in class action practice across the country and appreciate a quick reference to important decisions.

Stepping back, the picture of class actions that emerges from this book is of increasing diversity rather than unity. This conclusion might surprise some—the purpose of CAFA was to federalize class actions and Supreme Court decisions are meant to settle conflicts rather than create them. But students of civil procedure are probably not so shocked.

The history of the federal courts is full of ironies and unexpected results. Attempts to manipulate neutral rules of procedure often play out in unexpected ways as the situation on the ground changes. Likewise, controversial Supreme Court decisions have a way of being narrowed from below as common law judges and lawyers find ways to distinguish (and obfuscate) even the most settled legal rules.

Yet, whatever one makes of class actions as a political matter, it cannot be denied that it is one of the most exciting areas in which to practice. Attorneys already well versed in the law of class actions and newcomers to the field alike will appreciate consulting this book as a guide for this slippery subject.

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BEWARE RECEIVING EVIDENCE FROM THIRD PARTIES

The opportunity for counsel to obtain an adversary’s evidence from a third party raises difficult legal and ethical issues.

The ethical rules governing the receipt of an adversary’s evidence from a third party are generally uniform among the states, but local ethical rules and guidelines should be consulted.

Counsel presented with an adversary’s evidence should first try to determine if the third party is lawfully in possession of it.

Counsel must also determine whether the evidence offered by the third party contains an adversary’s privileged communication or work product.

Evaluating the existence of a privilege likely will require counsel’s superficial review of the evidence, but such review risks ethical violations.

Counsel’s review of such evidence should be terminated if he or she determines that it contains an adversary’s privileged information.

Counsel who is offered an adversary’s evidence from a third party may need to advise opposing counsel or the court, particularly if counsel accepts the evidence.

How the third party came into possession of the adversary’s evidence does not affect counsel’s ethical obligations in receiving and reviewing it.

Counsel cannot encourage a client to accept an adversary’s evidence from a third party when counsel’s own receipt or review of it would violate legal or ethical rules.

If necessary, counsel with an opportunity to receive an adversary’s evidence from a third party should solicit guidance from separate ethics counsel or from the court.

Each issue of Litigation News features 10 tips on one area within the field of litigation. This list complements the article by C. Thea Pitzen on page 14.