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# More Bark than Bite? The Impact of *Twombly* and *Iqbal*

By Ashish S. Prasad

When the U.S. Supreme Court reformulated the standard for federal civil pleading in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the new pleading standard sent "shockwaves through the federal litigation bar." Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* 59 Am. U. L. Rev. 553, 554 (2010). The Court appeared to abandon the liberal approach to notice pleading announced in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), by requiring plaintiffs to plead specific facts. Now, the pleading must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Practitioners and academics heaped both praise and scorn on the decision. For some, a stricter standard of pleading was a welcome relief from the threat of meritless nuisance suits. Defendants hoped that, rather than having to settle dubious cases simply to avoid the costs of burdensome discovery, they could now rely on *Twombly* to bring weak cases to a swift and inexpensive end. To others, stricter pleading standards meant that plaintiffs with meritorious claims would never get their day in court. Advocates for plaintiffs complained that, in cases where the only incriminating evidence was in the hands of the

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# Selected Recent Cases Applying *Ashcroft v. Iqbal*

By Carla R. Walworth, Mor Wetzler, Elizabeth Patterson, and Angela S. Fetcher

In *Ashcroft v. Iqbal*, the U.S. Supreme Court provided additional guidance for the applicable standard for a motion to dismiss for failure to state a claim and the pleading requirements in civil cases. To follow the continuing impact of this significant decision, the Pretrial Practice & Discovery Committee has formed an *Iqbal* Task Group. Among other things, this task group tracks selected cases applying *Iqbal* and prepares squibs of particularly interesting cases within each circuit. The *PP&D* newsletter is delighted to be the beneficiary of this work and, in this issue we offer summaries of recent cases applying *Iqbal* in the Second, Fifth, and Seventh Circuits. In future issues, we hope to be able to share more of this good, ongoing work of the *Iqbal* Task Group.

## Second Circuit

The Second Circuit has continued to explore the interplay between *Iqbal* and earlier decisions by the Supreme Court and the circuit. For example, in *Arista Records LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010), the Second Circuit noted that *Iqbal* did not raise the pleading standard beyond the plausibility requirement in *Twombly*, and reconciled *Iqbal* with *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which held that beyond providing fair notice of his claim, an employment-discrimination plaintiff need

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# Message from the Chairs

What is "complex litigation"? The Manual for Complex Litigation states that there is no "bright-line definition" for the term. According to Webster's, "complex suggests the unavoidable result of a necessary combining and does not imply a fault or failure." Thus, "complex" in the context of litigation might imply combining of multiple parties, numerous or difficult legal issues, multiple witnesses, tedious subject matter, or unusual proof problems. Potential litigation issues that might combine to make any litigation "complex" are myriad.

Even the most basic litigation has attained a certain level of complexity occasioned by our very complex modern world. Attorneys today face a greater challenge than ever before to stay abreast of developments in the law and even other areas, such as technology, which has become integral to litigation. One cannot litigate a case without dealing with electronic discovery or using courtroom technology to present evidence at trial. Our committee is dedicated to providing practical advice and education in areas of concern to civil litigators. As always, we are grateful to the very fine lawyers who have taken their valuable time to address some of these emerging or evolving areas of concern.

In this issue, we address the complexities presented by the ever-increasing burden posed by discovery, including ethical considerations involved in the logistical aspects of document review and production, the potential for inadvertent waiver of privilege, and the pricing of document-processing services. We also delve into the challenging issues presented by qualified immunity in claims against government officials and assertion of the Fifth Amendment in civil proceedings. Finally, we consider important issues involving civil procedure including

# Message from the Editors

The theme for this larger, combined Winter/Spring 2011 issue of *PP&D* is "complex litigation." What is "complex," of course, depends on your vantage point. Lawyers of a half-century ago would likely consider almost any piece of litigation in today's world—where even the simplest civil contest might feature evidence gleaned from Facebook and personal-finance programs—"complex." Ours is an evolving profession that requires new skills to be developed to face these complexities. This Winter/Spring 2011 edition of *PP&D* explores the intricacies of a variety of issues encountered in our complex world of litigation.

We begin with another article in our continuing coverage of the legal consequences of the *Twombly* and *Iqbal* decisions. In "More Bark Than Bite? The Impact of *Twombly* and *Iqbal*," Ashish S. Prasad reviews studies that have attempted to quantify the real-world impact of these decisions in the trial courts. He argues that based on the evidence, these decisions have not had a long-term impact on dismissal rates. Prasad provides insights on how plaintiffs and defendants can position their cases best in light of this data. Next, we provide the latest installment in our continuing series summarizing recent decisions interpreting *Twombly* and *Iqbal*. In this issue, we bring you updates from the Second, Fifth, and Seventh Circuits.

Litigation against government officials is almost always complex if for no other reason than the frequent invocation of the threshold issue of qualified immunity. In "Litigating a Claim Against a Government Official after Denial of a Dispositive Motion Raising Qualified Immunity," Mary Cox and Richard Caldwell address two important issues: the appealability of an order denying qualified immunity, and the continuing jurisdiction of the trial court while an appeals court reviews the trial court's decision.

We next have two articles focused on complex federal litigation. In "The Ten Commandments of Summary Judgment Practice," Brad McCullough, a chair of the committee's Dispositive Motions Subcommittee, provides practical tips on how to handle this "centerpiece of federal litigation." Brad walks us through his top ten tips on how to win on summary judgment, focusing on a range of issues from timing to tone. Amy Longo and Bill Dance provide a fascinating and detailed look at new case law on the complex issue of waiver of privilege in document production in "Federal Rule of Evidence 502—Lessons from the Second Year." Their analysis shows that most courts are adopting a forgiving approach to inadvertent disclosure but that some "outlier" courts have used a high standard for "reasonable steps" to prevent it, even in cases involving hundreds of gigabytes of data.

Another facet of large-document cases is explored in a piece by our own Greg Boyle and his colleague Jenny Lee. In "Litigation 101: Ethics Related to the Use of Contract Attorneys," they provide guidance for litigators navigating the use of contract attorneys in large-scale discovery projects. Greg and Jenny give us detailed "best practices" for hiring and supervising contract and temporary attorneys that we are sure

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best practices for positioning your case for dismissal on motion for summary judgment and developments in pleading standards following *Twombly* and *Iqbal*.

If you would like to become more involved in our committee, we would welcome your help. Opportunities for involvement include writing for our newsletter or website, helping prepare educational programs, and tracking the implementation of *Twombly* and *Iqbal* through our *Iqbal* Task Group. Visit the PP&D webpage at http://apps.americanbar.org/litigation/committees/pretrial to see what our committee offers. We hope to see you in Toronto for the ABA Annual Meeting in August!

Ian Fisher, Betsy Collins, and Kent Lambert

you will find useful in your next engagement. In the e-discovery vein, we also are pleased to share the practical advice provided in "Pricing Processing in E-Discovery: Keep the Invoice From Being a Surprise," in which Seth Eichenholtz walks through the various steps involved in processing electronically stored information for review, and pricing pitfalls to avoid at each stage.

Finally, Dona Szak tackles the complex intersection of criminal and civil practice in her in-depth piece, "Asserting the Fifth Amendment in Civil Proceedings." Dona warns against complacency at any stage of civil proceedings if criminal prosecution is a possibility, but also cautions against overuse of Fifth Amendment protection in light of potential adverse inferences that may be drawn.

We are happy to bring you this diverse collection of articles on the theme of complex litigation, and hope that you find them as useful and interesting as we have. We are always looking for timely, helpful articles to include in this newsletter. The theme for our next issue, Summer 2011, will be "Perspectives," followed by "Damages" in Fall 2011. If you are interested in writing an article or have any comments or suggestions, please contact Greg Boyle (312.923.2651 or gboyle@jenner.com) or Seth Row (503.222.1812 or srow@pfglaw.com). Please also be sure to visit the PP&D webpage at http://apps.americanbar.org/litigation/committees/pretrial for past newsletters, practice pointers, and periodic updates on cutting-edge legal developments including updates from our *Iqbal* Task Group.

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# Litigating a Claim Against a Government Official after Denial of a Dispositive Motion Raising Qualified Immunity

By Mary A. Cox and J. Richard Caldwell Jr.

Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities. Government officials lose the defense of qualified immunity when their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald* 457 U.S. 800, 818 (1982). When a district court finds that a government official's conduct violates clearly established statutory or constitutional rights, the protection afforded by qualified immunity is lost and a plaintiff is allowed to proceed with his or her suit against the government official. *Griffin Industries, Inc. v. Irvin* 496 F.3d 1189, 1200 (11th Cir. 2007). This article will address two issues encountered when a government official is denied the defense of qualified immunity: whether an order denying qualified immunity is immediately appealable, and whether a plaintiff's case can proceed in the district court while the appellate court considers the denial of a dispositive motion.

To ensure that qualified immunity is not lost when a court erroneously denies a defendant's dispositive motion, the U.S. Supreme Court held that an order denying qualified immunity is immediately appealable even though it is interlocutory. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The reason behind the rule allowing an interlocutory appeal is that qualified immunity is *immunity from suit*. Immunity from suit is lost if a court erroneously permits a case to go to trial.

In *Mitchell v. Forsyth*, a citizen whose conversations had been wiretapped with the permission of the attorney general sued the attorney general of the United States in his individual capacity. The attorney general argued that he was immune from suit under either the Absolute Immunity Doctrine granted to prosecutors, or the Qualified Immunity Doctrine granted to public officials. After holding that the attorney general was not protected by the Absolute Immunity Doctrine, the U.S. Supreme Court held that the attorney general would still be entitled to qualified immunity. Comparing qualified immunity to absolute immunity, the Supreme Court penned the following famous phrase: The entitlement is one of immunity from suit rather than a mere defense to liability.

The rule set forth by the Supreme Court 25 years ago is easy to understand as a general concept. Proper application of the rule to particular cases, however, has proved to be far more difficult.

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## Immediately Appealable Orders

In *Mitchell v. Forsyth,* the Supreme Court restricted the category of immediately appealable denials of qualified immunity, emphasizing that the appealable issue is purely a legal one: whether the facts alleged support a claim of violation of clearly established law. The availability of an interlocutory appeal depends upon whether the appellate court is being asked to decide a question of fact or a question of law. Unfortunately, as many practitioners have come to realize, the line between law and fact often is difficult to determine.

What is clear is that questions of fact alone are not immediately appealable. For example, in *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that where an order resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial, a denial of qualified immunity was not immediately appealable. In *Johnson*, Illinois police officers arrested a diabetic man who was having an insulin seizure, under the wrongful assumption that he was drunk. Mr. Jones brought a constitutional tort against the five officers. Three officers moved for summary judgment arguing that Mr. Jones offered no evidence that these three particular officers used excessive force.

The district court denied the three officers' summary-judgment motion. The three officers immediately appealed arguing that the denial was erroneous because the record contained "not a scintilla of evidence. . . ." Eventually the Supreme Court granted certiorari and concluded that questions of evidence insufficiency are not immediately appealable.

With the "easy" application of the rule out of the way, the Supreme Court went a step further in the last part of *Johnson* to clarify two common questions facing practitioners who are contemplating appeal. First, what happens if a district court's order makes both a factual determination that a defendant may have done "X" and a legal determination that "X" violates clearly established law? Second, what if a district court's order denying a defendant qualified immunity fails to state the facts upon which the ruling is based?

As to the first question, the Supreme Court clarified that when a district court's order contains a legal determination that "X" violates clearly established law, immediate appeal is available. The Supreme Court emphasized, however, that the appellate court reviewing a question of law does not have to exercise pendent jurisdiction to review the underlying question of fact. Rather, the appellate court can take as true the facts assumed by the district court. By so doing, the appellate court focuses on the order drafted by the district court and not

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necessarily a question craftily raised by petitioners to create appellate jurisdiction where it might not otherwise exist.

As to the second question, the Supreme Court instructed that when a district court does not state the facts it assumed when it denied the defendant's dispositive motion, the appellate court must undertake a detailed review of the record. Specifically, the Supreme Court instructed appellate courts to review the record to determine what facts the district court, in the light most favorable to the nonmoving party, *likely* assumed.

In essence, *Johnson* addressed four categories of appeals. In the first category are district-court orders finding solely that the record raised a genuine issue of material fact concerning an officer's conduct for qualified-immunity purposes. These orders are not immediately appealable. In the second category are district court orders that make both a factual determination and a legal determination. The second category of orders is immediately appealable. But, the appellate court can choose not to exercise pendent jurisdiction over disputed issues of fact. In the third category are district-court orders that find that a defendant's undisputed conduct violated clearly established law. The third category of orders is immediately appealable. In the fourth category are district court orders that do not state a basis for the ruling. The fourth category of orders is immediately appealable, and appellate courts must complete a detailed, cumbersome review of the record to determine the facts the district court *likely* assumed.

Following the Supreme Court's holding in *Johnson*, defendants seeking immediate review of a district court's denial of qualified immunity would be wise to make clear to the court: (1) that they take as given the facts that the district court assumed when it denied summary judgment; and (2) that the appellate court is being asked to determine whether those facts are sufficient to state a claim under clearly established law.

In the Eleventh Circuit, defendants seeking an immediate review may have even more leeway. In *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996), the Eleventh Circuit held that an appellate court could consider challenges to a district court's factual determinations as to the conduct the defendant engaged in, where the core issue being appealed was qualified immunity. In *McMillian*, a prisoner sued prison guards he claimed had conspired to mistreat him. On a motion for summary judgment, the district court concluded that a genuine issue of a fact existed as to whether the guards conspired to detain the prisoner. The guards appealed the denial. In response, the prisoner contended that the appeal raised issues of factual dispute.

The Eleventh Circuit conceded that while the prisoner's argument found some support in *Johnson v. Jones*, "this circuit has not construed *Johnson* to bar immediate appellate review of fact-based rulings in all circumstances." 88 F.3d at 1563. The court went on to rule that an appellate court may address the factual issues of the type of conduct the defendants engaged in, because the issue is a necessary part of the core qualified-immunity analysis of whether the defendant's conduct violated clearly established law. The Eleventh Circuit decision in *McMillian v. Johnson* further opened the court's door for defendants seeking immediate review of a question of fact accompanying a question of law. *Keating v. City of Miami*, No. 07-23005-CV-JEM (11th Cir. Mar. 2, 2010) (noting that "interlocutory appeal is available when the denial of qualified immunity is only partially based on an issue of law.").

## Stay Pending Appeal

Finally, if an appellate court does take an immediate appeal, a defendant should be quick to seek a stay of proceedings in the district court. The question of whether a district court has discretion to deny a defendant's motion to stay pending appeal is intertwined with the question of whether or not an appeal concerns a matter of law or a matter of fact. Where an appeal concerns a matter of fact, a plaintiff may argue that there is no legal basis for interlocutory appeal. As such, the district court has discretion to deny a motion to stay. *Grawey v. Saad*, 2008 W.L. 125183 (E.D. Mich.). However, when an appeal is based on an issue of law and the appeal is non-frivolous, the denial of qualified immunity divests the district court of jurisdiction. *Owens v. Ala. Dep't of Mental Health and Mental Retardation*, 2008 W.L. 4722038 (M.D. Ala); *See also Blinco v. Green Tree Servicing, LLC* 366 F.3d 1249, 1253 (11th Cir. 2004).

A defendant's entitlement to qualified immunity is a question for the court. When a district court denies a defendant the protection afforded qualified immunity, the reason behind the ruling matters. Therefore, practitioners should argue with an eye toward appeal, knowing that an order addressing a legal question, even in part, is a defendant's best chance to preserve his or her protection from suit after denial of a dispositve motion.

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# The Ten Commandments of Summary Judgment Practice

By J. Bradford McCullough

Of all the weapons at the litigator's disposal, the motion for summary judgment is one of the most potent. It can end a case in its entirety, strip away portions of the case, or alter the course and contours of the litigation. It is also one of the most frequently used tools. In the words of a former chair of the ABA Section of Litigation, "there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years," and "summary judgment motions have become part of virtually all substantial federal civil litigation." Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?* Litigation J., Vol. 34, No. 4 Summer 2008, p. 5. Given the power and the prevalence of the motion for summary judgment, how should counsel go about litigating such motions? What should you keep in mind as you consider the motion and as you prepare a motion or a response? There are certain principles that apply to summary judgment practice no matter the subject matter of the case, and that should be followed—or at least considered—in the course of seeking or opposing the entry of summary judgment. Here then are ten ideas, or if you will, Ten Commandments of summary judgment practice.

## Before Preparing and Filing the Motion for Summary Judgment

### *1. Have summary judgment in mind from the outset of the case and throughout the case.*

It is often said that from the moment that an attorney begins to prepare a complaint or an answer, he or she should also begin to prepare a closing argument to deliver at trial. The possibility of summary judgment should command similar attention—a lawyer should have summary judgment in mind from the outset of litigation. While state-court experiences can vary greatly from jurisdiction to jurisdiction, it is generally understood that federal courts are very receptive to well-founded motions for summary judgment, and many cases are resolved through the entry of summary judgment. Even if a motion for summary judgment does not resolve a case in its entirety, the court may enter partial summary judgment, determine that certain material facts are not genuinely in dispute, or otherwise narrow the scope of the litigation. Fed. R. Civ. P. 56 (a), (d). Such rulings often precipitate settlement, and streamline those cases that continue on for additional litigation and trial.

It is also important to keep in mind that some types of cases are particularly well suited for summary disposition. For example, claims that hinge on an interpretation of a written contract are prime summary judgment candidates. "If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue." *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir. 1993). Even if the contract is found to be ambiguous, summary judgment might still be available. "Even where a court, however, determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis." *Id.* As such cases are especially conducive to summary disposition, counsel should always have summary judgment in mind when litigating these cases.

In addition, counsel should know the issues that are likely to be the focus of the motion for summary judgment, and become familiar and comfortable with the applicable case law and statutory provisions that will govern those issues. Discovery should then be framed with those legal standards in mind. Counsel should draft written discovery with those controlling legal standards in mind, and interrogatories may include specific statutory language or specific language from pivotal cases. Similarly, deposition questioning should be tailored toward building the record needed to support the motion for summary judgment—or to oppose the motion that counsel anticipates may be coming from his or her opponent. *See* Michele L. Maryott, *The Trial on Paper: Key Considerations for Determining Whether to File a Summary Judgment Motion*, Litigation J., Vol. 35 No. 3 Spring 2009, p. 36.

### *2. Keep in mind the proper timing of a motion for summary judgment.*

As is true for many things in life, timing can be crucial in deciding when to file a motion for summary judgment. Traditionally, most motions for summary judgment have been filed after the completion of discovery, and that remains the most common time for filing such motions. Yet, there are some cases where an earlier motion might be appropriate. Indeed, federal courts have held that Fed. R. Civ. P. 56 "does not require trial courts to allow parties to conduct discovery before entering summary judgment." *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993). For example, where a claim on its face is time-barred, and the plaintiff fails to specify how additional discovery might unveil information that could somehow overcome that bar, a court may proceed to entertain the defendant's motion for summary judgment. *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993). Similarly, where the deposition testimony of the

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plaintiff destroys an element of his or her claim, the court does not have to wait until the close of discovery before considering and granting the defendant's motion for summary judgment. *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 922–924 (8th Cir. 2010).

Thus, in an appropriate case, you should carefully consider an early motion for summary judgment. As one commentator has noted, "in a complex case, for example, a judge might encourage the parties to file motions as early as possible regarding any claims that might potentially be disposed of by summary judgment, without prejudice to filing motions later in regard to other claims where additional discovery is needed." 3 Robert L. Haig, *Business and Commercial Litigation in Federal Courts* § 27:3, p. 305 (2005). Also, if a defendant prevails on a motion for summary judgment based on one narrow issue, and then seeks to recover its fees incurred in defending the claim—including discovery costs and expert-witness fees that were incurred in litigating all of the various issues presented by the plaintiff's complaint—a court might ask why the narrow motion for summary judgment had not been asserted earlier before all of those other costs were incurred. A response from counsel to the effect that they had pursued discovery on all issues because they wanted to move for summary judgment on all available grounds, and "you only get to do one motion for summary judgment," might not be well received by the court. Faced with that situation, the Eleventh Circuit observed that neither Fed. R. Civ. P. 56 nor the applicable local district rule limited a party to one motion for summary judgment, and remarked that "there is no reason to assume that a district judge will stubbornly refuse to rule on a motion for summary judgment at an early stage of the litigation if the moving party clearly apprises the court that a prompt decision will likely avoid significant unnecessary discovery." *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1188 (11th Cir. 2005).

### *3. Have a theme and a focus.*

Just as you should have a theme for trial, you should also have a theme for a motion for summary judgment or a response to such a motion. It is obviously important to make sure that the memorandum supporting the motion (or the opposition to the motion) contains a strong legal argument, with references to the record as well as to the governing legal authorities. But it is also important that the factual record and the controlling legal principles be presented in the context of a compelling story or narrative. In other words, it is not enough simply to give the judge the legal basis for ruling in your favor. You should also give the judge a basis for *wanting* to rule in your favor. Similarly, the motion should have a focus. Find the issue or issues that really support your position, clearly identify and address those issues, and stick to those issues. "Shotgun" style approaches that fire off a multitude of issues and arguments are seldom if ever advisable, but they are particularly ill-advised in motions for summary judgment. One trial court recently complained about the "organization-by-shotgun methodology" of a party's brief supporting its motion for summary judgment, and remarked that the shotgun methodology made "it difficult to identify with precision the arguments on which" that party relied. *Commodities Exp. Co. v. City of Detroit*, No. 09-CV-11060-DT, 2010 WL 2633042, *6 (E.D. Mich. June 29, 2010). Not surprisingly, that party's motion was denied.

### *4. Know the rules.*

This one should be obvious. But sometimes, it is easy to overlook the obvious. Different jurisdictions have different rules, some of which might differ greatly from what you might be used to seeing elsewhere. For example, in the Superior Court of the District of Columbia, before filing any motion, other than a motion seeking Rule 11 sanctions, "the moving party shall first ascertain whether the other affected parties will consent to the relief sought." D.C. Super. Civ. R. 12-I. Thus, when litigating in that court, you must seek consent to the entry of summary judgment before you actually file your motion for summary judgment.

Also, some jurisdictions expressly require a statement of material facts as to which the moving party contends there is no genuine dispute. *See, e.g.*, D.C. Super. R. 12-I (k). Other jurisdictions have no such requirement. *See, e.g.*, Md. Rule 2-510. Prior to December 1, 2010, the Federal Rules of Civil Procedure contained no such requirement, but the local rules for some district courts did—while others did not. *Compare* U.S. District Court for the District of Columbia Local Rule 7(h) with U.S. District Court for the District of Maryland Local Rule 105.

Remember that absent congressional action to the contrary, as of December 1, 2010, new subsection (c)(1) of Fed. R. Civ. P. 56 will contain such a requirement. The bottom line—you must read and know the rules.

### *5. Know the judge.*

Apart from the applicable rules, a particular judge might have his or her own "rules," maybe in the form of a formal standing order or maybe in the form of informal "preferences." Know them. Also, before filing a motion for summary judgment—or any other dispositive or nondispositive motion for that matter—you should try to find out what the judge has previously said on the same subject. Before filing a motion for summary judgment in a fraud case pending before U.S. District Court Judge Jones, a little research should uncover what Judge Jones has had to say about summary judgment procedures in general and fraud claims in particular. Do that research.

## As You Prepare and Present the Motion (or Response)

### *6. Keep it simple.*

When preparing a motion for summary judgment, avoid the temptation to look too innovative or creative. You should try your best *not* to leave the judge with the impression that your position is intriguing and "cutting edge." You are *not* trying to convince the judge that you are the brightest, most visionary lawyer practicing before the court. (While it is nice if the judge reaches that conclusion, that is not your primary objective). You *are* trying to convince the judge that there is no genuine dispute as to any material fact and that your client is entitled to judgment as a matter of law. There is nothing novel or earth-shattering about your client's case—it is an ordinary case where the law is well established and the factual record is clear. In other words, your case is one that does not deserve

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a trial. In preparing your papers, try to paint the picture that your case is clear and straightforward. Judges grant motions for summary judgment in cases that they see as being clear and straightforward. *See, e.g., First United Mortg. Co., Inc. v. Chaucer Holdings PLC*, Civil No. 2:08-2754, 2010 WL 3283525, *1 (D.N.J. Aug. 17, 2010) ("This matter is a straight forward coverage dispute rooted in the language of the policy agreement, and for the reasons which will be elaborated below, the Court will GRANT Defendant's Motion for Summary Judgment. . . .") If the judge concludes that your case is so clear that anyone could win it, then you will win. A judge does not need to "go out on a ledge" to grant such a motion.

Of course, if you are opposing a motion for summary judgment, you should try to paint a different picture. Your case is very complicated, with many factual twists and turns. *See, e.g., Star Spa Servs. Inc. v. Robert G. Turano Ins. Agency, Inc.*, 595 F.Supp.2d 519, 529 (M.D. Pa. 2009) ("The court concludes that this complicated factual situation would be best resolved by a jury and will deny summary judgment on this point.") There is something about your case that is different. There might be case law that holds that facts "a, b, and c" dictate a particular result. Well, maybe your case has facts "a, b, and c," but your case might also have facts "d, e, and f"—or at least a genuine dispute about those latter three facts. And maybe the controlling case law has not directly addressed the significance of those facts. *See, e.g., A&L Precision Prods. v. Alloy Bellows & Precision Welding, Inc.*, Civil No. 07-0345, 2009 WL 2959608, *7 (W.D. Pa. Sept. 14, 2009) ("[T]his Court will deny A&L's request for summary judgment on this portion of Alloy Bellows' fraudulent claim, declining to determine in advance of necessity the complex and novel question of whether the Pennsylvania Supreme Court would, under the circumstances alleged, bar A&L's fraudulent inducement claim premised on A&L's alleged 'passing off' of a defective product under the gist of the action doctrine.") In short, this case is *not* clear and straightforward.

Counsel representing the target of an early motion for summary judgment, and who concludes that additional information must be obtained through discovery before responding to the motion, should turn to Fed. R. Civ. P. 56 (f), or any state-court equivalent. That rule permits a district court to deny a motion for summary judgment, or to grant a continuance for the party opposing the motion to obtain affidavits, to take depositions, or to undertake other discovery. To obtain that relief from the court, however, the party opposing the motion for summary judgment must show "by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56 (f). Failure to comply with that affidavit requirement will result in a denial of the request to defer disposition of the motion for summary judgment. *Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 127–128 (1st Cir. 2006).

### *7. Consider partial summary judgment.*

The Federal Rules of Civil Procedure permit a motion "for summary judgment on all or *part* of the claim." Fed. R. Civ. P. 56 (a) (emphasis added). A judge who might be reluctant to grant a motion for full summary judgment, which would have the effect of tossing out a plaintiff's claim (or less commonly, a defendant's defense) in its entirety, might be more receptive to a motion for partial summary judgment. Your motion for partial summary judgment, which attacks one or two of the five counts in your opponent's complaint, could present a slightly different picture to the trial judge than would a motion seeking summary judgment on all five counts. The former looks like an effort to streamline the case and save judicial resources as well as the resources of the litigants. It has the feel of being of assistance of the court. The latter motion, on the other hand, could create the perception of over-reaching and overzealous advocacy.

Which is not to say that you should not file a motion for full summary judgment on all five counts of a five-count complaint if there is truly a strong case for arguing that there is no genuine dispute as to any material fact with respect to any count and that your client is entitled to judgment as a matter of law on each count. If, however, you have a strong case for obtaining summary judgment on two or three of the counts, and a weak case at best on the other two or three counts, you are probably better off filing a narrowly focused motion for partial summary judgment than you are filing a motion for full summary judgment. The danger with the motion for full summary judgment in that situation is that the weaker arguments could dilute and diminish the strength of your more compelling arguments. If the judge concludes that there is a genuine dispute as to a material fact with respect to two or three of the counts, he or she could conclude that there are factual issues foreclosing summary judgment as to *any* aspect of the case. Remember the warning—"pigs get fed, hogs get slaughtered."

### *8. Remember the beauty of brevity.*

Less is generally more. Judges are busy and appreciate it when we get to the point. Do not say in 25 pages that which can be said in 15—or 10.

### *9. Tone it down: Persuasive is not the same as argumentative.*

Do not overdo the rhetoric and do not overplay your hand. Avoid personal attacks, invective, and ad hominem arguments. Similarly, the overuse of adjectives and adverbs can easily detract from your papers. *See, e.g.*, Jim McElhaney, *Style Matters* ABA J., June 2008. An indiscriminate characterization of each one of your positions as being "clear," and each one of your opponent's positions as being "baseless," "specious," or "absurd" can quickly get tiresome, and can cause you to lose credibility. Make your argument clearly and persuasively with heavy reliance on nouns and verbs. If the judge finds that your position is "clear," the judge will come to that conclusion without you having to tell him or her. Likewise, if the judge finds your opponent's position as "baseless," "specious," or "absurd," the judge does not need you pointing it out. The judge will come to that conclusion without any prodding.

### *10. Responding? Consider a cross-motion for summary judgment.*

Sometimes the appropriate response to a motion for summary judgment includes filing a cross-motion for summary judgment. This often occurs in cases dealing with the interpretation of

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# Federal Rule of Evidence 502—Lessons from the Second Year

By William H. Dance and Amy Longo

Federal Rule of Evidence 502, which took effect on September 19, 2008, was intended to provide uniformity in the law governing waiver of privilege when documents that have privileged content are disclosed in litigation. According to the Advisory Committee notes, a second purpose was to respond "to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information." With two years of case law decided by the courts since the new rule went into effect, questions remain whether Rule 502 has been applied with relative consistency and in ways that allow litigants to reduce their costs. As the cases below illustrate, courts have taken varying approaches to some of the core elements under Rule 502, and it may take further decisions to truly discern clear standards for its application.

## Rule 502(d): Can Courts Impose Clawback "Agreements" on Unwilling Parties?

The new rule specifically sanctioned so-called clawback agreements in which the parties agree that inadvertent production can be cured and waiver avoided by a demand by the producing party that the disclosed document be returned. In *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010), U.S. Magistrate Judge Waxse considered whether the court had the power to impose a clawback agreement as part of a protective order when one of the parties did not consent. Though Rule 502 is silent on this issue, Judge Waxse cited the statement of congressional intent regarding Rule 502, which explains that subsection (d) "'is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews. . . .'" Judge Waxse also found authority for a court-imposed order under Federal Rule of Civil Procedure 26(c)(1), which permits the court, for good cause, to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Having determined that he had authority to enter an order over a party's objections, Judge Waxse rejected plaintiff Rajala's arguments against doing so by referring to the general purpose of Rule 502.

> To deny entry of such a clawback provision merely because Plaintiff would be deprived of the opportunity to demonstrate that the producing party had not taken reasonable care to prevent disclosure would defeat the purpose behind Rule 502(d) and (e). The goal is not to encourage disputes regarding waiver and inadvertent production, but to prevent such disputes from arising in the first place.

Judge Waxse concluded that it was in the best interests of both parties and the court to impose a clawback provision over the plaintiff's objection.

## Rule 502(b): "Reasonable Steps" to Prevent and Rectify Inadvertent Disclosure

Rule 502(b) provides that disclosure is not a waiver when it is inadvertent and when the disclosing party took "reasonable steps" to prevent and to promptly rectify the disclosure. Rule 502(b). The rule does not define the extent or nature of the "reasonable steps" a litigant must take to avoid waiver.

Most courts that considered this issue in 2010 recognized that in large-scale electronic document productions, perfection should not be required. For instance, in *Olem Shoe Corp. v. Washington Shoe Co.*, No. 09-23494-CIV, 2010 WL 3981694 (S.D.Fla. Oct. 8, 2010), U.S. Magistrate Judge O'Sullivan considered whether defendants waived privilege when their copy service provided plaintiffs with an entire set of documents marked as attorney-client privileged. When the plaintiffs emailed defense counsel's paralegal to inquire whether they had intended to disclose these documents, the paralegal did not respond for eight days. Only when the plaintiff's counsel again contacted defense counsel, this time directly, did defense counsel respond, the same day, with a clawback email.

The plaintiff's counsel refused to return the documents, arguing that the disclosure was not inadvertent and that privilege was waived; defense counsel moved to compel the return of the documents. Judge O'Sullivan first held that the disclosure was "clearly inadvertent." *Id.* at *3. "The defendant sent the documents to a commercial copier service with instructions that the documents labeled 'Attorney-Client Privilege' be returned to the defendant. The copier service mistakenly produced the privileged documents to the plaintiff." *Id.* The delivery instructions amounted to reasonable steps to prevent disclosure. The court also found that the defendant's counsel took the required prompt steps to rectify the error once he learned of it by sending the plaintiff "a detailed four-page letter by mail and email providing the plaintiff's counsel with instructions on returning the documents." *Id.*

Judge O'Sullivan blamed both parties for lack of promptness in rectifying the disclosure.

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> The plaintiff's counsel waited approximately 20 days after receiving the documents before sending the email about the privileged documents. The plaintiff's counsel failed to directly notify the defendant's counsel and instead communicated this information to the defendant's paralegal. The undersigned also finds fault in the defendant's counsel and his staff. It is inexcusable that the defendant's paralegal would not have responded to the plaintiff's email and, at the very least, communicated the contents of the email to the defendant's counsel. It seems that the defendant's counsel may have failed to properly supervise his paralegal.

*Id.* Notwithstanding the delay, Judge O'Sullivan found no waiver had occurred and ordered the plaintiff to return all copies of the inadvertently disclosed documents.

U.S. Magistrate Judge Lloyd took a similarly forgiving approach in *Mformation Technologies v. Research In Motion Ltd.*, No. C08-04990 JW (HRL), 2010 WL 3154441 (N.D. Cal. Aug. 9, 2010). There, defendant RIM informed Mformation that Mformation appeared to have produced two privileged documents. Mformation promptly recalled those documents. Several months later, Mformation recalled an additional 55 documents it asserted were privileged and inadvertently disclosed. RIM argued that Mformation had waived privilege by waiting too long to re-review its production and attempt to claw back the 55 privileged documents. The court noted Mformation's assertion that "it took pains to review (a)its entire document production (comprising, this court is told, some 3.6 million pages) to identify any privileged materials that were inadvertently produced, as well as (b) its entire production process to help ensure that privileged materials would not be disclosed on a going-forward basis." The court found Mformation's review process reasonable and concluded that although "Mformation was perhaps not as diligent as defendant would have liked, on the record presented, this court declines to find that Mformation waived the claimed privilege as to those 55 documents. Accordingly, RIM's motion is denied." *Id.* at *2.

In *Gilday v. Kenra, Ltd.*, No. 1:09-cv-00229-TWP-TAP, 2010 WL 3928593 (S.D. Ind. Oct. 4, 2010), U.S. Magistrate Judge Baker justified taking a forgiving approach to inadvertent disclosure by citing Rule 502's stated goal of controlling discovery costs. Like Judge O'Sullivan and Judge Lloyd, Judge Baker was adjudicating a dispute over whether a party, in this case the defendant, Kenra, had waived privilege by failing to take reasonable steps to prevent and rectify disclosure of privileged documents under Rule 502(b). Judge Baker found that Kenra had taken reasonable steps with respect to preventing and rectifying disclosure. Judge Baker did not describe the steps in detail, saying only that Kenra had reviewed its documents for privilege before production and had moved for a protective order within nine days of the inadvertent production. Judge Baker concluded his analysis of the disclosure by observing that "[o]f course, had Kenra's counsel double- or triple-checked its privilege log against its production, this whole argument might have been avoided. However, as this court observed in *Alcon Manufacturing, Ltd. v. Apotex, Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *6 (S.D. Ind. Nov. 26, 2008), 'this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid.'"

While not all of the opinions in 2010 were quite as forgiving, most courts to consider the issue seemed to recognize that despite due care, disclosure of even hundreds of privileged documents within a large production can be inadvertent. In evaluating disclosure of privileged documents in the context of very large productions, many courts cited for guidance the Advisory Committee note to Rule 502(b), which suggests a flexible test including as possible factors "the reasonableness of precautions taken, the scope of discovery, the extent of disclosure, and . . . the number of documents to be reviewed," among others. Some courts calculated the ratio of inadvertently produced documents to the total document production, as opposed to the absolute number of privileged documents disclosed, to evaluate the reasonableness of the efforts to prevent disclosure. For instance, in *Kmart Corp. v. Footstar, Inc.*, No. 09 C 3607, 2010 WL 4512337 (N.D. Ill. Nov. 2, 2010), the court observed that Liberty Mutual had produced only 130 pages of privileged documents out of a total production of 4,500 pages. U.S. Magistrate Judge Cox pointed out that this was an error rate of less than 3 percent, which she did not "believe . . . is a significant mistake." *Id.* at *4. The court ultimately found, however, that other aspects of Liberty Mutual's conduct outweighed this low percentage of inadvertently disclosed documents and concluded that Liberty Mutual had not taken reasonable steps to prevent the disclosure,

Another case involving a much greater scale of electronic production but similar legal issues was *Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F.Supp.2d 845 (E.D. Mich. 2010). The defendants attempted to claw back as privileged 184 documents that had been inadvertently produced within a production of 56,846 documents, which exceeded 4 million pages. The error rate in this case was approximately 0.33 percent—less than one percent and about one-tenth of the 3 percent error rate that Judge Cox found insignificant in *Kmart*.

The plaintiffs argued that the disclosure resulted in a waiver of privilege as to the disclosed documents because the defendants had not taken reasonable steps to prevent the disclosures. A great deal was at stake in the court's decision because in one of the documents, the defendant's chief financial officer admitted that the defendant controlled two companies, Haden International Group and Haden Environmental, Inc., and this admission went "to the heart of a disputed factual issue that the plaintiffs seek to establish in their case before the Court." According to the plaintiffs, the defendants produced this key document on four separate occasions. The plaintiffs contended that multiple productions of the same privileged document and the absolute volume of privileged documents produced demonstrated that the defendants had not taken reasonable steps to protect their privileged documents. The plaintiffs also argued that the defendants' electronic evidence was in a searchable database and that the reviewing attorneys should have found the documents at issue in a search term review because many were marked "privileged and confidential."

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In response, the defendants submitted documentation of their privilege review:

> [a]ccording to the defendants, their law firm reviewed 63,025 documents totaling an estimated 4.7 million pages; produced 56,846 documents totaling some 4.3 million pages; and prepared privilege logs for 1,306 documents. The defendants used a team of sixteen associates (who were supervised by two senior associates) to conduct review, and the team spent about 2,500 hours reviewing 8,700 hard copy documents and more than 59,000 electronic documents, including emails.

U.S. District Judge Lawson applied the flexible-balancing test described in the Advisory Committee notes for Rule 502(b) to conclude that, in light of the efforts described, "the defendants are entitled to avoid a finding of waiver as a result of the production of the discovery documents, which the Court is satisfied is inadvertent."

But in another case concerning an allegedly "key" document disclosed to the opposing party, *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125 (S.D. W.Va. 2010), U.S. Magistrate Judge Stanley took a much harder line in evaluating reasonableness. In *Mt. Hawley*, the defendant, Felman, produced 346 gigabytes of documents in TIFF format. It subsequently attempted to claw back 377 documents.

Judge Stanley did not specify how many documents were within the 346 gigabytes produced, so it is not possible to derive an error rate to compare against *Board of Trustees*. According to the 2005 edition of *The Sedona Conference Glossary: E-Discovery & Digital Information Management*, in terms of image storage, one gigabyte equal approximately 17,000 8.5" x 11" pages scanned at 300 dpi and stored as TIFF Group IV images. Using that estimate, 346 gigabytes of TIFF files conservatively represents 5,882,000 pages, considerably more than were produced by the defendants in *Board of Trustees*. It is safe to say that both the scale of production and the scale of privileged documents disclosed seem to be roughly the same order of magnitude on both cases, with an error rate of well under 1 percent.

According to Judge Stanley, defendant Felman used third-party software—Concordance—to review and categorize its documents. One Concordance database "inexplicably built an incomplete index of potentially privileged materials," and according to the defendants, the manufacturer "has not been able to explain why the index was incomplete." Of the 377 privileged documents Felman wanted to claw back, 328 came from the defective Concordance database.

Felman's attorneys exhaustively documented the steps they took to prevent and rectify disclosure, which the court recounted in a series of 24 bullet points. The steps included creating privilege search terms, setting aside documents that were potentially privileged, and conducting individualized document-by-document privilege review of these documents. Felman's attorneys did not document the number of attorney hours spent in the review. Though the steps documented appeared thorough, the court took issue with the attorneys' failure to perform quality-control sampling "to determine whether their production was appropriate and neither over-inclusive nor under-inclusive" and concluded that "[t]he production of 377 documents which are now claimed to be privileged is not solely attributable to the problem with the fourth Concordance database file." Judge Stanley did not provide the basis for this conclusion, but she might have based it on the fact that only 328 of the 377 inadvertently produced documents were from the faulty database.

The court found that Felman's disclosure of the 377 documents was inadvertent and that it had taken reasonable steps to rectify the disclosure. But it found that the steps Felman had taken to prevent the disclosure in the first place were not reasonable and that, therefore, Felman had waived privilege over the 377 documents at issue.

It seems likely that the content of one of the documents at issue influenced Judge Stanley's decision. That document was an email exchange between Felman's outside counsel at the time and its manager of human resources. The email appeared to substantiate the plaintiff's basic contention that Felman had made a fraudulent claim for the insurance coverage at issue in the dispute. The document potentially triggered the crime-fraud exception to attorney-client privilege.

*Mt. Hawley* shares the characteristic of a privileged-document disclosure occurring as a result of vendor error with the defendant in *Olem Shoe Corp.*, 2010 WL 3981694, discussed above, where the court did not find a waiver. *Olem Shoe Corp.*, 2010 WL 3981694 at *3. The details of the technical glitch in *Mt. Hawley* are also quite similar to those in *Datel Holdings Ltd. V. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993 (N.D. Cal. March 11, 2011). There, a software glitch resulted in numerous versions of an email chain being produced without the initial communication showing that the entire dialogue

## Key Internet Links

- *The Sedona Conference Glossary: E-Discovery & Digital Information Management* (2005 ed.): www.thesedonaconference.org/dltForm?did=Glossary_2005
- *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125 (S.D. W.Va. 2010) (via Google Scholar): http://scholar.google.com/scholar_case?case=15124134762420283726&q=Hawley+Felman+Production&hl=en&as_sdt=4,376
- *Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F.Supp.2d 845 (E.D. Mich. 2010) (via Google Scholar): http://scholar.google.com/scholar_case?case=3069910449992554140&q=sheet+metal+workers+pension+palladium&hl=en&as_sdt=4,343

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in the email chain was initiated by a request for investigation by defendant Microsoft's in-house counsel. Magistrate Judge Laporte reviewed the details of the technical error and found that "[m]istaken production due to an unexpected software glitch that occurred despite the use of standard discovery software falls squarely on the inadvertent side of the divide between intentional disclosure under Rule 502(a) and unintentional disclosure under Rule 502(b)."

*Mt. Hawley* is also similar to *Board of Trustees*, discussed above, in several respects. Both involved very large-scale document productions. Both had defendants who, following production, sought to claw back hundreds of privileged documents. In both, one of the privileged documents produced was a potentially case-dispositive email. Both defendants exhaustively documented the steps taken to prevent and rectify disclosure, showing what appeared to be quite low error rates. Yet in *Board of Trustees*, the court found no waiver, whereas in *Mt. Hawley*, the court deemed that the defendant waived privilege for the disclosed documents.

The *Mt. Hawley* opinion illustrates that it is possible for courts to evaluate very similar facts, applying Rule 502, and to reach opposite conclusions with respect to waiver. *Mt. Hawley* may prove to be an outlier opinion that is neither cited nor relied on in years to come. On the other hand, if it is widely followed, it is likely to create much more uncertainty with respect to the reasonableness requirements of Rule 502(b).

## The Importance of Documenting Reasonable Steps to Prevent and Rectify Disclosure

One issue about which the 2010 Rule 502 opinions are remarkably consistent is that parties must be prepared to provide detailed factual support to demonstrate the reasonableness of the steps that they took to prevent and rectify disclosure if they expect to convince a court that they did not waive privilege. For example, despite failing to convince Judge Stanley in *Mt. Hawley*, defendant Felman Productions presented a very thorough accounting of its efforts in these respects, as did defendant Liberty Mutual in *Board of Trustees*. Both provided details of, among other statistics, the number of attorneys involved in the privilege review, all the steps taken to preserve, collect, and review, the time consumed, and the volume of documents collected, reviewed, produced, and logged as privileged.

Other litigants who were not so detailed did not fare well under Rule 502. In *Conceptus, Inc. v. Hologic, Inc.*, No. C-09092280, 2010 WL 3911943 (N.D. Cal. Oct. 5, 2010), U.S. District Judge Alsup found waiver with respect to a letter, based in part on the fact that "[p]laintiff does not . . . describe any reasonable steps taken to prevent disclosure of the letter." Similarly, in *Dubler v. Hangsterfer's Laboratories*, No. 09-5144 (RBK/JS), 2011 WL 90244 (D.N.J. Jan. 11, 2011) U.S. Magistrate Judge Schneider found waiver based on deficiencies in the defendants' evidence of their efforts to protect and rectify, stating that "[d]efendant has not proffered any evidence regarding the reasonable steps it took to prevent the October 15, 2010 disclosure. In addition, defendant has not demonstrated that it took reasonable steps to rectify its error."

## The Importance of Promptness

Since Rule 502 became law, courts have consistently required parties to demonstrate that their clawback efforts are not only reasonable, but also prompt. In *Kmart Corp.*, 2010 WL 4512337, the court found fault with defendant Liberty Mutual's failure to object immediately and on the record at a deposition when inadvertently produced privileged documents were introduced as exhibits. Moreover, Liberty Mutual did not move to have the contested documents returned until 12 days later. In finding waiver, the court held that "a reasonable step would have been to file a motion within a matter of days." Liberty Mutual also waited almost a month after the deposition to assert privilege over another deposition exhibit. Judge Cox found that "once an error is observed a party is required to properly follow up. . . . We do not believe, therefore, that Liberty Mutual promptly took reasonable steps to rectify the alleged error." *Id.* at *5.

But in another opinion addressing the same issues, *Zapmedia Services, Inc. v. Apple Inc.*, No. 2:08-CV-104-DF-CE, 2010 WL 5140672 (E.D. Tex. Sept. 24, 2010), U.S. Magistrate Judge Everingham found that failing to object to introduction of privileged documents at a deposition was not an automatic waiver. Zapmedia allowed several of its witnesses to answer questions about privileged documents at two depositions over the course of several months without objection. Two additional privileged documents were introduced at a third deposition, and Zapmedia's counsel allowed Zapmedia's Rule 30(b)(6) witness to answer questions about them. Then, just two hours after the deposition concluded, Zapmedia sent a clawback notice to defendant Apple, Inc., attempting to clawback the privileged documents introduced at all three depositions. Judge Everingham found that the privilege had been waived as to the documents introduced at the first deposition, which had taken place eight months before the clawback. He also found waiver for the documents introduced at the second deposition, which occurred a week before the third deposition and the clawback notice. Defendant Apple argued that the introduction of the documents as exhibits was a per se waiver, so Zapmedia had waived privilege as to all the introduced documents. But the court accepted Zapmedia's argument that there is no such per se rule. "Considering that the privileged nature of these documents was not obvious from the face of the documents and that Zapmedia sent its claw back request immediately after the deposition," the court found that Zapmedia acted promptly and reasonably and did not waive privilege as to those two documents.

## Rule 502(a): What Is the Proper Scope of Waiver?

Rule 502(a) allows courts to limit the subject matter of a waiver to only the disclosed document, but also provides for the court to find a broader waiver, extending to undisclosed communications, "only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." A number of opinions found that litigants had waived privilege as to particular documents and

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# Litigation 101: Ethics Related to the Use of Contract Attorneys

By Gregory M. Boyle and J. H. Jennifer Lee

In an economic downturn, the role of the contract attorney, or an attorney without a permanent relationship with law firms, has taken center stage as an effective means for controlling costs in litigation. In addition, law firms may hire contract attorneys due to a conflict of interest in certain cases. Employing contract attorneys typically involves avoiding the expense of using law-firm associates or of counsel, billed out at going firm rates, in favor of contracting with individual, licensed attorneys to perform tasks only for a particular client matter. These tasks may include drafting legal memoranda, performing legal research, or—most commonly—providing document-review-and-production services.

Litigators and their clients frequently hire contract attorneys in circumstances where there is a need to respond quickly and effectively to discovery issues or motions to compel. In light of the time crunches under which the hiring of contract attorneys often arises, it is critical for attorneys to understand in advance the ethical considerations that apply to work performed by contract attorneys.

## Retaining Contract Attorneys and Informed Consent

Using contract attorneys is an area of modern legal practice into which the inexperienced attorney should not venture without thoughtful planning. With respect to the practical issue of finding contract attorneys, it is fortunate that the proliferation of contract attorney agencies presents the litigator with no shortage of options. However, attorneys relying on vendors and agencies may lose sight of counsel's independent obligations. Overlooking ethical obligations related to discovery can have grave consequences for clients' abilities to pay for and prevail in litigation. Where parties are held to have engaged in discovery misconduct, courts have ordered draconian remedies like adverse instructions or substantial monetary sanctions as a means to prevent the abuse of judicial processes. *See, e.g.*, *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs. LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubalake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). Counsel should be well aware of its obligations before contacting vendors and agencies.

When a client has not demanded that the firm use contract attorneys in the first place, is the firm required to report or obtain informed consent on the use of contract attorneys? On the one hand, given that the client selected the firm in particular and presumably expects to be represented by attorneys in association with the firm, shouldn't the client be informed of any deviation from that expectation? On the other hand, a law-firm attorney typically has no ethical obligation to get informed consent for every subordinate associate or paralegal who works on the case. As long as the firm attorneys supervise the contract attorneys, from an ethical perspective, shouldn't use of a contract attorney be considered the same as use of any other subordinate within the firm?

The answer differs depending on the jurisdiction in which the attorney practices. Although the ABA Committee on Ethics and Professional Responsibility Formal Opinion 88-356 is permissive, certain states require a client's informed consent. ABA Opinion 88-356 states that a firm is not obligated to inform the client about using contract attorneys on a matter, as long as those attorneys work under the close supervision of firm attorneys or the firm attorneys adopt the contract attorneys' work as their own. The rationale underlying this approach is that there is no risk to the client's expectations.

However, bar organizations in some jurisdictions have issued ethics opinions rejecting this approach. In Illinois and New York City, there are opinions holding that a firm must obtain informed consent from the client whenever contract attorneys are used. Ill. State Bar Assoc. Adv. Op. 92-07; Assoc. of Bar of City of N.Y. Comm. on Prof'l and Judicial Ethics Formal Op. 1988-3. In California, there is a different approach. There, a firm must disclose the use of contract attorneys whenever their use constitutes a "significant development" in the legal matter. Calif. State Bar Formal Op. 1994-138. There is no express standard concerning what constitutes a significant development. It depends on the circumstances, such as whether responsibility for overseeing the client's work is changing and whether the new attorney will perform a "significant" amount of work. In light of the lack of a clear standard, it appears that if there is any doubt, disclosure to the client should be made.

Another wrinkle with respect to disclosure and consent is if the firm includes overhead and profit in what it charges to the client for contract attorney work. *See* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 00-420 (discussing disclosure of charges for contract attorneys as calculated disbursements versus as fees for legal services). Where the cost of a contract attorney is not a purely pass-through cost, it is a best practice for the firm to disclose the use of contract attorneys, and the firm's plan to charge for overhead and profit and receive client consent.

## Ethical Rules Regarding Supervision of Work

The principal ethics rules governing the supervision of contract attorneys are Model Rules 5.1(b) and 5.3(b). Rule 5.1(b) provides that, "[a] lawyer having direct supervisory authority

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over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." In addition, according to Rule 5.3(b), a supervisory lawyer must "make reasonable efforts to ensure that the [contract attorney's] conduct is compatible with the professional obligations of the lawyer."

The operative question, then, is what "professional obligations" and "Rules" tend to be relevant to the work that will be performed by contract attorneys in discovery? The two primary rules are Rules 3.3 and 3.4.

Rule 3.3 provides that:

> A lawyer shall not knowingly:
>
> make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law . . . or
>
> (3) offer evidence that the lawyer knows to be false . . .

*See* Rule 3.3(a).

Rule 3.4 provides that:

> A lawyer shall not
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . or
>
> (d) make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

*See* Rule 3.4.

In fast-paced litigation, attorneys must be mindful that accuracy and promptness in responding to a subpoena or document request are critical not only to abide by ethical obligations, but also to avoid sanctions that may be imposed on the lawyer or the client. This may be challenging, however, in view of the fact that litigation is often perceived by clients as a cost center. Nonetheless, it is imperative that any avenue to reducing discovery costs be consistent with the obligation to advance a client's interests.

Certain best practices can be used in the process of training and supervising contract attorneys to ensure accuracy, ethical propriety, and efficiency. Establishing certain safeguards in the context of document review and production can ensure that a litigator's retention and supervision of contract attorneys comport with ethical rules. They may include:

1. Assess the contract attorney's education background and relevant work experience.
2. Execute confidentiality agreements.
3. Conduct conflict checks/implement proper screens.
4. Conduct training on consistent billing practices.
5. Explain the obligations of confidentiality and loyalty to the client.
6. Incorporate sufficient lead-in time for training.
7. Incorporate an initial second-level review by a firm attorney to perform quality control checks early on. After the initial contract attorney team has been assembled, identify a lead training attorney who will teach future contract-attorney hires as additional production sets need to be reviewed; use discretion on whether a contract attorney can fill this role or whether training should be done by a firm attorney.
8. For cases sufficiently complex to merit it, prepare and disseminate a set of written materials explaining the issues in the case and the type of documents being reviewed.
9. Use sample sets of documents to test accuracy in a low-risk environment.
10. If privilege is at issue for the review, provide a refresher tutorial on the attorney-client privilege and attorney-work-product doctrines.
11. Encourage the use of the same foreign-language translator, when appropriate, so that there is familiarity on the team with the same language consultant.

In addition to the best practices listed above, if the document review is being performed at a location outside the law firm, the supervising attorney should consider conducting a site visit to inspect the quality of the resources and the security measures in place at the legal-services agency. Ideally, to minimize costs of repeated screening visits, such a site visit could take place only once, followed by an ongoing relationship with the same agency for future projects.

## Conflicts of Interest

It is by now well established that attorneys are prohibited from representing a client that is directly adverse to another client or may be materially limited by responsibilities to another client or by the lawyer's own interests. ABA Model Rule of Professional Conduct 1.7. However, the hiring of contract attorneys presents unique considerations regarding potential conflicts. *See* D.C. Bar Op. 352.

In particular, Rule 1.10 provides that while lawyers are "associated in a firm," none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7. The question that then arises is whether or not the conflicts of interest faced by the contract attorney are imputed to the firm. Generally, whether the contract attorney is "associated with a firm" depends on the contract attorney's access to the files regarding other clients of the firm, the contract attorney's actual knowledge of matters of other firm clients, and screens or other controls put into place to limit such file access.

Given the complexity of the inquiry and dire consequences from any misstep (i.e., disqualification), firms may want to just assume the contract attorney is "associated," treat any potential conflict on the matter as it would for any other firm, and limit access to only the file the attorney is hired to work on.

## Post-Script: Outsourcing Legal Services

ABA Ethics Opinion 08-451 is entitled, "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services." According to this opinion, there is nothing "inherently unethical" about outsourcing. However, following the recent

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# Pricing Processing in E-Discovery: Keep the Invoice from Being a Surprise

By Seth Eichenholtz

E-discovery continues to confound law firms and clients with a lack of consistency in pricing. This lack of consistency may have many reasons, likely due to various vendors having different internal costs owing to the wide range of core competencies and services that e-discovery vendors purport to offer. But perhaps the most critical reason for the lack of consistency in pricing is that vendors have been able to take advantage of the fact that both law firms and clients are all over the map in defining specifically what "processing" means in the e-discovery lexicon. Processing data in e-discovery means different things to different people, and pricing for processing has followed suit.

Of all the major hurdles in any e-discovery engagement, perhaps the biggest challenge is being able to foresee the costs of processing the data. Processing can also become the most expensive component of litigation, short of a long and drawn-out document review. The reason for this is that there has been no uniformity among e-discovery vendors regarding how to categorize the various elements and issues inherent in processing data in e-discovery nor what those costs should be. And it is very easy to envision a case with current market processing costs where the processing costs alone can quickly reach six-figure sums. So to the extent that one can police, lower, and perhaps best of all, predict pricing, this is a critical issue and an opportunity to better represent your company or client.

Before we assess pricing processing, we should first define what processing in e-discovery means. While there are no governing bodies overseeing e-discovery, there are a few key groups and organizations that are well recognized and respected for their insights and descriptions of the various components of e-discovery. The E-discovery Reference Model (EDRM) (http://edrm.net/) and the Sedona Conference (www.thesedonaconference.org) both offer well-documented, court-cited definitions of what processing in e-discovery is.

The EDRM states the following about the processing stage (lifecycle) of e-discovery:

> [F]ollowing preservation, identification, and collection, it often becomes necessary to "process" data before it can be moved to the next steps of the lifecycle. Some primary goals of processing are to discern at an item-level exactly what data is contained in the universe submitted; to record all item-level metadata as it existed prior to processing; and to enable defensible reduction of data by "selecting" only appropriate items to move forward to review. All of this must happen with strict adherence to process auditing; quality control; analysis and validation; and chain of custody considerations.

The EDRM goes on to break up processing into four subcategories: assessment, preparation, selection, and output. Assessment may allow for a determination that certain data need not move forward. This stage, typical in a consultative manner, may include general data sets or evidence items that are deemed not relevant or necessary for whatever reason. The preparation phase involves performing activities on the data set that will later allow for specific item-level selection to occur (extraction, indexing, hashing, etc.). The selection phase involves de-duplication, searching, and analytical methods for choosing specific items that will be moved forward. The output phase allows for transport of reviewable items to the next phases of the lifecycle.

The Sedona Conference includes the following regarding the processing of data:

> Principle 11: A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

While both the EDRM and the Sedona Conference offer excellent points on methodology, there is little information in either definition to truly define processing as it would appear in a vendor's statement of work or services agreement.

However processing is defined, the following key steps are prevalent:

- de-duplication (either globally or by custodian)
- filters for relevant dates, custodians, file types (de-NISTing, or removing known files that have no pertinent data in them, like system executable files)
- search terms (or keyword searches, also called Boolean searches)
- metadata filters
- load file creation

The trend seems to be employing all of the steps listed above before the load file creation stage—often called the initial culling phase—and price it on the lower end of the spectrum. This is most likely a knee-jerk reaction to the general complaint by law firms and clients that e-discovery costs too much. But

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this brings up two important questions:

- When was the last time you purchased anything of importance because it was the least expensive?
- If vendors drop their price, does that mean they are making less money or that other parts of their services are being priced appropriately?

The first question is really a warning to not be seduced by the lowest price. Many vendors choose to charge a low upfront cost to cull down the initial data set as an inducement for the client to sign on. The second question is a logical follow-up to the first, postulating that a low price on one part of the bill may be making up for various other components. This is what is going on all too often in e-discovery processing.

The initial culling involved in processing seems cut and dry, but there are issues to consider that many vendors will not list in their pricing sheets or are purposely keeping vague. The most common issue I've seen in the initial culling phase relates to keyword searches. As anyone reading this article knows, generating searches and keywords is far from a perfect science. And I've rarely been involved in any matter where the search terms are set and not altered (or more likely added to) throughout the engagement. How your e-discovery vendor charges for that service is critical from a cost perspective.

Let's see how this plays out with three different pricing structures.

- Vendor A includes keyword searches (and ostensibly, search terms as well) but no further information in its pricing.
- Vendor B includes initial keyword searches as part of the initial culling price and additional keyword searching at an hourly rate.
- Vendor C includes keyword searching as part of its initial culling stage and up to three iterations before load file creation.

It is entirely possible, and arguably even likely, that the first set of keywords or search terms will be modified. Vendor A has not provided insight on how they would charge for three or four different iterations of search terms. Ostensibly, it could very well charge the same per-GB charge for initial culling for every new set of terms. While this method may inspire counsel to come up with a complete set of search terms to avoid unexpected costs, the client will most likely be unhappy with re-processing data over and over. By applying some numbers to this example, one can see that at a low market rate of $150 per gigabyte for initial culling, if the data set is 50 gigabytes and the search terms are re-run four different times, the client may think it is paying $7,500 ($150 multiplied by 50 gigabytes) for the initial culling, but without clear language or discussion on pricing, the client could receive a bill for $30,000 ($7,500 multiplied by 4).

Vendor B spells out clearly that after the first set of search terms, it charges an hourly rate to re-run search terms. This is still an incredibly vague way of assessing costs, however, since there is no way to predict how long it would take to re-run search terms across a given data set. Variables like software type, type of data, volume of data, and processing power are but a select few variables to consider. But it is safe to assume that even in a modestly sized data set of 50 gigabytes, it is a matter of hours, not minutes or seconds, to re-run search terms. In applying some numbers to this example, assuming the same $150 per gigabyte initial culling cost, the client needing to re-run search terms four different times, a low market rate of $50 per hour to re-run search terms, and assuming a conservative estimate of four hours to re-run each new set of search terms, the client would go from paying $7,500 (the first round of search terms included) to $8,100, or an additional $600 for running search terms ($50 per hour multiplied by four hours, or $200 performed three times).

Vendor C allows three different iterations before load file creation for its clients to finalize their search terms. To some, that may be fair and practical, but to others, it may not mean a thing if the matter is a multi-district, multi-party litigation with nine different law firms involved where running three sets of search terms is a drop in the bucket. Ostensibly, Vendor C can charge its initial culling fee after any new search term is needed beyond the first three. Applying numbers to this example is not necessary to clearly show that in using a vendor who prices this way, one must have a solid grasp of the keyword searching that will be needed for that specific matter. If it will clearly go beyond three rounds, a separate pricing agreement should be made to ensure that the initial culling costs don't skyrocket.

Unfortunately, there is no best situation here, as each case and situation is always unique. The key is to be able to look at a service agreement or scope of work and be armed with the knowledge to extrapolate how things may play out so that the client is not stuck with a bill that is thousands of dollars higher than what was estimated.

The critical point here, and the best way to be a true advocate for your client or company, is to get the most consistent pricing—not necessarily the least expensive. If you estimate a certain amount for e-discovery costs, coming as close to that estimate is much more likely to be beneficial than having the cost be the lowest you could find with the risk that the service will suffer.

## Load Files

This is an area that tends to be so consistently mismanaged that it is interesting more people are not discussing it. First, some context and a definition for the uninitiated: E-discovery projects frequently involve attorneys reviewing documents in TIFF or PDF images. Converting native files to TIFF or PDF format is frequently standard operating procedure for many attorneys and is a common method for producing documents to opposing counsel. But creating TIFF or PDF images also removes the metadata from the original document. Therefore, a separate file containing each document's metadata (typically in the form of a spreadsheet with specifically defined fields) is needed to review the data or produce it. The spreadsheet is the load file. Some vendors call this step deployment for review, stage two processing, or native file processing—and it is almost always more expensive than initial culling due to more manual labor.

The EDRM offers a good general definition for a load file: "A data file that sets out links between the records in a database and the document image files to which each record pertains."

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(*See* http://edrm.net/resources/glossary/l/load-file.) The key, for e-discovery purposes, is that the load file contains all the metadata from the original data set, points to the extracted text for search functionality in a text file, and links the metadata and text files back to the image files that were created.

For document review, a load file containing a production set is typically created by an e-discovery vendor to easily input information into a document review repository tool like Summation, Concordance, or iPro. Things can get quite complicated, however, as load files come in a variety of formats and versions. And now with law firms, clients, and vendors all using different tools for different purposes, you may find yourself in a situation where data is sitting in one tool and a load file needs to be created to move the data to another tool for document review, but if the load file specs don't match up or the vendor does not have a tool readily available to create the necessary load file, extra costs for creating that custom load file will certainly be incurred.

Thus, to keep costs in check, it is vital to understand what document review tools are going to be used by both parties (and any additional software, like Early Case Assessment tools) as well as what fields will be needed in your document review as early as possible, as the corresponding load file specifications will be a determining factor in the cost.

Many law firms and some clients have very specific, and oftentimes extensive, specifications for how data is to be processed and how metadata and text are to be extracted. While there are common load file formats, it is absolutely critical to understand how your vendor is charging for the creation of the load file. As mentioned earlier, from the vendor's point of view, this is a different procedure than initial culling with different software and additional time required. It is the critical link between the raw processed data and the processed data that the attorneys are reviewing.

The load file processing stage can yield the following components:

- extraction of metadata
- extraction of text (and creation of corresponding text file)
- native files
- creating image files (TIFF or PDF)

Most vendors will include the extraction of metadata and text, and of course, the corresponding native files in their load file pricing. The pricing discrepancy lies in how vendors charge for the creation of image files. There are effectively three ways to deal with image files at this stage:

1. Create the images during the load file creation stage before the data is put in the review tool. This is the most desirable approach, particularly if there is a need to search the corresponding image files. This approach also has benefits when production timelines are tight because the images are already created.
2. Use the TIFF "on the fly" during document review approach when small or unanticipated productions need to take place. This may create issues with bates numbers and branding those image files with and among various users.
3. Create the images after document review while gearing up for production. This approach is very common assuming there are no tight production deadlines.

When you create the TIFF and PDF image files can also be an expensive decision. Since vendors typically charge $.02, $.03, $.05 per page or more to create a TIFF or PDF image while reviewing the documents, one must consider if it is worthwhile to create the images early on during the load file creation stage, or during or after the document review at a per image price. What I've seen repeatedly is the client choosing the less-expensive option on first glance, which is creating the TIFF images after the document review, and then being baffled as to why there are additional fees in the tens of thousands of dollars for the creation of those images.

As an example, let's assume your data set is about 50 GBs. If you choose to create the files during or after the documents are reviewed, let's assume only a percentage of the files will be needed in TIFF format, bringing the volume of documents down to 25 GBs. Assuming 50,000 pages in a GB at a conservative rate of $.03 per page, it could be an additional $37,500 in costs—most likely not in the original estimate.

Now compare this to the situation of choosing to create the files during the load file creation stage with the same assumptions. If the additional costs accrued were $700 per GB to the price of the load file creation cost (a market-accurate number), even without the hindsight of only converting half the volume, 50 GB multiplied by $700 is $35,000. Not only is that actually less than if half the documents had a TIFF image created during the document review stage, but the cost would

## Practice Tip for Young In-House Lawyers

Make yourself accessible to all members of the organization; make it a priority to get to know not only upper management but all other levels of the organization's employees. These people can be as much of a resource to you concerning institutional history and operations as you are to them regarding legal matters. In addition, the more people who are familiar with you and feel that they have access to you, the greater the likelihood that issues—both legal and otherwise—will be brought to your attention. Even if the issues are not legal issues that are appropriate for in-house counsel to address, they can be passed on to the appropriate administrator. Join a listserve in your practice area so that you can rely on the wisdom and advice of others who have more and/or different experiences in the same field.

—Jean Walker Tucker, Senior University Attorney, University of South Alabama

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have been a known entity and accounted for. It is exactly this kind of pricing challenge that has driven lawyers and clients to become weary when working with e-discovery vendors.

Be sure to consider if image files will be utilized early on and query your vendor regarding what services are included in the load file creation phase. Some vendors will offer all-inclusive pricing on the load file creation, which may appear to be more expensive, but most likely will keep costs down and, moreover, becomes a quantifiable cost early on. Other vendors may offer a blended rate that includes the initial culling phase and the load file creation phase. Either way, be sure to understand and account for all the potential costs along the way. The goal is to never be surprised by the invoice at the end of the day.

## Other Costs to Consider

### *Project Management Fees*

This may also be identified as consulting or professional services fees. Many vendors will attach project management fees to your processing costs. To some extent, this is understandable, as there are certain things that must be done in the processing phase that take up time, such as filling out and reviewing for quality control chain of custody forms, generating reports, and communicating with the client and/or law firm. Some of this may be included if your vendor offers flat-rate pricing, but be sure to ask, and never assume anything when reviewing a services agreement. Pricing varies on this greatly, from under $50 per hour to upwards of $275 per hour. Those numbers can add up very quickly and are an expensive afterthought.

### *Technical Time*

Like anything with computers, there is the very real concern that there will be technical issues to overcome. From the mundane (password-protected files) to the complicated ("My data is in Early Case Assessment Tool X, and I need a load file created with custom fields for Review Platform Y by tomorrow afternoon") most vendors will charge you some form of an hourly rate. Be sure to query your vendor as to what constitutes actual billable technical time as opposed to something that should be covered under the general processing fee.

### *Exceptions Processing*

In any data set, there will most likely be files that the vendor was unable to process upon initial culling. Most vendors will supply their client with an exceptions report listing those specific files and related information. These reports will typically include odd or proprietary file names/extensions, container files (like a ZIP or PST file—not to be confused with the actual files contained within), password-protected files, and others. The exceptions report can be critical, and the pricing methodology varies among vendors greatly. Some vendors will include processing the contents of the exceptions report as part of the initial culling phase; some charge extra for that kind of work (hourly or by the GB); and many will combine a per-gigabyte pricing fee with an hourly fee for technical time. Be sure to confirm how your vendor charges for dealing with exceptions reports before the initial culling begins.

## Conclusion

This article is not intended to give in-depth instruction on how to process data nor is it intended to give ammunition to law firms and clients to be overly aggressive with their vendors. The fact is that most vendors really try to do a good job in servicing their clients. But e-discovery presents many unique challenges, and, combined with the wide variety of backgrounds vendors come from, the lack of any true governing body overseeing e-discovery methodology, and the inherent miscommunication between attorneys, IT professionals, clients, and litigation-support professionals, there are myriad issues and challenges that arise daily. However, by grasping the basic nature of what the processing stage in e-discovery truly consists of, and, moreover, the nuances of how various vendors price those services, one can learn to ask the right questions and thus engage the best vendors for the job. The best possible result is not only a job well done but also a price tag consistent with expectations and delivered services.

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## The Ten Commandments

(Continued from page 8)

a written contract. By submitting cross-motions for summary judgment, the parties are telling the court that they do not think that there are any genuine disputes as to any material fact and that the case should be decided as a matter of law. The court, however, does not have to agree with that assessment, but is free to conclude that there is a disputed question of fact and therefore deny both of the cross-motions. *Podberesky v. Kirwan*, 38 F.3d 147, 156 (4th Cir. 1994), amended on denial of reh'g, 46 F.3d 5 (4th Cir. 1994).

## Conclusion

Motions for summary judgment are powerful weapons that are frequently used in contemporary civil litigation. Careful attention to the applicable rule provisions, together with knowledge of the substantive legal principles governing your dispute, provides the necessary foundation for analyzing the availability of summary judgment in your case. If you build on that foundation by following the foregoing "Ten Commandments," you should do well in representing your clients' interests.

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# Asserting the Fifth Amendment in Civil Proceedings

By Dona Szak

As violations of financial, competition, and environmental laws become increasingly criminalized—for offenses that formerly were treated purely as civil violations—management of companies in the energy industry are confronted with the need to understand the implications of asserting a Fifth Amendment privilege against self-incrimination.[1]

After the deadly Upper Big Branch mine explosion in West Virginia, for example, at least six witnesses from Massey Energy asserted their Fifth Amendment rights against self-incrimination rather than testify during a joint federal and state investigation into the accident's causes.[2] While the witnesses and their attorneys apparently claimed that individual investigators had abused the investigation process, it is the actual or potential threat of criminal liability that triggers the right to assert the Fifth Amendment in connection with an investigation.

For example, after BP engineer Robert Kaluza asserted his Fifth Amendment right to avoid self-incrimination during May 2010 rather than testify before the coast guard interior department panel investigating the Macondo oil spill, Attorney General Eric Holder announced in early June 2010 that the Macondo oil spill would be the direct subject of a criminal investigation.[3] Thereafter, the coast guard itself directly raised the Fifth Amendment issue when panel cochair Hung M. Hguyn noted that a Transocean engineer could avoid the panel's questioning only by invoking the Fifth Amendment.[4]

For these and other accidents in the energy industry, the risk of criminal prosecution may have consequences for companies as well as individual witnesses, as was the case when prosecutors used the Clean Water Act and the Refuse Act to bring criminal charges against Exxon itself (rather than individual management) following the 1989 Exxon Valdez oil spill.[5]

These same considerations, of course, also apply in the context of civil litigation for companies whose witnesses are called to testify. For this reason, it is a good idea for counsel to brush up on principles governing the use (and abuse) of the Fifth Amendment privilege in any lawsuit involving allegations that would trigger potential criminal penalties.

We commonly hear that a criminal defendant's choice to invoke the Fifth Amendment is not admissible as evidence of guilt.[6] But may a defendant invoke the Fifth Amendment and decline to testify in a civil or an administrative proceeding? If so, what is the effect on the civil case? Can civil litigation proceed without the defendant's testimony? As explained below, an individual may indeed decline to testify during civil proceedings on the ground that his testimony may incriminate him—but the decision not to testify carries potentially severe consequences should the case proceed to trial.[7]

In contrast to a criminal trial, the court and jury are allowed to draw an adverse inference when a defendant invokes his Fifth Amendment rights in a civil case.[8] It doesn't take a genius, therefore, to see that that the Fifth Amendment privilege is a tradeoff between disagreeable alternatives in a civil context—a choice between greater risk of criminal consequences if the witness testifies or a greater risk of civil liability if the witness does not (e.g., "He must have something to hide!").

## Invoking the Fifth Amendment in a Deposition

The discovery stage of civil litigation presents the first potential pitfall for the actual or potential criminal defendant. Must he or she submit to a deposition? The defendant indeed is required to appear for a deposition, and cannot use the existence of parallel criminal proceedings, or his or her fear of criminal proceedings, to avoid giving a deposition. Nevertheless, the defendant may assert his or her rights under the Fifth Amendment and decline to answer specific questions that he or she reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[10] The witness need not have been actually accused of a crime to invoke this right. In response to an incriminating question, the witness may answer along the following lines: "Based on the advice of counsel, I assert my rights under the Fifth Amendment of the United States Constitution and respectfully decline to answer the question."

This answer of necessity deprives the plaintiff of discovery that could be critical to the outcome of the case. Typically, a defendant who declines to testify to relevant facts faces sanctions for discovery abuse. Can the criminal defendant be sanctioned? May his or her pleadings be stricken? Since the defendant's Fifth Amendment rights take precedence over the right to discovery, a defendant cannot be sanctioned for invoking his or her Fifth Amendment rights.[11] The court is not empowered to strike the defendant's pleadings, enter a default judgment, or hold the defendant in contempt solely for declining to answer questions on Fifth Amendment grounds.

## Choosing Whether to Testify

Nevertheless, the plaintiff has a powerful remedy that can effectively devastate the defendant's ability to mount a persuasive defense. As noted earlier, the court and jury in a civil case are allowed to draw an adverse inference against a defendant who invokes his or her Fifth Amendment rights.[12] In other words, the jury may be informed that the defendant pleaded the fifth and declined to testify (or they can see that he or she is doing so at trial), and the jury can consider this factor in deciding whether to impose liability.

As the Fifth Circuit succinctly explained, "[a]lthough a jury in a criminal case is not permitted to draw adverse inferences

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based on a defendant's invocation of his Fifth Amendment rights, it is well-settled that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[13] When the witness's invocation of the Fifth Amendment has sufficient probative value, the trial court may abuse its discretion by excluding evidence of the invocation.[14]

The defendant may perceive that he or she is placed in an untenable situation. Either the defendant risks self-incrimination to effectively defend the civil case, or preserves his or her right to avoid self-incrimination, thereby increasing exposure to civil liability. This is indeed a serious dilemma. Many counsel will advise the defendant to choose the course of action that provides maximum protection from criminal conviction. This is a decision with potentially life-changing consequences for the defendant and must be made with utmost consideration for the potential outcomes.

Even when the defendant chooses to stand on Fifth Amendment rights, he or she still has a chance of prevailing in the related civil case. Since a civil trial court is permitted—but not required—to draw an adverse inference, the defendant has the opportunity to demonstrate why the court should exercise its discretion against drawing the inference. The detriment to the defendant in asserting Fifth Amendment rights must be no more than is necessary to prevent unfair disadvantage to the plaintiff.[15] Federal Rule of Evidence 403 allows the court to exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice. The court must consider all of the facts surrounding the defendant's conduct in the litigation to reach a result that is fair to both parties.[16]

## Retracting the Fifth Amendment Assertion

One factor that the court may consider in deciding whether to draw an adverse inference is whether the defendant asserted his or her right to decline to testify early in the case, but later retracted and submitted to a full deposition. In *Evans v. City of Chicago*, for example, a group of defendants invoked their Fifth Amendment rights during the two-year period that the case was in discovery.[17] The plaintiff proceeded to prepare for trial without benefit of the defendants' testimony. Approximately one month before trial, the defendants changed their minds and retracted their Fifth Amendment assertions. The court ordered the defendants to give depositions during the weeks leading up to the trial. Immediately before the trial commenced, the court issued a ruling to exclude evidence of the defendants' two-year-long invocation of their Fifth Amendment rights against self-incrimination. The jury returned a verdict in favor of the defendants.[18]

The plaintiff, on appeal to the Seventh Circuit, argued that the trial court abused its discretion by allowing the defendants to change their position at the eleventh hour and then declining to allow evidence of their earlier Fifth Amendment assertions. The Seventh Circuit affirmed the trial court's decision, explaining that the court reasonably could have determined that ordering additional discovery cured any prejudice to the plaintiff.[19] In a strong dissent, Judge Williams criticized this decision, pointing out that the defendants had a change of heart only after seeing the plaintiff's case unfold. Judge Williams noted that a series of hurried depositions taken on the eve of trial could not have sufficiently cured the prejudice occasioned by two years of silence.[20]

Many judges have not been as charitable as the *Evans* court toward defendants who retract their Fifth Amendment invocations. Several courts, including the Seventh Circuit in an earlier opinion, have issued decisions consistent with Judge Williams's reasoning.[21] As a result, a defendant who changes his or her mind and decides to testify (whether due to a good faith change of heart or for tactical advantage) has no guarantee that the court will allow the subsequent testimony, and even if it does, that the court will exclude evidence of the defendant's prior invocation of the Fifth Amendment.

## Staying Civil Proceedings Because of Parallel Criminal Proceedings

A defendant is not without recourse to protect against an unfavorable inference. A defendant who is the target of an active criminal investigation may request a stay of the civil litigation pending resolution of the criminal proceedings. The courts have enunciated several factors to consider when deciding whether to issue a stay. The factors include the extent to which the issues in the civil and criminal cases overlap; the status of the criminal case, especially whether the defendant has been indicted; the private interests of the plaintiff in proceeding expeditiously weighed against the harm to the plaintiff caused by the delay; the private interests of and burden to the defendants; the interests of the court; and the public interest.[22] The two most important factors are the overlap between the civil and criminal matters and whether an indictment has been issued in the parallel criminal proceeding. Although courts have issued stays of civil proceedings absent an indictment, as a practical matter, obtaining a stay will be difficult unless an indictment has been issued and a criminal case is underway.[23]

What if some, but not all, of the defendants, invoke their Fifth Amendment rights? The grounds for a stay may be stronger when the rights of non-target defendants are at risk. The non-targets, like the plaintiff, are precluded from obtaining testimony from potentially key witnesses. The unavailability of

(Continued on page 27)

## Civil Liability in the Shadow of Criminal Proceedings

To understand the ramifications of a defendant's Fifth Amendment assertion, it is helpful to understand how self-incrimination issues typically arise. An individual who violates a criminal statute obviously can be prosecuted. He or she may be an actual defendant in an active criminal case, may be aware of an ongoing criminal investigation, or may simply fear criminal proceedings at some undetermined point in the future. The criminal act may well have caused damages to others. If so, the injured parties are free to file suit even if a criminal prosecution or investigation is ongoing.[9] Once a civil suit is filed, the plaintiff will want to take depositions and otherwise move the case toward trial. The court typically will enter a scheduling order with discovery cutoff and trial dates.

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## More Bark than Bite?

(Continued from front cover)

defendant, it would be impossible to meet the new standards for pleading facts, even if discovery would have vindicated the plaintiff.

About the only thing on which it seemed commentators agreed was that *Twombly* would have a big impact. Said one, "[n]o decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*." Douglas G. Smith, *The Twombly Revolution?* 36 Pepp. L. Rev. 1063, 1063 (2009). A law professor testified to Congress that, "[t]he decisions in *Twombly* and *Iqbal* have brought about sweeping changes in the lower courts." Statement of Eric Schnapper, December 16, 2009, House Subcommittee on Courts and Competition Policy (2009 WL 4829082).

But *Twombly* is now three years old, and more information about the effects of *Twombly* (and the more recent *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which reiterated *Twombly*'s new standard) has begun to emerge. In this article, I will review some of the latest data on the effects of *Twombly*, and discuss how this affects practitioners. What the new data seem to show is a much less dramatic effect of the new pleading standard than originally anticipated by many observers. It appears that, regardless of whether *Twombly* was a step in the right or the wrong direction, it was only a small step. This has significant ramifications on how practitioners should approach pleading in new litigation, and, in particular, on how practitioners should plan with their clients for litigation and discovery.

### Background

Federal Rule of Civil Procedure 8(a)(2) sets the standard for a civil complaint in federal court. "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." This deceptively simple standard for pleading reflects the Federal Rules' commitment to so-called notice pleading.

Of course, a pleading that fails to meet this standard can be dismissed under Rule 12(b)(6). Until *Twombly*, the standard for dismissals was governed by *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), which described "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In *Twombly*, the Court announced a very different rule. In *Twombly*, a consumer had filed an antitrust claim against the "Baby Bell" telecom companies, claiming a conspiracy amongst them not to compete with each other. The Court held that the complaint's essentially bare allegation of "parallel conduct" in support of its conspiracy claim was insufficient to survive a motion to dismiss. The Court criticized *Conley*'s "no set of facts" language and concluded that, "after puzzling the profession for 50 years, this famous observation has earned its retirement." 550 U.S. at 558. In its place, the Court required that a complaint plead facts "plausibly suggesting (not merely consistent with)" the plaintiff's legal claim. 550 U.S. at 557.

Two years later, the Supreme Court revisited federal pleading in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). It applied *Twombly* to a civil-rights claim brought by an Arab Muslim detained by the FBI in the aftermath of September 11, 2001. The plaintiff alleged that Attorney General John Ashcroft and FBI Director Robert Mueller were "instrumental" in devising a plot to detain Arab-Muslim men on account of their race, religion, or national origin. The Court held that the complaint should be dismissed. The Court's opinion expounded on the meaning of *Twombly*'s "plausibility" requirement, and specifically rejected the argument that *Twombly* was limited to antitrust cases. 129 S. Ct. at 1953.

The Supreme Court's rulings on civil pleadings since *Twombly* have not been uniformly pro-dismissal, however. In *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), the pro se plaintiff, a state prisoner, alleged that prison officials had terminated treatment of the plaintiff's hepatitis C, endangering his life. The Court reversed the dismissal of the plaintiff's claim, noting "the liberal pleading standards set forth by Rule 8(a)(2)" and the plaintiff's pro se status. 551 U.S. at 94. Despite being decided mere weeks after *Twombly*, nowhere did the Court cite *Twombly*'s new "plausibility" standard. It is not surprising, then, that *Twombly* and its progeny have generated not only controversy, but also uncertainty about their scope.

### Research on the Effects of *Twombly* and *Iqbal*

Some research on the effect of *Twombly* seems to indicate that many more cases are now being dismissed in federal court, especially among antitrust cases and civil-rights cases. An analysis by the law firm Shearman & Sterling LLP in early 2009 found that, among their sample of published opinions ruling on motions to dismiss in antitrust cases since *Twombly*, nearly two-thirds were dismissed. Heather L. Kafele, Mario Meeks, and Melissa Colangelo, *Antitrust Digest: Emerging Trends and Patterns in Federal Antitrust Cases After* Bell Atlantic Corp. v. Twombly (2009) (online at www.shearman.com/files/upload/AT-030609-Antitrust%20Digest.pdf (last accessed January 29, 2011)). The study did not determine, however, whether this dismissal rate is higher than the dismissal rate of antitrust cases before *Twombly*.

Some academic studies have compared dismissal rates before and after *Twombly*, and found a rise in dismissals after *Twombly*. For example, one study concludes that "district courts are taking *Twombly* and *Iqbal* to heart. Especially after *Iqbal*, they appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*." Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?* 59 Am. U. L. Rev. 553–633 (2010).

It is perhaps surprising, though, that these results have *not* been confirmed by more recent research that looks at larger samples of cases (including cases not published on Westlaw) and attorney interviews. The preliminary results of ongoing research by the Federal Judicial Center (FJ"), the research arm of the U.S. courts, seem to indicate only modest effects of *Twombly* and *Iqbal*. In a report to the Civil Rules Advisory Committee, the Hon. Mark R. Kravitz describes "some increase in the rate of

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motions [to dismiss being filed], and—for most case categories—no more than slight increases in the rate of granting motions." In the area of civil-rights cases, however, there appears to be a rise in dismissals after *Iqbal*, but the preliminary results do not reveal why. *See* Hon. Mark R. Kravitz, Report to the Civil Rules Advisory Committee from the Standing Committee on Rules of Practice and Procedure, May 17, 2010. The final report from the FJC is due to be released in 2011.

Ongoing research at the University of Chicago Law School uses an even larger set of data—a database of all federal civil cases terminated from 2006 to 2008—to see whether dismissals jumped up after *Twombly* was decided. Preliminary results find a very small effect of *Twombly* on the rate of dismissals. This is true across all types of litigation, even antitrust and civil-rights cases. While this sample cannot address the effect of *Iqbal*, this study indicates that *Twombly* alone has had little effect on the rate of dismissals and the rate of filings in federal civil litigation thus far.

A third study uses interviews with individual practitioners, rather than statistical data, to study the effect of *Twombly*. In a series of interviews conducted in early 2010, researchers from the FJC asked both plaintiffs' and defense attorneys about how *Twombly* has changed their practice. *See* Thomas E. Willging and Emery G. Lee III, *In Their Words: Attorney Views about Costs and Procedures in Federal Civil Litigation*, Federal Judicial Center (March 2010). Although the methodology was quite different from the statistical studies, the results seemed to be similar. The authors report, "Most interviewees indicated that they had not seen any impact of the two cases in their practice."

The interviews also shed some light on why the new pleading standards may have had a modest effect thus far. The plaintiffs' attorneys who were interviewed often said that their practice has always been "to plead enough facts to tell a coherent and persuasive story." Although not required by notice pleading, detailed pleadings were used by plaintiffs' attorneys "for tactical reasons." The goal of detailed pleadings has been "to make a good first impression on the judge."

It appears it may be that, even before *Twombly*, fewer cases than previously thought had involved notice pleading as a practical matter, because, at least in the eyes of the plaintiffs' attorneys interviewed, their complaints "have always satisfied the standards laid out in the *Twombly/Iqbal* line of cases." To defense attorneys accustomed to reading complaints with dozens or hundreds of paragraphs of allegations, this conclusion should come as no surprise.

## Making Sense of the New Data

Practitioners and their clients should be aware of the data on the effect of *Twombly*. The first thing to keep in mind is that these studies can only tell us about the overall trend among cases—in any individual case, it is possible that the new pleading standards could have a big effect, and some practitioners may experience a much bigger effect than others. Nonetheless, if the overall effect of *Twombly* is more modest than has been previously thought, savvy practitioners and their clients will need to ask themselves what this means for their own cases in federal court.

## What It Means for Plaintiffs

For plaintiffs, it is important to recognize that *Twombly* is not the death knell of their legal claims, although for some types of claims—civil rights may be one—surviving a motion to dismiss seems to have become harder. For plaintiffs' attorneys, the common practice of using the complaint "to tell a coherent and persuasive story" may remain the most effective means of pleading. (*See* Willging and Lee, *supra*.) A comparison of *Erickson v. Pardus* and *Ashcroft v. Iqbal* is informative. They both were civil-rights claims that depended largely on questions about the motivations of defendants in positions of authority. In both cases, the plaintiff could provide no direct evidence of the defendant's motivations to make his allegations "plausible," yet the outcome in each case was different.

**Studies appear to confirm that *Twombly* is no magic bullet for defendants.**

The key difference between these cases under *Twombly* appears to be whether the facts *that were available to the plaintiff* were enough to give the court a reason to allow discovery. In *Erickson*, the fact that treatment for hepatitis C was withdrawn before the plaintiff was cured seemed, on its face, troubling. Even if there were extenuating circumstances, the plaintiff's claim was at least "plausible." In contrast, the fact that the government detained a number of individuals, many of whom were Arab or Muslim or both, *immediately after the September 11 terrorist attacks*, was, on its face, what might be expected in the *absence* of illegal discrimination. The circumstantial evidence in the case did not raise suspicions of illegal conduct, and hence the claim was "implausible." From the plaintiff's point of view, the key lesson is that a lack of direct evidence of malfeasance is not fatal—but without direct evidence, the new pleading standard requires a careful presentation not only of the legal *claim*, but also of the *circumstantial evidence*.

## What It Means for the Defense

For defense attorneys and their clients, the implications of the new data on the effect of *Twombly* are more nuanced. Experience has shown, and the recent studies appear to confirm, that *Twombly* is no magic bullet for defendants. Most cases, no matter how artfully the defense argues a motion to dismiss, may survive to discovery. Even in cases where the claims appear weak, it is not enough to merely invoke *Twombly*. Courts seem to be treating it as an incremental change, and plaintiffs may be able to insulate their complaints from attack by preparing detailed pleadings. This leads to three key recommendations.

First, defense counsel need to make sure to keep clients' expectations about *Twombly* in line with reality. Managing the expectations of clients is always an important part of advocacy, and this is certainly the case when defense counsel is discussing

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the effect of *Twombly* with a client. It is important for clients to understand that courts do not seem to have dramatically increased their willingness to dismiss cases, so defense counsel should not "oversell" prospects for a successful motion to dismiss. Expectations of a quick termination of litigation have to remain realistic. Otherwise, defense counsel run the risk of appearing ineffective when their motions to dismiss are denied. Even after *Twombly* and *Iqbal*, defense counsel must be selective in determining whether to file a motion to dismiss, and in choosing which claims to attack in a motion to dismiss.

Second, when drafting a motion to dismiss, it is important to argue that *Twombly* and *Iqbal* have raised the bar for plaintiffs, but the argument cannot stop there. The motion to dismiss should explain to the judge why the new pleading standard matters in *this* case (even if many cases may not be affected by the new standard). Because *Twombly* focused on the factual *implausibility* of the plaintiff's pleadings, defendants need to make arguments that are tailored not only to any legal inadequacies of the complaint, but also to the specific facts of the complaint that make the plaintiff's story seem far-fetched, or at least unlikely. If defense counsel can convince the judge that the complaint doesn't pass the "smell test," *Twombly* may give the judge a basis for dismissing the case on that ground.

Here, the case of civil-rights litigation is instructive, and the defendant's view is the mirror image of the plaintiff's view. It may not be enough for a defendant to rest his or her argument on a lack of a "smoking gun" showing wrongdoing if the plaintiff has alleged circumstantial evidence raising some suspicions of discrimination. The argument may need to be more subtle. The defense may need to show that the circumstantial evidence—even if it is *consistent* with the plaintiff's claim—does not *raise* the suspicion of the court that the defendant has committed a legal wrong. If the circumstantial evidence is consistent with discrimination, but equally consistent with innocent behavior by the defendant, then the claim may be subject to dismissal. This is the basis upon which *Iqbal* seems to have been decided.

Third, the data seem to show that many, if not most, cases are going to survive a motion to dismiss, no matter how well the defense crafts a motion to dismiss. Thus, the savvy defense attorney will prepare a motion to dismiss with an eye toward the most likely outcome: discovery. Even if the judge is not sufficiently skeptical of the allegations in the complaint to dismiss the case, a persuasive motion to dismiss can highlight the dubious allegations in the complaint. In this respect, the defense attorney can use the motion to dismiss the same way that a plaintiffs' attorney can use the complaint: "to make a good first impression on the judge." (*See* Willging and Lee, *supra*.) The motion to dismiss is the defendant's first opportunity to make a detailed argument about why the defense should win. Even if the motion to dismiss is denied, the defense has had an opportunity to counterbalance any persuasive impact of the complaint.

This becomes immediately important because the first order of business after the pleadings stage of litigation is the scheduling of discovery, according to Rules 16 and 26. Because discovery is often the greatest source of legal expenses in litigation, it is beneficial for defense counsel to focus on persuading the judge to keep discovery limited. To this end, an emphasis on the "implausibility" of plaintiffs' claims in a motion to dismiss is another tool of the practitioner. When the defense asks the judge to exercise oversight of the discovery process, the judge may be more inclined to limit discovery initially to those allegations that are least plausible. This can potentially reduce the expense of defending the lawsuit for the client. If discovery on those allegations disproves the plaintiff's claim, then the defendants can move for summary judgment on those claims without necessarily bearing the full expense of across-the-board document review and production.

## Conclusion

Although *Twombly* and *Iqbal* changed the standards for pleading, recent research seems to suggest that they have not dramatically changed the balance of power between plaintiffs and defendants in most cases. Attorneys for both plaintiffs and defendants need to account for this fact as they refine their strategies for pleading and motions to dismiss. Plaintiffs' counsel should draft their complaints to tell a persuasive story to the judge, including not only the legal claims but also the circumstantial evidence supporting the story. Defense counsel should look for ways to use *Twombly* and *Iqbal* to persuade the judge of the implausibility as well as the legal inadequacies of the complaint's claims, which can pave the way for more limited discovery. Defendants cannot generally count on ending a lawsuit at the pleading stage, even in the era of *Twombly* and *Iqbal*.

## Litigation 101

(Continued from page 14)

proliferation in outsourcing practices, on November 23, 2010, the ABA Commission on Ethics 20/20 released draft amendments to the official comments to Model Rules 1.1 (competence), 5.3 (responsibilities regarding non-lawyer assistants), and 5.5 (unauthorized and multijurisdictional practice of law). The proposed amendments relate to the lawyer's obligation to take reasonable steps to ensure the quality of outsourced services and to obtain informed consent for work requiring that confidential client information be disclosed to outside service providers. The draft is being circulated for comments prior to a decision on whether to recommend to the ABA House of Delegates that it adopt the amendments.

Regardless of the outcome of the proposed amendment, lawyers remain ethically bound to ensure that client services are rendered competently pursuant to Model Rule 1.1. The best practices provided above will help litigators leverage the cost savings of contract attorney services and deliver legal services in a manner that comports with the obligation to provide "competent representation" consistent with the "legal knowledge, skill, thoroughness and preparation" required in Rule 1.1.

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## Selected Recent Cases Applying *Ashcroft v. Iqbal*

(Continued from front cover)

not also allege "specific facts establishing a prima facie case."

*Arista Records LLC* was a copyright-infringement action based on downloading or distribution of music. Anonymous defendants moved to quash a subpoena served on their Internet service provider to obtain information sufficient to disclose their identity. One of the anonymous defendants appealed the denial of the motion to quash, claiming that the subpoena should be quashed based on his First Amendment right to anonymity, and because under *Twombly* and *Iqbal*'s higher pleading standard, the companies did not state plausible copyright-infringement claims. On appeal, the Second Circuit found that, to the extent anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected by the First Amendment. Moreover, the court held that the plausibility standard does not prevent a plaintiff from pleading facts alleged "upon information and belief" where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible. In reaching this conclusion, the court dismissed "the notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence." The court said that this notion is "belied by the *Twombly* opinion itself." The court emphasized that *Twombly* did "not require heightened fact pleading of specifics." "Nor did *Iqbal* heighten the pleading requirements." Although the defendants' identities were not alleged, the complaint stated plausible claims of copyright infringement with detailed facts concerning specific songs found in the defendants' file-sharing folders, marked with particular dates and times on a specified file-sharing network. The court thus recognized that *Twombly* raised the pleading standard, but found that *Twombly* and *Iqbal* do not require pleading specific evidence or extra facts beyond what is needed to make a claim plausible.

In another application of *Iqbal*, the Second Circuit found that *Iqbal* superseded the circuit's prior pleading requirements for "class of one" equal-protection cases. In *Ruston v. Town Board for Town of Skaneateles*, 610 F.3d 55 (2d Cir. 2010), landowners brought a "class of one" equal-protection claim against the village, town board, and town planning board when their development applications and requests for sewer hookups for a proposed subdivision were denied. The court first clarified the circuit's pleading requirements for "class of one" cases. In *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003), the Second Circuit held that a "class of one" claim was sufficiently pled without specification of others similarly situated. The *Ruston* court noted that *DeMuria* was decided "under a now-obsolete pleading standard." The *Ruston* court found that *Iqbal*'s pleading standard supersedes the previous "general allegation" deemed sufficient in *DeMuria* because *Iqbal* established that "factual allegations must be sufficient to support necessary legal conclusions." Under the new "plausibility" pleading standard, the court affirmed dismissal for failure to state a claim against the town and village because the landowners failed to specifically identify sufficiently similar properties.

In another decision, the Second Circuit used the heightened pleading standard established in *Twombly* and *Iqbal* to support its suggestion that prior decisions relying on the older *Conley v. Gibson* standard may have less precedential weight. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010) (rejecting the plaintiffs' emphasis on the holdings of earlier decisions in the case because they had applied *Conley v. Gibson* but "the Supreme Court articulated a 'plausibility' standard" after those decisions).

In contrast, the Second Circuit noted that despite *Iqbal*'s pleading requirements, complaints against a union are treated somewhat differently. This is because the court's review of allegations against a union is "highly deferential [to the union], recognizing the wide latitude that unions need for the effective performance of their bargaining responsibilities." *Vaughn v. Air Line Pilots Ass'n, Intern.*, 604 F.3d 706, 709 (2d Cir. 2010). Applying this guidance to allegations that a union breached its duty of fair representation, the court nonetheless found that the allegations did not cross the line "from conceivable to plausible." The court affirmed the district court's conclusions that the plaintiffs failed to show that the union breached its duty of fair representation and that, for certain claims, the plaintiffs failed to show causation between the union's actions and their injuries.

The Second Circuit also has offered the district courts some clarity as to *Iqbal*'s effect on pleading requirements for specific cases, and more direction is anticipated. *Compare Caro v. Weintraub*, 618 F.3d 94 (2d Cir. 2010) (clarifying pleading requirements for tortious intent in context of recording allegedly violating wiretap statute) *with Zucker v. Five Towns College*, No. 09-CV-4884 (JS)(AKT), 2010 WL 3310698, at *2 (E.D.N.Y. Aug. 18, 2010) (noting intra-circuit split regarding what must be alleged in age-discrimination claims in light of *Iqbal* and *Twombly*).

— Carla Walworth and Mor Wetzler

### Fifth Circuit

District courts in the Fifth Circuit recently have applied the pleading requirements described in *Twombly* to affirmative defenses. Rule 8 of the Federal Rules of Civil Procedure requires a party to affirmatively state any affirmative defense, and a court may strike from a pleading any insufficient defense. The Fifth Circuit has previously held that an affirmative defense is subject to the same pleading requirements as a complaint. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). Under the Rule 8 pleading requirements as clarified in *Twombly*, a party must provide fair notice of any affirmative defense with enough specificity or factual particularity.

In *T-Mobile USA, Inc. v. Wireless Exclusive USA, LLC*, plaintiff T-Mobile filed a motion to strike the defendants' affirmative defenses in a case involving the alleged resale of

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prepaid mobile phones. No. 3:08–CV–0340–G, 2008 U.S. Dist. LEXIS 50165 *1-2 (N.D. Tex., July 1, 2008). T-Mobile argued that the defendants' affirmative defenses were insufficient as a matter of law and should be stricken.

In *T-Mobile*, the defendants attempted to assert an affirmative defense of unclean hands against T-Mobile with the bald assertion that the claims "are barred by the doctrine of unclean hands." *T-Mobile*, 2008 U.S. Dist. LEXIS 50165 * 7. The court held that "[a]n affirmative defense is subject to the same pleading requirements as is the complaint." *T-Mobile*, 2008 U.S. Dist. LEXIS 50165 * 5. The court further held that a "formulaic recitation of the elements of a cause of action will not do," the "factual allegations must be enough to raise a right to relief above a speculative level," and must be specific enough to provide the plaintiff with fair notice. *Id.* The court found that under these standards the unclean-hands affirmative defense was insufficient as a matter of law and granted the motion to strike. In contrast, the court denied the motion to strike an affirmative defense under Digital Millennium Copyright Act related to allegations of unlocking or altering phones. The court held that the defendants provided fair notice to T-Mobile by citing a specific section of the act and providing enough information for an analysis of the defense.

**The court emphasized that *Twombly* did "not require heightened fact pleading of specifics."**

With respect to an antitrust anti-tying defense, the defendants argued that T-Mobile's claims were barred because T-Mobile's actions "constitute[d] an illegal tying arrangement in violation of federal and state antitrust laws" because T-Mobile conditioned the sale of the phones on the purchase of T-Mobile minutes. *T-Mobile*, 2008 U.S. Dist. LEXIS 50165 * 9. To prove a tying arrangement exists, a party must show that (1) the arrangement involves two separate products or services; (2) the sale of one product or service is conditioned on the purchase of another; (3) the seller has market power in the tying product; and (4) the amount of interstate commerce in the tied product is substantial. The court held that the defendants failed to allege sufficiently the final element, and thus, the defense was insufficient as a matter of law.

In *Cosmetic Warriors Ltd. v. Lush Boutique, L.L.C.*, Cosmetic Warriors alleged trademark infringement and unfair competition under the Lanham Act and Louisiana state law, breach of contract, breach of implied covenant in good faith, and promissory estoppel. No. 09-6381 Section "C" (5), 2010 U.S. Dist. 16392 *1–2 (E.D. La., Feb. 1, 2010). Cosmetic Warriors operates retail stores and a retail website at www.lush.com supplying bath and beauty products. Defendant Lush Boutique operates a retail clothing store in New Orleans, and according to the plaintiff, Lush Boutique had agreed to change its name before reneging on the agreement. Cosmetic Warriors filed a 12(b)(6) motion to dismiss and a 12(f) motion to strike affirmative defenses.

In the *Cosmetic Warrors* case, the court held that "several of the affirmative defenses asserted by Lush Boutique bear little relation to the facts of this case . . . " and "consist of the boilerplate language that is not sufficient to fulfill the requirements. . . . " 2010 U.S. Dist. 16392 *5. For example, Lush Boutique alleged that the plaintiff's claims were "barred by laches" and "barred by the doctrine of equitable estoppel" without providing enough specificity or factual particularity to give fair notice of the defense. *Id.* Additionally, the affirmative defense alleging that Cosmetic Warriors obtained a trademark by fraud fell short of the requirements under Rule 9 and included none of the required particularities. The court denied Cosmetic Warriors' motion to dismiss and granted the motion to strike Lush Boutique's affirmative defenses without prejudice.
— Elizabeth Patterson

## Seventh Circuit

Since the *Iqbal* decision was handed down, there have been several issues on which different circuits, and different district courts within the same circuit, have differed in their interpretations of the requirements of *Iqbal*'s pleading standards. One of those areas where a split of authority can already be seen is the applicability of the *Iqbal* pleading standards to affirmative defenses. Courts in the Seventh Circuit appear to be siding with those courts that hold that *Iqbal* pleading standards do apply to affirmative defenses, although their treatment of those affirmative defenses under *Iqbal* appears to differ. For instance, in *In re Mission Bay Ski & Bike, Inc.*, Nos. 07 B 20870 & 08 A 55, 2009 Bankr. LEXIS 2495 (Bankr. N.D. Ill. Sept. 9, 2009), the bankruptcy trustee sued First American Bank for fraudulent transfer and other claims. *Id.* at *3. The bank asserted several affirmative defenses in summary fashion, i.e., "the trustee's claims are precluded, in whole or in part, by the doctrine of estoppel." *See id.* at *17. For this reason, the plaintiff moved to strike the affirmative defenses. The court held that *Iqbal* and its standards apply to affirmative defenses because affirmative defenses must comply with Rule 8 of the Federal Rules of Civil Procedure. *Id.* at *15–16. The court held that the summary affirmative defenses asserted by the defendant were mere legal conclusions without facts to demonstrate their plausibility and struck the affirmative defenses with leave to amend. *Id.* at *17. And in *Bank of Montreal v. SK Foods, LLC*, No. 09 C 3479, 2009 U.S. Dist. LEXIS 106577 (N.D. Ill. Nov. 13, 2009), the plaintiff sued the defendant to collect on debts guaranteed by the defendant after debtors defaulted. *Id.* at *2. As in the above case, the defendant filed an answer containing, among others, an affirmative defense of breach of the implied covenant of good faith and fair dealing, which the plaintiff moved to dismiss for lack of plausibility under *Iqbal*. *Id.* at *10. The court found that *Iqbal* is applicable to affirmative defenses, citing to a California federal decision. *Id.* at *11 (citing *CTF Dev., Inc. v. Penta Hospitality, LLC*, No. 09 C 02429 WHA, 2009 U.S. Dist. LEXIS 99538, AT *8 (N.D. Cal. Oct. 26, 2009). With regard to the specific affirmative defense at issue, the court

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recognized that the affirmative defense's allegations, which contained many factual allegations, could mean that the plaintiff acted in a manner equally consistent with lawful behavior and stated that the allegations were "somewhat implausible." *Id.* at *11. However, the court denied the motion to dismiss, stating that "striking the good-faith affirmative defense at this early stage is inappropriate." *Id.*

Another portion of the *Iqbal* decision that is being decided differently by the courts is the level of factual detail needed to maintain a complaint under *Iqbal*'s pleading standards. Two different methods are illustrated here—one by the Seventh Circuit and one by a district court. In *Walton v. Walker*, No. 09-2617, 2010 U.S. App. LEXIS 2338 (7th Cir. Feb. 3, 2010) the plaintiff appealed the dismissal of his 82-page complaint for failing to meet the pleading standards of *Iqbal*. *Id.* at *1–3. The Seventh Circuit affirmed the district court's dismissal under *Iqbal* of the plaintiff's claims that 24 people conspired to falsely arrest and convict him, claims the district court claimed were based on "paranoid fantasy." *Id.* at *2. It held that not only were the plaintiff's claims "threadbare recitals of the elements of a cause of action," which was found insufficient under *Iqbal*, but that because *Iqbal* allowed the district court to rely on judicial experience and common sense in its determination, the district court was allowed to rely on its familiarity of the plaintiff's prior meritless litigation in determining whether to dismiss his claims. *Id.* at *3–4. However, in *Kuryakyn Holdings, Inc. v. Just In Time Distribution Co.*, No. 09-cv-702-bbc, 2010 U.S. Dist. LEXIS 22977 (W.D. Wis. March 11, 2010), the plaintiff sued the defendant, claiming that the defendant sold motorcycle accessory designs and related products to a third party without first offering the plaintiff the right of first refusal to purchase them as required under the parties' contract. *Id.* at *1–5. The defendant sought to have the court refuse to consider the plaintiff's breach-of-contract and unjust-enrichment claims when determining whether to dismiss the case under the first-to-file rule, claiming that under *Iqbal* and *Twombly*, these claims were "inconceivable" and "particularly suspect." *Id.* at *11. The court declined, holding that plausibility is not akin to probability and that a claim is not implausible under *Iqbal* because the allegations in it are "fanciful," or "def[y] reason or rest[] on assertions contrary to the received [sic] wisdom of common experience." *Id.* at *13. In so holding, the court stated that "[e]ven if defendant is correct that plaintiff's allegations are *unlikely* or that it is *illogical* to think plaintiff would redesign products without ceasing royalty payments to defendant, plaintiff's claims are not *implausible* under *Iqbal* and *Twombly* because they (1) are specific and (2) address the critical elements of the claims." *Id.* at *13–14. Therefore, the court considered the claims in its first-to-file rule analysis. *Id.* at *14.

— Angela S. Fetcher

## Federal Rule of Evidence 502

(Continued from page 12)

then considered the proper scope of the waiver under Rule 502(a). Although the opinions do not display rigid consistency, they do establish a clear pattern: Where a document was produced intentionally but would not be used in the case, courts tended to limit waiver to the disclosed document itself. On the other hand, where a party introduced for strategic reasons a document or testimony over which it could arguably have asserted privilege, such as in an advice-of-counsel defense, courts tended to find a broader subject-matter waiver.

An example of the narrow approach is *GATX Corp. v. Appalachian Fuels, LLC*, No. 09-41-DLB, 2010 WL 5067688 (E.D. Ky. Dec. 7, 2010). There, in the context of evaluating privilege, work product, and waiver disputes for hundreds of documents, U.S. Magistrate Judge Atkins concluded that GATX had disclosed several privileged documents and had failed to identify to the court the reasonable steps it had taken to rectify the error, so the disclosure was intentional and GATX had waived privilege. But Judge Atkins denied the defendant's motion for a broader subject-matter waiver, explaining that

> [i]n the present case, the Court does not find that GATX is using the attorney-client privilege as both a shield and a sword. . . . [I]t does not appear that GATX has put the contents of either of these [privilege-waived] emails at issue in order to prove its case. . . . Accordingly, the Court finds that any waiver of the attorney-client privilege in this matter extends only to the information actually disclosed in the [two emails].

The court took the opposite approach in *Johnson Outdoors, Inc. v. General Star Indemnity*, No. 05-C-0522, 2011 WL 196825 (E.D.Wisc. Jan. 19, 2011). U.S. District Judge Clevert found a broader subject-matter waiver when plaintiff Johnson Outdoors "relied on its attorney-client communications to support its argument" in the case. Judge Clevert applied Rule 502(a) to compel disclosure of additional privileged documents on the same subject, holding that "[t]he withheld documents concern the same subject matter and the court believes that it serves the interests of justice for all the communications to be considered together." *Id.*

In general, opinions interpreting Rule 502 show a consistency that should reassure litigants that courts share a common understanding of the purposes of the rule. The exception to this common understanding, however, is in an area that is crucial to Rule 502's ultimate efficacy: evaluating what constitutes reasonable steps to prevent and rectify disclosure of privileged documents under Rule 502(b). The *Mt. Hawley* opinion found fault in well-documented prevention and rectification efforts that fell squarely within the range that many other opinions found to constitute reasonable steps. Whether *Mt. Hawley* will gain a sufficient following to create a significant disagreement or will remain an outlier in a growing body of consistent interpretation will be vitally important as the body of Rule 502 opinions grows in the years to come.

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## Asserting the Fifth Amendment

(Continued from page 20)

codefendants' testimony, coupled with potential prejudice at trial to the testifying defendants, provide stronger grounds for issuing a stay in such circumstance.[24]

### Understanding the Adverse Inference

Notwithstanding the concerns discussed above, the adverse inference that can be drawn from a Fifth Amendment assertion does not relieve the plaintiff of the burden to prove the case. A key facet of the adverse inference is that the Fifth Amendment does not forbid an adverse inference when a party refuses to testify in response to probative evidence offered against him or her.[25] The inference itself cannot substitute for admissible evidence to support an ultimate issue of fact.[26] In *Lefkowitz v. Cunningham*, the Supreme Court declined to allow an adverse inference, as probative evidence had not been adduced.[27] Accordingly, before the plaintiff can count on utilizing an adverse inference, there must be some evidence, even if circumstantial, to support its claims. Only then may the defendant's invocation of the Fifth Amendment be used to bolster the plaintiff's case.[28]

White-collar prosecutions continue to grab headlines. Pleading the Fifth Amendment is frequently a sound choice for criminal defendants, yet it is important to understand how this decision affects a civil case. The courts have endeavored to maintain a balance between the defendant's Fifth Amendment rights and a plaintiff's right to fully present evidence. Nevertheless, as statutes and regulations continue to expand in scope by criminalizing a wide variety of violations, both counsel and the courts will need to carefully apply this balance in the context of civil proceedings.

*"Asserting the Fifth Amendment in Civil Proceedings" by Dona Szak, 2010,* Energy Litigation *10:1, pp. 10–12. Copyright © 2010 by the American Bar Association. Reprinted with permission.*

### Endnotes

1. *See, e.g.*, Tom Fowler, *Disaster in the Gulf*, Houston Chronicle, Aug. 24, 2010, Section B (discussing application of Fifth Amendment rights to events such as the Macondo oil spill).

2. *See* Howard Berkes, *Massey Officials Plead the 5th in Mine Disaster Probe*, Vermont Public Radio (Oct. 29, 2010, 3:02 PM), *available at* www.vpr.net/npr/130917523/.

3. *See BP was warned of gas danger, contractor says*, MSNBC (Aug. 24, 2010, 5:21 PM), *available at* www.msnbc.msn.com/id/38837179/.

4. *See* David S. Hilzenrath, *Deepwater Horizon Chief Engineer Testifies in New Round of Hearings*, The Washington Post (July 19, 2010, 5:25 PM), *available at* www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904349.html.

5. *See* Curt Anderson, *Gulf Oil Spill Criminal Case Difficult Against Execs*, Huffington Post (June 3, 2010, 3:15 AM), *available at* www.huffingtonpost.com/ 2010/06/03/gulf-oil-spill-criminal-c_n_598875.html.

6. *See* Carter v. Kentucky, 450 U.S. 288, 301 (1981).

7. *See* Kastigar v. United States, 406 U.S. 441, 444–45 (1972). The Fifth Amendment's privilege against self-incrimination applies only to individuals. The privilege does not extend to corporations. *See* Braswell v. United States, 487 U.S. 99, 102 (1988). As a result, a corporation's employees may assert the Fifth Amendment for themselves, but not on behalf of the corporation.

8. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

9. *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980) (summarizing significant decisions authorizing parallel criminal and civil proceedings).

10. *See id.*; *see also* Evans v. Chicago, 513 F.3d 735, 743 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 899 (2009); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000). The same standard applies when a witness takes the Fifth Amendment when testifying at trial.

11. *See* SEC v. Graystone Nash, Inc., 25 F.3d 187, 190–91 (3d Cir. 1994); *See* Fed. R. Civ. P. 26(b)(5) (asserting privilege in response to discovery requests).

12. *See Baxter*, 425 U.S. at 318; *see also* Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 674 (5th Cir. 1999) (allowing adverse inference to be drawn against corporate defendant whose designated representative invoked the Fifth Amendment).

13. *See* Hinojosa v. Butler, 547 F.3d 285, 291 (5th Cir. 2008) (quoting *Baxter*, 425 U.S. 308)(internal quotations and citations omitted).

14. *See Hinojosa,* 547 F.3d at 293–95; Harris v. Chicago, 266 F.3d 750, 755 (7th Cir. 2001).

15. *See* Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910 (9th Cir. 2008); Doe ex rel. Rudy-Glanzer, 232 F.3d at 1265.

16. *See* Doe ex rel. Rudy-Glanzer, 232 F.3d at 1264-67 (determining that trial court properly declined to draw negative inference because defendant's answers would have been inadmissible).

17. *Evans*, 513 F.3d at 735.

18. *Id.* at 740.

19. *Id.* at 745.

20. *Evans*, 513 F.3d at 747–48 (Williams J., dissenting).

21. *See, e.g., Harris*, 266 F.3d at 756 (trial court committed reversible error by excluding evidence of defendant's Fifth Amendment assertion); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 576 (1st Cir. 1989) (trial court correctly declined to allow defendant to testify at trial after he asserted Fifth Amendment at deposition).

22. *See In re* CFS-Related Sec. Fraud Litig., 256 F. Supp. 2d 1227, 1236-37 (N.D. Okla. 2003); Volmar Dist., Inc. v. New York Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993); *see also* Pendergest-Holt v. Certain Underwriters at Lloyd's of London, Civil Action No. H-09-3712, 2010 WL 3199355, at *3 (S.D. Tex. Aug. 11, 2010) (denying motion to stay filed by plaintiffs who asserted Fifth Amendment right because stay would unduly burden opposing parties).

23. *See Dresser Indus., Inc.*, 628 F.2d at 1377 (declining to block SEC investigation due to parallel grand jury proceedings); Sterling Nat. Bank v. A-1 Hotels Intern., Inc., 175 F. Supp. 2d 573 (S.D.N.Y. 2001), (noting that courts of 2nd Circuit generally consider stay only after defendant has been indicted); *but see* Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1089 (5th Cir. 1979) (affirming three-year stay where party threatened with prosecution); Chao v. Fleming, 498 F. Supp. 2d 1034, 1039–40 (W.D. Mich. 2007) (granting stay when no indictment had yet been issued); SEC v. Healthsouth Corp., 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003) (same).

24. *See In re* Adelphia Comm. Sec. Litig., No. 02-1781, 2003 WL 22358819, at *5 (E.D. Pa. May 13, 2003) (citing prejudice to testifying defendants as factor in granting motion to stay).

25. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977); *Baxter*, 425 U.S. at 318.

26. *See* Avergin v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991).

27. *Lefkowitz*, 431 U.S. at 808 n.5.

28. *See, e.g.,* LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir. 1995) (holding that plaintiff not entitled to summary judgment when defendant, asserting Fifth Amendment right, declined to admit or deny facts); *In re* Enron Corp. Sec., Derivative & ERISA Litig., 490 F. Supp. 2d 784, 825–26 (S.D. Tex. 2007) (dismissing complaint for fraud due to lack of pleading with particularity, as evidentiary significance of Fifth Amendment assertion could not cure pleading deficiencies); *In re* Curtis, 177 B.R. 717, 720 (S.D. Ala. 1995) (holding that plaintiff cannot rely on defendant's assertion of Fifth Amendment to establish elements of fraud).

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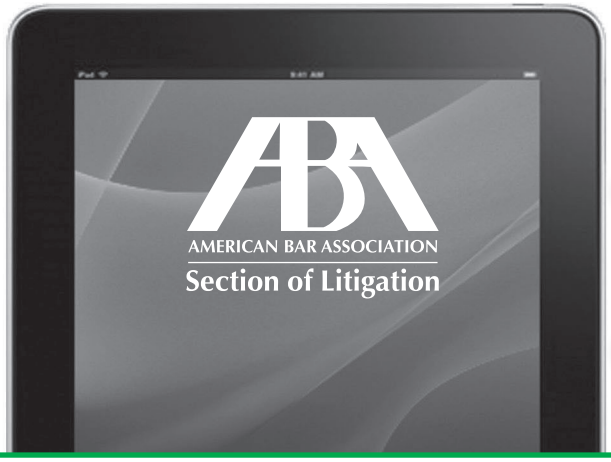


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