

# MEMORANDUM

TO: MA Judicial Conference: Civil Procedure Team  
FROM: Civil Procedures Prep. Team  
DATE: September 11, 2015  
RE: “Wait, Wait”: MA District Court Conference – Civil Procedures: Specific Jurisdiction Following *Walden v. Fiore*

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## I. Executive Summary: Specific Personal Jurisdiction After *Walden v. Fiore*

In *Walden v. Fiore*, the Supreme Court ruled that specific jurisdiction, in accordance with due process, arises out of contacts that the ‘defendant *himself*’ creates with the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1118 (2014) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Specific jurisdiction is not determined by the level of contacts the defendant has with persons living in a state, but rather it is his or her contacts with the forum itself. In brief, “[t]he plaintiff cannot be the only link between the defendant and the forum.” *Walden*, 134 S. Ct. at 1118.

## II. Personal Jurisdiction Before *Walden v. Fiore*

### A. Development of Specific Personal Jurisdiction

*International Shoe Co. v. Washington* recognized that “the commission of some single or occasional acts” in a State may sometimes be enough to subject a defendant to jurisdiction of that State’s tribunals. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). The general test for evaluating whether a state can exercise personal jurisdiction over a non-resident considers whether a defendant has “certain minimum contacts” with the State such that the suit does not offend “traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316. Thus, when an individual or entity has no “minimum contacts” with a forum State, the Due Process Clause of the Fourteenth Amendment bars that State from exercising jurisdiction over that individual or entity. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

### B. Reaching a Non-Resident Defendant

The test established in *International Shoe* has two key requirements. First, conforming to the Due Process Clause requires the State’s long-arm statute grant the court the ability to exercise jurisdiction over a non-resident defendant. See, e.g. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995) (J. Selya); *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir.1994) (J. Seyla).

If a State's long-arm statute grants the court the discretion to exercise jurisdiction, several other factors must also be evaluated to determine whether an exercise of specific personal jurisdiction conforms to the Due Process Clause. First, the defendant's activities must "arise out of or relate" to the forum State. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Second, the claim must be "reasonable" in light of the defendant's relation with the forum. See *World-Wide Volkswagen*, 444 U.S. at 297 ("conduct and connection with the forum State [be] such that he should reasonably anticipate being haled into court there"). Lastly, "the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable." *United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (J. Seyla).

The factors above typically "play a larger role in cases where the minimum contacts question is very close." *C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59, 69 (1st Cir. 2014) (J. Lynch) (citing *Adelson v. Hananel*, 510 F.3d 43, 51 (1st Cir.2007) (J. Torrella)). However, the larger focus of the "minimum contacts" analysis is on the relationship between "the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). The inquiry thus examines the contacts that the "defendant himself" creates with the forum State that establishes a sufficient, "substantial connection." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

### **III. Calder v. Jones: Minimum Contacts Complications**

#### **A. Calder v. Jones Facts and Background**

The ability of the court to exercise specific jurisdiction over a non-resident defendant became unclear following *Calder v. Jones*. In *Calder*, entertainer Shirley Jones filed a libel suit in California against the author and editor of the national magazine, *The National Enquirer*, for comments directed at Jones. Defendants were Florida residents and Calder had only visited California twice on unrelated trips prior to the article's publication. *Calder*, 465 U.S. at 783, 786 (1984).

#### **B. Calder v. Jones Implications**

In *Calder*, the Supreme Court held that California could exercise specific personal jurisdiction over both out-of-state defendants because the "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* at 789-91. This seemed to suggest that causing harm to another could be a sufficient basis to establish "minimum contacts" with a forum state. In other words, even if a defendant did not avail themselves of a forum in other traditional ways, the State as "focal point" of the harm could still exercise jurisdiction over a non-resident based on the "effects" of the conduct in the forum state. *Id.* at 489. Further, this created new questions over whether a mere relationship between an in-state plaintiff and out-of-state defendant was sufficient "minimum contacts" to exercise personal jurisdiction. See *Burger King*, 471 U.S. at 478 (holding one year later that "an individual's contract with an out-of-state party alone can[not] automatically establish sufficient minimum contacts in the other party's home forum").

In *Calder*, the Supreme Court held an exercise of specific jurisdiction valid because “the reputation-based “effects” of the alleged libel connected the defendants to California, not just to the plaintiff.” *Id.* at 1123-24. The Court rationalized, “the ‘effects’ caused by the defendants’ [magazine] article—*i.e.*, the injury to the plaintiff’s reputation . . . connected the defendants’ conduct to *California*, not just to a plaintiff who lived there.” *Id.* “That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court’s exercise of jurisdiction.” *Id.* at 1124.

#### **IV. Specific Jurisdiction After *Walden v. Fiore***

##### **A. *Walden v. Fiore* Facts and Background**

In *Walden v. Fiore*, the Supreme Court clarified the requirements of specific jurisdiction and *Calder*. Fiore and Gipson were traveling home to Nevada following a gambling trip to San Juan. While transferring flights in Atlanta, DEA Officer Walden seized their winnings, over \$97,000 in cash, on suspicion the funds were drug-related. Fiore and Gipson continued to Nevada, and under counsel, contacted the DEA over the funds the next day. At first the DEA refused to return the cash because of an allegedly false and misleading affidavit filed by Walden. However, the funds were eventually released.

Fiore and Gipson then filed an action in Nevada against Walden, seeking damages resulting from alleged violations of their Fourth Amendment rights. *Walden*, 134 S. Ct. at 1120. Even though Walden had not availed himself of Nevada, the Ninth Circuit reversed the District Court ruling that Walden could not be sued in Nevada. The Ninth Circuit applied the *Calder* “effects” test to hold that a court may exercise personal jurisdiction over a tort defendant “if the defendant ‘expressly aimed’ his tortious conduct *at the forum state.*” *Fiore v. Walden*, 688 F.3d 558, 564 (9th Cir. 2012) rev’d, 134 S. Ct. 1115 (2014) (citing *Calder*, 465 U.S. at 789). Because the allegedly false affidavit had been filed while Fiore and Gipson had been in Nevada, the Ninth Circuit rationalized that Walden’s knowledge of their residency and resulting harm constituted sufficient minimum contact to exercise personal jurisdiction in Nevada over Walden, a Georgia-resident. *Walden*, 134 S. Ct. at 1124.

##### **B. Holding of *Walden* and Clarification of *Calder v. Jones***

The Supreme Court found that the Ninth Circuit had incorrectly applied the principles of *Calder* by “shifting the analytical focus from petitioner’s contacts with the forum to his contacts with respondents.” *Id.* Just as the only connection cannot be the defendant and the plaintiff, “mere injury to a forum resident is not a sufficient connection to the forum.” *Id.* at 1125. Rather, the nature of the defendant’s conduct in relation to the forum must support the minimum contacts analysis.

In *Walden*, the Supreme Court clarified the proper test to establish personal jurisdiction over a non-resident defendant. First, “whether the *defendant’s* actions connect him to the *forum.*” *Id.* at 1122. Second, the “minimum contacts” analysis “looks to the defendant’s contacts with the

forum State itself, not the defendant's contacts with persons who reside there," and emphasized that "the plaintiff cannot be the only link between the defendant and the forum." *Id.*

While *Calder* was analogous, the connection between the out-of-state defendant and forum was not present in *Walden*. The Court held that because Walden's "relevant conduct occurred entirely in Georgia," and only "affected plaintiffs with connections to the forum State" without establishing other ties to Nevada, Walden had not established sufficient "minimum contacts" required to authorize jurisdiction. *Id.* at 1126.

### C. Problems and Criticism of *Walden v. Fiore*

#### i. *Can Calder v. Jones be Remedied with Walden v. Fiore?*

Even though the Court attempted to distinguish *Walden* from *Calder*, some have argued that it is a distinction without a difference. See generally Charles W. Rhodes & Cassandra B. Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207 (Nov. 2014) (noting similarities in the cases, including how the author and editor in *Calder* could not be held culpable as they did not define or determine the market of *Esquire Magazine*, and thus were not the party that established contact with California). Taken at face, the validity of the *Calder* "effects" test remains questionable. "In the absence of evidence that the defendant's unlawful activities occurred within the state," "[p]laintiffs' counsel may no longer assume personal jurisdiction will be found" where their client has been harmed. B. Kinnaird et. al., "*Minimum Contacts*" *Inquiry Cannot Be Minimal: U.S. Supreme Court Rejects Broad Reading of the Effects Test for Personal Jurisdiction*, (March, 2014).

#### ii. *Relatedness, Reasonableness, and Purposeful Availment?*

While *Walden* represents an attempt to clarify the "minimum contacts" analysis, it ultimately "reflects the Court's continuing ambivalence regarding specific jurisdiction." Bernadette B. Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. Rev. 107, 167 (Winter, 2015). While there is some discussion of the "factors" which have proven sufficient to establish minimum contacts, in *Walden* they were considered largely "in isolation." *Id.* There seemed "limited consideration to whether each factor revealed contacts by defendant with the forum," and the Court's discussion seemed to assume that "if [the court] found a contact by the defendant with [an outside forum], specific jurisdiction must automatically follow." *Id.* Rather than providing for a flexible standard, "that would permit realistic assessment of the reasonableness of hailing a defendant into the particular court, given the particular claims at issue," the Court settled by adding a "one-dimensional requirement that a defendant must have sufficient forum contacts." *Id.*

Notably, the courts in the First Circuit have attempted to reconcile *Walden* by incorporating it into its "flexible, relaxed" relatedness inquiry, examining whether "suit-related conduct" is created between the defendant and the forum state. See *C.W. Downer*, 771 F.3d at 65; see also *Skyworks Solutions, Inc. vs. Kinetic Technologies HK Ltd.*, D. Mass., No. CIV.A. 13-10655-GAO (Feb. 4, 2015) (J. O'Toole) (citing *Walden*, at 1123–25) ("The proper question is not where

the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way").

iii. *E-Commerce*

Lastly, *Walden* failed to address how personal jurisdiction may change with the growth of "e-commerce." The Court provided only a hint, stating that personal jurisdiction protects "the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties," suggesting a potential future willingness to discount "virtual" contacts in a forum where there exists no other physical link to the defendant. Kinnaird, "*Minimum Contacts*" *Inquiry Cannot Be Minimal* (citing *Walden*, at 1122).

**V. Conclusion: Implications of *Walden v. Fiore***

*Walden* "continues the Supreme Court's steady march toward a more conservative approach to personal jurisdiction, giving the Due Process Clause renewed force." Kinnaird, "*Minimum Contacts*" *Inquiry Cannot Be Minimal*. The case will likely "limit the ability of the plaintiff's bar to litigate in forums they believe to be more favorable." *Id.* However, this is not necessarily a bad thing as the growth of the "internet, global commerce, and class action practice have all increased a company's exposure to litigation in distant forums," while also "enhancing a defendant's ability to press a defense remotely." *Id.* Thus, even though *Walden* will undoubtedly create larger questions that the lower courts and practitioners will be left to disentangle, its "clarification" of *Calder* and the requirements of specific personal jurisdiction may nevertheless successfully strike a balance by "limiting jurisdiction to forums with tangible connections to the defendant." *Id.*

# Memorandum

TO: Christine E. Devine, Kate P. Foley

FROM: Clayton Brite

DATE: June 30, 2015

**RE: Joint Representation, Massachusetts District Court Conference**

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Joint representation of two or more parties can present a myriad of issues. While separate representation is encouraged, two or more clients may desire to be represented by a single attorney (i.e. cost considerations, a level of trust with the attorney, etc.). If an attorney chooses to represent multiple parties, that attorney should ensure each client has the same goal or outcome in mind as the others before representing multiple individuals. However, an attorney must also be mindful of any divergence in a client's needs and strategy. Conversely, a client should also be mindful of their needs and goals as compared to other co-clients'. If a divergence exists, the attorney should re-evaluate his choice to represent all parties and consider whether withdrawing from one or all clients would be appropriate.

Important cases discussing the ethical concerns of joint representation are:

1. *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987)

In this case, the failure to disqualify counsel due to a conflict of interest was abuse of discretion by the lower court. *See id.* at 830-31. The attorney represented a class of female prisoners. After counsel rejected the state's settlement offer on the grounds that the offer was contrary to interest of a class which counsel represented in separate action; the court declined to accept counsel's arguments regarding extraordinary factors that made the settlement offer unacceptable or the risk that disqualifying the class would further delay a long case. The court believed those considerations did not warrant denial of the disqualification motion unless the state "created" the conflict by intentionally offering facilities involved in counsel's separate suit. The two groups' interests were at odds with respect to the settlement offer from the state of New Hampshire. *Id.* at 829. Thus, the Court concluded that counsel was placed in an untenable position that prevented counsel from properly advocating on behalf of all parties. *Id.*

2. *United States v. Osborne*, 402 F.3d 626, 632 (6th Cir. 2005)

In this case, the Osbornes and a third defendant were represented by one attorney. The defendants told the magistrate judge that they all intended to be represented by the same attorney. Despite numerous attempts from the judge, the Osbornes claimed they were content with their representation. *See id.* at 627-28. Mrs. Osborne took a plea bargain at the

recommendation of counsel. During his representation of Mrs. Osborne, counsel did not make a “safety valve” motion<sup>1</sup>, which is common for attorneys in federal drug cases to make. *Id.* at 628-30. On appeal of her plea bargain, Mrs. Osborne claims she would not have settled if she had independent counsel. *Id.* at 630.

The opinion cites to the Supreme Court who defined an actual conflict in the Sixth Amendment context as “a conflict of interest that adversely affects counsel's performance.” *Mickens v. Taylor*, 535 U.S. 162, 172 n. 5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). The opinion provides little actual or circumstantial evidence of the attorney’s conflicted loyalties. The Court speculates that the actions of counsel could be excused simply on legal strategy. *United States v. Osborne*, 402 F.3d at 633. On balance of the facts and mitigating circumstances, the Court was unable to determine if an actual conflict occurred. *Id.* However, the Court remanded the case to the District Court to have a Rule 44(c) hearing to inquire about the propriety of joint representation. *Id.* at 634.

3. *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445 (D.P.R. 1985)

In this case, the court may also examine the circumstances surrounding the consent to determine if it was truly voluntary and informed. It held that if the conflicts of interest involve abuse of confidential information given by the client, rather than the mere possibility of disloyalty in advocacy during litigation, the client's consent might be insufficient.

“Informed consent” may be insufficient to prevent disqualification of counsel seeking to jointly represent a number of parties due to a conflict of interest. The court argues if it is not obvious that counsel will be able to represent all clients adequately, there may be a conflict of interest. A potential conflict depends on a number of contingencies, such as the eventual determination of whether the inheritance was accepted, the real financial resources of the estate and the heirs, the degree of contributory negligence, if any, attributed to the deceased and the eventual determination of the “efficient” or legal cause of the accident, it is a reality that under the law in Puerto Rico these conflicting claims and defenses could be raised among plaintiffs. If the estate is accepted, the heirs are held responsible for its liabilities and, thus, the non-heirs as well as the heirs of the other estates could technically sue the estate for the negligence of their decedent.

4. *Flanagan v. U.S.*, 465 U.S. 259 (U.S.Pa., 1984)

In this case, four Philadelphia police officers were indicted for conspiring to deprive citizens of their civil rights. They retained a law firm to act as joint counsel, and continued the joint representation after the indictment, even though the indictment did not make the same allegations against all petitioners. *Flanagan v. U.S.*, 465 U.S. at 259. After three of the

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<sup>1</sup> A “safety valve” motion is a known legal strategy in federal drug cases. A successful motion will allow a defendant to forego harsh mandatory minimum sentences. Thornton may have forgone making a “safety valve” motion because it was a legally weak argument and could backfire on the defendant.

petitioners moved to sever their case from the fourth petitioner's, and after petitioners moved to dismiss the conspiracy count, the District Court granted the Government's motion to disqualify the law firm from its multiple representation. The severance motion and supporting papers showed that petitioner Flanagan's interests were likely to diverge from the other petitioners' interests. *Flanagan v. U.S.*, 465 U.S. at 262. Although the joint parties waived their right to conflict-free representation, the court concluded, however, that it had the authority and, indeed, the obligation under Rule 44(c) to disqualify counsel when "the likelihood is great that a potential conflict may escalate into an actual conflict." *Id.*

## MEMORANDUM

June 24, 2015

**TO:** John Loughnane

**FROM:** Hayley N Ryan

**RE:** Electronic Communications & Waiver of Attorney-Client Privilege by Employee

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### Case Law

A communication is protected by attorney-client privilege where the party asserting privilege can show: (1) that an attorney-client relationship exists; (2) that “the communications were received from a client during the course of the client’s search for legal advice from the attorney in his or her capacity as such;” (3) that “the communications were made in confidence;” and (4) that “the privilege as to these communications has not been waived.” *In the Matter of the Reorganization of Electric Mutual Liability Insurance Company, LTD.*, 425 Mass. 419, 421, 681 N.E.2d 838 (1997).

For a communication to be made “in confidence”, there must be a reasonable expectation that the communication will remain private. *Commonwealth v. Petty*, 4 Mass. L. Rep. 611 (Mass. Super. Ct. 1995). Communications sent using work email generally will not be privileged because most companies have explicit policies which destroy any expectation of privacy with regard to work emails. However, communications sent using a private personal email account accessed through company-owned equipment will only lose their privileged status if the company explicitly notifies employees that (1) “all such e-mails are stored on the hard disk of the company’s computer in a “screen shot” temporary file;” and (2) that “the company expressly reserves the right to retrieve those temporary files and read them.” Without such clear guidance, a reasonable person would not know that screen shots are temporarily stored on the hard drive of their company device, and that their employer has the ability to access them. *National Economic Research Associates, Inc. v. Evans*, 21 Mass L. Rptr. 337 (2006).

### Application to Hypothetical

If the founder used InsulCo email to communicate with his counsel, then the emails will be subject to discovery if InsulCo had published policies which notified employees that emails are not confidential and that InsulCo can read them at its discretion.

If the founder used an InsulCo device to send his counsel emails from a personal email account, such as G-Mail, the emails will only be subject to discovery if InsulCo had published policies that explicitly notified employees that screen shots are stored on the hard drives of devices and the company retains the right to retrieve and read the screen shots.

# Memorandum

**TO:** Christine E. Devine & Kate P. Foley

**FROM:** Alexandra Mansfield

**DATE:** June 30, 2015

**RE:** Social Media  
*Massachusetts District Court Conference*

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## Introduction

The increased use of social media by attorneys has implicated a host of ethical concerns. Many attorneys use social media in an entirely unofficial capacity, completely isolated from their professional lives. Others, however, take advantage of the nuances of the platforms to seek information they may otherwise not be able to obtain, or to advertise their services to gain a broader base of clientele. The various uses of these platforms have led to the invocation of various ethical rules, many of which are not necessarily geared to handle the particular issues that are unique to social media. The main issues arising in this context are discussed below.

## Various Social Media Uses and Ethical Implications

A very common use of social media platforms is simply making a profile that is viewable by the public. In this situation, attorneys generally state basic information about themselves, including their profession as an attorney. Doing so triggers Rule 7.1 of the ABA Model Rules of Professional Conduct (the “Model Rules”), which forbids an attorney from making false communications about himself or his services. See American Bar Association Formal Ethics Opinion 10-457 “Lawyer Websites”, (2010). The rule states that a communication is false or misleading if it contains a material misrepresentation of fact or law, or if it omits a fact necessary to make the statement considered as a whole not misleading. This can arise in the context of an attorney exaggerating his achievements, or even lying about his credentials. An additional consideration is that information placed on a social media site may be interpreted as advertising, and thus subject to the constraints of Rule 7.2 of the Model Rules, which prohibits the compensation of someone for advertising another’s services. It is important to note that the intent of the attorney in displaying such information is generally irrelevant; since there is no legal

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authority to the contrary, an attorney should remain vigilant and assume that any information posted on such sites about his profession is subject to the constraints of these rules.

Many attorneys use blogging to solicit clients. In such a situation, an attorney writes about issues relevant to his or her practice area, and sometimes gives advice in certain situations. Usually, the author will include his law firm affiliation and a method of contacting him for further advice. When an author posts generally about a legal issue and merely invites prospects to join the conversation, it typically is not considered solicitation. See American Bar Association Formal Ethics Opinion 10-457 “Lawyer Websites”, (2010). But if the attorney caters a response to an individual or advises an individual to retain counsel, this no longer remains the case. See id. It should be noted that when an attorney is erring more on the side of advertising through blogging, such written solicitations are subject to Rule 7.3 of the Model Rules, requiring the retention of such records for two years.

Another issue that arises in the context of blogging is one in which the attorney is not soliciting new clients, but merely writing “anonymously” about the happenings in his or her career. An example is the discipline of Kristine A. Peshek, a public defender whose license was revoked in Illinois, and subsequently in Wisconsin. See In Re: Disciplinary Proceedings Against Peshek, 334 Wis.2d 373, 377 (2011). Attorney Peshek assumed she was venting about a client anonymously, but the court found that she included enough detail to lead to the client’s identification, clearly violating client confidentiality. See id. at 374. Many opinions have cited a common thread of needing to exercise common sense, and this seems to fall into that category. Many situations, however, are less clear, and require an understanding of the various ethical rules that could possibly be implicated.

On sites such as “Question & Answer” forums, attorneys need to be sure that they are not inadvertently entering into an attorney-client relationship. See American Bar Association Formal Ethics Opinion 10-457 “Lawyer Websites”, (2010). To reduce this risk, attorneys should use explicit disclaimers and make it clear that they do not wish to engage in such a relationship merely by responding to a post. See id.

Lastly, some attorneys use social media platforms for a more controversial purpose: to retrieve nonpublic information which may otherwise be unattainable. A common example is “friending” someone for the purposes of uncovering information that is not accessible to the public. A Massachusetts Bar Association Ethics Opinion recently addressed this issue. See Massachusetts Bar Association Opinion 2014-5. In this opinion, an attorney inquired if she could request to “friend” an adverse party to access non-public information. See id. The Massachusetts Bar Association (the “MBA”) distinguished between a represented party and an unrepresented party. See id. In the latter situation, the MBA stated that an attorney may request to “friend” such a person, but must include in the request information disclosing the attorney’s interest in the

case. See id. This stems from Rule 4.3 of the Model Rules, which prohibits an attorney from stating or implying that he is disinterested, and if confusion arises, the attorney must take immediate steps to clarify his position. The MBA felt that including such a requirement would reduce the risk that the unrepresented party was deceived. See id. If, however, the party is represented, the attorney's conduct is subject to Rule 4.2 of the Model Rules, which prohibits communication about the subject matter. The opinion did not address if "friending" a represented person and subsequently viewing his information would constitute communication for purposes of Rule 4.2.

Memorandum

June 30, 2015

**TO:** John Loughnane

**FROM:** Courtney Fears

**RE:** Admissibility of Expert Testimony Regarding Prospective Damages in Trade Secret Misappropriation Cases

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Relevant Law

Expert testimony regarding future lost profits must be based on reliable methodology. *See Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, 13 N.E.3d 604 (2014) (stating expert testimony is inadmissible when it lacks a demonstrated reliable methodology capable of being validated and tested). When determining damages based on trade secret misappropriation courts cannot base damages on guess, speculation or conjecture. Ritchey & McCallum, *Enforcement of Trade Secret Rights and Noncompetition Agreements* at 32 (American Bar Association 2002). Assessing damages requires the courts to look at “(a) trade secret owner’s business records prior to and after the misappropriation, (b) experience of comparable businesses not otherwise affected by the misappropriation or (c) expert opinion based on either.” *Id.*

Expert testimony based on assumptions about future market behavior without adequate foundation is inadmissible. 13 N.E.3d at 607. Therefore, the testimony of the expert witness must be based on reliable damage calculation theories. “Reliability is as much a part of the broader determination of admissibility of the expert’s opinion as it is of the determination as to the reliability of the methodology employed.” *Id.* at 609 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)). Without the ability to test and validate the expert’s methodology, the court is unable to determine the reliability of the testimony.

Use of traditional lost profit analysis may not be appropriate when calculating damages for a startup business in trade secret misappropriation cases. *See Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, 13 N.E.3d 604, 614 (noting that such businesses often operate for long periods without turning a profit, but this fact should not render them damage proof). Therefore, expert witnesses should rely on other theories to determine future lost profits for startup businesses. Other theories may include: “(1) the defendant’s actual profits from the use of the secret; (2) the value that a reasonably prudent investor would have paid for the trade secret; (3) the developmental costs the defendant avoided incurring through misappropriation; and (4) a ‘reasonable royalty’ for the defendant’s continued use of the secret.” Melvin F. Jager, 1 Trade Secrets Law.

These alternate theories are based on actual figures and information that may validated and tested by the court.

#### Application to Hypothetical

InsulCo's expert will need to base their testimony on damage calculation theories that may be validated and tested. When calculating potential damages, the expert should take into consideration: (1) Dr. Labrat's actual profits from the use of the secret; (2) The amount invested to start InsulCo; (3) any developmental costs Dr. Labrat avoided with the use of the trade secret in his new endeavors in California; (4) a reasonable royalty for Dr. Labrat's continued use of the trade secret. These alternate theories of damage calculation are capable of being tested and validated by the court. Ensuring the expert's methodology is easily tested will guarantee the admissibility of the testimony at trial.

## MEMORANDUM

June 30, 2015

**TO:** John Loughnane

**FROM:** Courtney Fears

**RE:** Limits on Inadmissibility of Settlement Offers

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### Relevant Law

Under the Federal Rules of Evidence, settlement offers and negotiations are generally not admissible as evidence in a trial. FRE 408. However, like many of the Federal Rules of Evidence, FRE 408 is subject to exceptions.

Rule 408 under the Federal Rules of Evidence states the use of settlement offers and negotiations by any party either to prove or disprove validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction is inadmissible. However, FRE 408(b) explains, “the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation.” FRE 408(b)’s exception has been used in instances where the “offer” which was delivered with the threat to commence litigation was an attempt at extortion, relevant to the issues in the case. *See Ray v. Ropes & Gray LLP et al.*, 961 F. Supp. 2d 344 (2013).

In *Ray v. Ropes & Gray LLP*, Judge Stearns allowed the defendant’s use of the settlement offer as it was used not as an admission of liability but rather as evidence of the plaintiff’s bias. 961 F.Supp.2d 344 (2013). Judge Stearns asserts that he allowed the settlement offer because, “Ropes’s use of the offer coupled with the defendant’s threat to commence litigation was an attempt at extortion, relevant to the issue of bias.” *Id.*<sup>1</sup> The settlement offer was used to show the witness’s bias in this situation, exactly as FRE 408(b) intended. Therefore, as long as the settlement offer is being used for a purpose other than proving or disproving validity of a disputed claim, it may be admissible under FRE 408(b).

### Application to Hypothetical

Following the general rule of FRE 408, the founders will likely be precluded from admitting the settlement offer as evidence at trial. The settlement offer likely contains admissions and FRE 408 bars the admission of such evidence. However, the offer may be admitted providing the founder’s legal team can craft a persuasive argument using the exceptions outlined in FRE 408(b). For example, the offer may be admitted if it is used to

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<sup>1</sup> Order on Parties Cross-Motion for Summary Judgment n. 3. (2013)

show Mr. Angel's bias or prejudice. The settlement offer will not be admitted if the founders plan to use it to prove or disprove any disputed claim or to impeach a prior inconsistent statement by Mr. Angel.

# Memorandum

TO: Christine E. Devine, Kate P. Foley

FROM: Clayton Brite

DATE: June 30, 2015

RE: **E-Discovery**, Massachusetts District Court Conference

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Courts typically impose a duty on both counsel and the parties themselves to ensure discovery is properly conducted and responses to requests are candidly answered. This area of jurisprudence stems from the Model Rules of Professional Responsibility and the Federal Rules of Civil Procedure. Comment 2 to Model Rule 3.4 discusses the right of an opposing party to obtain evidence through discovery or subpoena. FRCP 26 expands on this by creating the duties of adverse parties to meet and confer a plan and guidelines to the discovery process followed by attending a Rule 16(b) conference with the judge to confirm the plan. Fed. R. Civ. P. 26(f). Failure to produce evidence can result in sanctions. Fed. R. Civ. P. 60(b). The First Circuit has characterized Rule 60(b) as “a vehicle for extraordinary relief” and has held that motions brought pursuant to that rule should be granted “only under exceptional circumstances.” *de la Torre v. Cont'l Ins. Co.*, 15 F.3d 12, 14 (1st Cir. 1994) (*internal citations omitted*).

The First Circuit, in concert with the other Circuits, believes accidental or intentional discovery pitfalls or gaps constitute misconduct that can be established by clear and convincing evidence. Therefore, it must then be shown the misconduct foreclosed full and fair preparation or presentation of the case. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) *aff'd*, 900 F.2d 388 (1st Cir. 1990) (*internal citations omitted*).

Two potential forms of misconduct can arise depending on the characterization of the mindset of the attorney or client. The first involves a failure to disclose a document that should have been identified through the opposing counsel’s keyword search. The second pitfall pertains to the opposition’s discovery methodology and when it fails to uncover a document that would be relevant to the case. The former is a question of carelessness by opposing counsel, which begs the question whether an attorney has a duty to identify the mistake to his/her adversary. The latter is a question pertaining to the discovery plan design, and is not inherently an issue with discovery. In both instances, courts exercise their discretion and decide whether a violation has occurred on a case-by-case basis. Attorneys should be mindful of both the procedural and substantive rules surrounding misconduct during the course of discovery. While the 21<sup>st</sup> Century has given rise to e-discovery and electronically stored information (ESI), there has been no greater or lesser duty imposed on attorneys by the “physical” or “electronic” discovery processes. Important cases discussing the ethical concerns of discovery disclosure are:

1. Symposium, *Ethical Issues in E-Discovery, Social Media, and the Cloud*, 39 Rutgers Computer & Tech. L. J. 125, 125-26 (2013).

Although not controlling case law, the Hon. Ronald J. Hedges, former United States Magistrate Judge, and attorney Maura Grossman, participated in a “question and answer” session during a symposium. The subject of their participation regarded an attorney’s obligation to disclose electronically discovered information (ESI) not uncovered due to opposing counsel’s poor choice of search terms. It was the opinion of both panelists that an attorney has no obligation to do anything in the interest of justice unless the attorney has made an affirmative assertion to the contrary to the adversary of the court. *Ethical Issues*, at 125-26. The attorney’s obligation is to represent his or her client and to conform to the Rules of Professional Conduct. *Id.* This specific problem is governed by Model Rules 3.1 & 3.4. However, the panelists acknowledge that special duties do attach, for instance, in an attorney’s role as a prosecutor. *See Model Rules of Prof’l Conduct R. 3.8.*

2. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) *aff’d*, 900 F.2d 388 (1st Cir. 1990)

In this case, the First Circuit Court of Appeals found that a failure to disclose or produce materials requested in discovery can constitute “misconduct” within the context to Rule 60(b)(3). The Court went on to further say that “[m]isconduct’ does not demand proof of nefarious intent or purpose as a prerequisite and believes accidental omissions could be subject.” *Id.* at 923. However, the Court believes intent should bear some consideration and an inquiry into potential misconduct should be conducted on a case by case basis. *See Id.* at 925. The *Anderson* Court presented the following standard for determining misconduct within discovery:

“[I]n motions for a new trial under the misconduct prong of Rule 60(b)(3), the movant must show the opponent's misconduct by clear and convincing evidence. Next, the moving party must show that the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial.... The burden can also be met by presumption or inference, if the movant can successfully demonstrate that the misconduct was knowing or deliberate. *Id.* at 926.

3. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432-33 (S.D.N.Y. 2004)

In this case, the Court identified actions which should be taken by counsel in conducting e-discovery. Counsel should take the time to speak with at least “key members” of the company and express the importance that they retain documents. If possible, counsel should run broad keyword searches and preserve a copy of each “hit” or “potentially relevant information.” Counsel would not have to review these documents and would only be obliged to review documents that came up as “hits” on the second, more restrictive search by opposing

counsel. The Court went on to say Rule 26 creates a “duty to supplement” those responses and that duty, from a practical standpoint, falls on the attorney, not the client. In conjunction with the duty to supplement, the Court believes Rule 26 also creates a **reasonable** “duty to preserve” documents and ensure their survival throughout litigation. Thus, the Court would require a case-by-case review of this duty, cognizant that while these duties rest with counsel, the client may be at fault.

In the present case, the court found counsel failed to adequately communicate with employees the importance of preservation during litigation and to ensure their daily practices did not compromise that goal. *See Id.* at 435.

4. *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 CIV. 4837(HB), 2006 WL 1409413, at \*3 (S.D.N.Y. May 23, 2006)

In this Case, the District Court ruled in favor of broad discretion to sanction attorneys with respect to discovery misconduct. *See Id.* at \*3 (*internal citations omitted*). The Court, following the holding of *Zubulake*, affirmed counsel’s duty to locate relevant information during discovery and ensure relevant information is discovered. Similar to *Zubulake*, counsel had a duty to preserve and inform their client of its obligation to preserve documents during discovery.

5. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071, at \*5 (Fla. Cir. Ct. Mar. 1, 2005), *rev'd on other grounds*, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007)

In this case, the defendant's failure to preserve and search backup tapes led to a large number of relevant e-mails being irretrievably lost in a suit alleging fraud in a corporate acquisition. Notwithstanding the issue of preservation, the issue was exacerbated by defendant's and “its counsel's lack of candor [which] frustrated the court and opposing counsel's ability to be fully and timely informed.” *Id.* The court ultimately found defendant had engaged in a “willful and gross abuse of its discovery obligations” and, subsequently, the court ordered a number of severe sanctions, including rendering a partial default judgment, and ordering that (1) defendant would bear the burden of proving it lacked knowledge of the alleged fraud; and (2) allowing the jury to derive whatever inferences it chose from the facts related to defendant's discovery failures. *Id.* at \*7-8.

# MEMORANDUM

TO: MA Judicial Conference: Civil Procedure Team  
FROM: Civil Procedures Prep. Team  
DATE: September 11, 2015  
RE: “Wait, Wait”: MA District Court Conference – Civil Procedures: ESI and Electronic Discovery Under Proposed Rule 37(e)

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## I. Executive Summary: Proposed Changes to Rule 37(e)

On April 29, 2015, the Supreme Court approved key changes to the Federal Rules of Civil Procedure to be effective on December 1, 2015, including Rule 37(e) (“Proposed R. 37(e)”). Proposed R. 37(e) will bar a court from imposing sanctions where electronic stored information (“ESI”) has been lost despite a party’s “routine, good-faith operation” of its ESI system. The overriding purpose of the amendment is to provide a uniform approach to sanctions for spoliation of ESI.

Proposed R. 37(e) sets forth potential penalties if ESI should have been preserved, but is lost because of a party’s failure “to take reasonable steps,” and the data cannot be “restored or replaced through additional discovery.” Penalties are not automatic even if a party fails to preserve information. Further, curative measures may only be awarded upon a court finding that another party was prejudiced from losing the information. Most significantly, Proposed R. 37(e) clarifies that more severe penalties, such as an adverse inference or default judgment, are only permitted where a party “acted with the *intent to deprive another party of the information's use in the litigation.*” (emphasis added).

## II. Current Rule 37(e)

Federal Rule of Civil Procedure 37(e) was enacted in 2006 to address the growth of ESI. The current rule states:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Current Rule 37(e) reaffirms the common law duty to preserve information “not only during litigation” but also during the “period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) *citing Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). At the same time, the rule attempted to provide a “safe harbor” from sanctions when no duty to preserve ESI exists, or the destruction of ESI is the result of regular good-faith operation.

Due to the evolution of technology, Rule 37(e) has “not adequately addressed the serious problems resulting from the continued exponential growth in the volume” of ESI. *See* Judicial Conference Comm. on Rules of Practice & Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure 13-14, app. B-1 to B-2 (Sept. 2014) (the “Sept. 2014 Report”).<sup>1</sup>

Current Rule 37 is now outdated and led to a jurisdictional split in the courts’ approach to consequences from the loss or destruction of ESI. This Circuit split has ultimately complicated the ESI destruction and preservation process, causing further problems for businesses and practitioners.

**A. Problem #1 with Current Rule 37(e): Inconsistent Remedies and Standards: Is Negligent Spoliation Sufficient?**

Courts have applied inconsistent remedies for lost or destroyed ESI. Generally, the intent and degree of prejudice to the innocent party provides courts with some guidance in determining the appropriate remedy for spoliation of evidence. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 Fordham L. Rev. 2005, 2017 (2011) [hereinafter “Spencer, *The Preservation Obligation*”]. However, a court still has “wide discretion in sanctioning a party for discovery abuses.” *Reilly v. NatWest Mkts. Grp., Inc.*, 181 F.3d 253, 267 (2d Cir. 1999).

The First, Fourth, and Ninth Circuits “often emphasize the presence of bad faith,” however “bad faith is not essential to imposing severe sanctions if there is severe prejudice.” In addition, adverse inference jury instructions may be imposed for the negligent loss of ESI. *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (discussing jurisdictional split and reaffirming the 5th Circuit’s requirement of bad faith); *see, e.g., Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”)

Alternatively, the Fifth, Seventh, Eighth, Tenth, and D.C. Circuits have held negligence insufficient for an adverse inference instruction, and require a showing of bad faith. *Rimkus Consulting Group*, 688 F. Supp. at 614; *see, e.g., Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (“In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith.”); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir.2007) (“A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’ ” (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir.2004))).

**B. Problem #2 with Current Rule 37(e): Costs of Over-Preserving ESI**

As a result of the circuit split, entities that may be subject to an ESI request have incurred significant costs to avoid potential sanction. As the Sept. 2014 Report noted, “persons and entities over-preserve ESI out of fear that some ESI might be lost, their actions might with hindsight be

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<sup>1</sup> Available at [http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf).

viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence.” Sept. 2014 Report. This has resulted in entities “spending millions of dollars preserving ESI for litigation that may never be filed.” *Id.*

### **III. Proposed R. 37(e)**

Proposed R. 37(e) states:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

#### **A. Proposed R. 37(e) Meaning and Purpose**

##### *i. Proposed R. 37(e) Limited to ESI*

The Subcommittee identified the following reasons for limiting the scope of Proposed R. 37(e) to ESI.

1. Evolving nature of ESI drove the need for a new rule;
2. Existence of already well-defined state law relating to spoliation of other forms of evidence.
3. Impracticality of Proposed R. 37(e) to be universally and practically applied to all other forms of evidence.

##### *ii. Reasonable Steps to Preserve*

Proposed R. 37(e) calls for a party to take “reasonable steps” to preserve ESI. First, to evaluate reasonableness, courts consider a party’s “resources and the proportionality of the efforts to preserve.” Sept. 2014 Report. Second, “a party’s level of sophistication” may bear on whether the party should have realized that information should be preserved. *Id.* Third, as discussed in *Victor*

*Stanley II* and *Rimkus Consulting Group, Inc. v. Cammarata*, “preservation efforts must be analyzed through the lens of reasonableness.” Philip J. Favro, *The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments*, 21 Rich. J.L. & Tech. 8, 33 (2015) (“Favro, The New ESI Sanctions Framework”). This significant step obliges courts to examine preservation issues more broadly, and to “not focus exclusively on whether and when the party modified aspects of its electronic information systems.” Sept. 2014 Report. Thus, the rule hopes to “direct preservation questions away from a mythical standard of perfection” that has crept into discovery jurisprudence over the past several years. Favro, *The New ESI Sanctions Framework* at 13.

iii. *Proportional Efforts to Restore or Replace Lost ESI*

If a court finds that reasonable steps were not taken and information was lost as a result, Proposed R. 37(e) requires an inquiry over whether the ESI can be “restored or replaced through additional discovery.” Proposed R. 37(e). As detailed in the Committee Note, “[n]othing in the rule limits the court’s power under [amended] Rules 16 and 26 to authorize additional discovery.” Sept. 2014 Report. However, “[o]rders . . . that would ordinarily be considered inaccessible” or too costly to produce under amended Rule 26 “may be pertinent to solving such problems.” *Id.* The emphasis on discovery of lost ESI is on whether efforts are “proportional to the apparent importance of the lost information” in litigation. *Id.* Proposed R. 37(e) dovetails with proposed changes to Rule 26 to strengthen proportionality in discovery. See Proposed Fed. R. Civ. P. 26 (effective December 1, 2015). In addition, Proposed R. 37(e) should limit the imposition of sanctions for lost ESI “where there is essentially no harm to the moving party given the availability of replacement evidence.” Favro, *The New ESI Sanctions Framework* at 14.

iv. *Subsection (e)(1): Finding of Prejudice from Failure to Preserve*

When a party fails to take reasonable steps to preserve ESI, and the information cannot be retrieved by proportional means, subdivisions (e)(1) and (e)(2) set forth possible court responses. Upon a finding of prejudice from a failure to preserve, a court “may order measures no greater than necessary to cure the prejudice.” Proposed R. 37(e). This language “preserves broad trial court discretion to cure prejudice caused by the loss of ESI,” and courts may “draw on its experience in addressing this or similar issues” for further information.” Sept. 2014 Report. However, where there is no intent to deprive ESI discovery, it is implicit that the court appears barred from imposing the severe penalties prescribed under subdivision (e)(2).

v. *Subsection (e)(2): Finding of Intent to Deprive*

The “primary purpose of [subdivision (e)(2)] is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.” Sept. 2014 Report. Subdivision (e)(2) attempts to limit ESI-related adverse inference instructions “to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation.” *Id.* Subdivision (e)(2) appears to require more than mere negligence and suggests a heightened level of evidentiary support than is currently required under the applicable First, Fourth and Ninth Circuit case law. Thus, when a party acts with intent to deprive another of ESI, and the information cannot be restored via proportionate means, subdivision (e)(2) allows a court to provide severe measures including an adverse-inference instruction, dismissal, or default judgment. Proposed R. 37(e).

## B. Proposed R. 37(e) Implications

In addition to unifying ESI procedures and policy, Proposed R. 37(e) addresses the following ambiguities under the current rule:

1. There is no new or additional duty to preserve ESI. Rather, “[t]he new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated.” Sept. 2014 Report.
2. The rule “does not affect any common-law tort remedy for spoliation that may be established by state law.” *Id.*
3. The rule “[e]mpowers [the] Court to order additional discovery or other curative measures when a litigant has destroyed information that it should have retained for litigation.” Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26 *Utah B.J.*, September/October 2013, at 38, 43 (2013).
4. Companies with “reasonable and proportionate preservation measures” will benefit from the changed rule by reducing the possibility of unpredictable future discovery requests. *Id.*

## C. Criticism of Proposed R. 37(e)

### i. What are “Reasonable Steps to Preserve”?

If “reasonable steps” are taken to preserve relevant ESI, one is theoretically protected from being sanctioned. However, “reasonable steps” is undefined and Subcommittee notes provide only “general guidance.” Favro, *The New ESI Sanctions Framework at 20-21*. “For example, the draft note suggests sanctions may not be appropriate if the destroyed ESI is either outside of a preserving party’s control or has been wiped out by circumstances (e.g., flood, fire, hackers, viruses, etc.) beyond the party’s control,” but “the note does not suggest these *force majeure* circumstances are an absolute defense to a sanctions request.” *Id.*

### ii. What is an “Intent to Deprive”?

“Conduct that is ‘intentional’ and which results in the spoliation of ESI is not necessarily tantamount to bad faith.” *Id.* at 25-26. In *Mathis v. John Morden Buick, Inc.*, the Seventh Circuit noted the distinction between bad faith and intentional conduct with spoliation of evidence: “[t]hat the documents were destroyed *intentionally* no one can doubt, but ‘bad faith’ means destruction for the purpose of hiding adverse information.” *Id.* citing *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998).

If the “intent to deprive” requirement encompasses lesser forms of ESI spoliation than bad faith, then “intentional” spoliations “may very well include instances where parties have been reckless or willful in their destructions of ESI.” Favro, *The New ESI Sanctions Framework at 25-26*, citing

*Pension Comm. Of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 463-465 (S.D.N.Y 2010). Whether conduct is sufficient to satisfy “intent” will ultimately depend on the facts, and as a result “courts will again be left to sort out the meaning of a key provision from the rule.” Favro, *The New ESI Sanctions Framework* at 25-26.

*iii. Is there a Duty to Preserve Information in the Cloud?*

Lastly, proposed Rule 37(e) fails to clarify how the rule may apply in the context of cloud computing. This is a particularly significant given the increasing use and dependence on cloud-based storage. While companies gradually turn to cloud-based storage, “there are few lawyers who possess the expertise or understanding required to preserve and produce that data in discovery.” Favro, *The New ESI Sanctions Framework* at 27.

## Appendix: Proposed Rules with Edits

### **Rule 26 – Proportionality**

**Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.—~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.~~ For good cause, ~~the court may order discovery of any matter relevant to the subject matter involved in the action.~~ Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

### **Rule 37**

**(e) Failure to Provide-Preserve Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice 32 to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

# MEMORANDUM

TO: MA Judicial Conference: Civil Procedure Team  
FROM: Civil Procedures Prep. Team  
DATE: September 11, 2015  
RE: "Wait, Wait": MA District Court Conference - Civil Procedures: Standard of Plausibility in Removal Actions

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## I. Executive Summary

The Supreme Court's recent opinion in *Dart Cherokee Basin Operating Company, LLC* 135 S. Ct. 547 (2014) definitively clarified the meaning of "short and plain statement" in 28 U.S.C. §1446(a). The Court held that section 1446(a) does not require the defendant to attach evidentiary materials to notices of removal in order to remove the case to federal court. Rather, the defendant must only include a "short and plain statement" establishing the basis for removal. The Court analogized the removal statute to the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), which requires only a "short and plain" statement of the claims in a pleading. Before *Dart*, the Fourth, Seventh, Eighth, and Ninth Circuits did not require evidence in support of removal, whereas the Tenth Circuit required the defendant to offer "affirmative" proof that the jurisdictional elements were satisfied. The *Dart* decision resolved the Circuit split in favor of the majority view .

## II. Case Law Prior to *Dart*

### A. The Fourth, Seventh, Eighth, and Ninth Circuits Interpreted U.S.C §1446(a) to Not Require Evidentiary Support in a Defendant's Removal Notice

Prior to, and consistent with, *Dart*, the Fourth, Seventh, Eighth, and Ninth Circuits analogized the standard for removal to the Federal Rule of Civil Procedure 8(a) pleading standard, as Rule 8(a) contains the same "short and plain statement" language of the removal statute, 28 U.S.C. §1446(a).<sup>1</sup> Since Rule 8(a) only requires pleadings to "state a claim to relief that is plausible on its face," so too, these courts reasoned, does removal under section 1446(a). See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544).

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<sup>1</sup> The language of §1446(a) states that a defendant seeking removal to federal court must file a notice of removal "containing a short and plain statement of the grounds for removal." Rule 8(a) similarly requires "a short and plain statement."

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

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August 13, 2015

The Fourth Circuit in *Ellenburg v. Spartan Motors Chassis, Inc.*, noted that the language of the removal statute is “deliberately parallel” to the language in the pleading requirement in finding that a notice of removal does not need to “meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint.” 519 F.3d 192, 200 (4th Cir. 2008). The court further found that, upon remand, a court may then require a defendant to prove jurisdiction. *Id.*

In *Spivey v. Vertrue, Inc.*, the Seventh Circuit reiterated that, while the removing party “bears the burden of describing how the controversy exceeds \$5 million,” the removal notice requirement is “a pleading requirement, not a demand for proof.” 528 F.3d 982, 986 (C.A.7 2008). Similarly, the Eighth Circuit cited *Spivey* in finding that the face of a plaintiff’s complaint alone was enough to prove the jurisdictional amount required for removal. *See Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944 (8th Cir. 2012).

Finally, in an unpublished disposition, the Ninth Circuit held that “[n]othing in 28 U.S.C. §1446 requires a removing defendant to attach evidence of the federal court’s jurisdiction to its notice of removal.” *Janis v. Health Net, Inc.*, 472 F. Appx. 533, 534 (9th Cir. 2012).

#### **B. The Tenth Circuit Consistently Required Defendants to Establish Removal Beyond a Preponderance of Evidence in Notice or Complaint**

Creating a circuit split, the Tenth Circuit held in *Laughlin v. Kmart Corp.* that “[b]oth the requisite amount in controversy **and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.**” 50 F.3d 871, 873 (10th Cir. 1995) (emphasis added). As a result, the court held that evidence prepared after the notice of removal was inadequate to prove that jurisdiction existed “at the time the motion was made.” *Id.* Citing *Laughlin*, the court in *Martin v. Franklin Capital Corp.* reversed an order denying a motion to remand where a defendant simply summarized the allegations and the requested relief discussed in the plaintiff’s complaint without specifying damages. In its reversal, the court stated that the “mere summary... does not provide the requisite facts lacking in the complaint.” 251 F.3d 1284, 1291 (10th Cir. 2001). Again citing *Laughlin*, the court reaffirmed its holding in *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, stating that “[t]he jurisdictional minimum must be established at the time the removal motion is made” and that the court must “deny such jurisdiction if not affirmatively apparent on the record.” 149 Fed. Appx. 775, 778 (10th Cir. 2005).

#### **C. The First Circuit Required Defendants to Show a “Reasonable Probability” that the Amount in Controversy was Satisfied, but Permitted Successive Attempts at Removal**

The First Circuit in *Amoche v. Guarantee Trust Life Inc. Co.* echoed the Tenth Circuit in finding that a defendant “must sufficiently demonstrate that the amount in controversy” satisfied the jurisdictional requirements for removal, stating that it must “show a reasonable probability” of the amount in controversy. 556 F.3d 41, 50 (1st Cir. 2009). In affirming the district court’s

August 13, 2015

order of remand, the First Circuit assessed the information that the defendant reasonably controlled but failed to present in its removal notice in determining that the defendant had not met its burden of showing reasonable probability. *Id.* at 52. The court went on to state that the affirmance of the plaintiff's remand order does not "permanently foreclose" the defendant from making later attempts to remove the case to federal court based on newly available evidence. *Id.* at 53.

### **III. The Supreme Court in *Dart* Clarified That Notices of Removal Do Not Require Evidentiary Support**

The Court vacated the judgment of the Tenth Circuit denying review of the district court's grant of the plaintiff's remand motion to clarify the evidentiary requirement for removal notices.<sup>2</sup> In vacating the judgment of the Tenth Circuit, the Court held that a defendant's notice of removal does not need to be accompanied by evidence. Rather, the plain language of 28 U.S.C. §1446(a) merely required that grounds for removal be given in "a short and plain statement."

In its removal notice to the district court, Dart stated that the amount in controversy was more than \$8.2 million.<sup>3</sup> The plaintiff moved to remand to state court due to Dart's lack of evidentiary support proving the amount in controversy in his removal notice. Dart later responded by providing detailed calculations that demonstrated the amount in controversy exceeded \$11 million. Without contesting the calculations, the plaintiff argued that the declaration was insufficient because it was not originally included in the removal notice. *Dart Cherokee Basin Operating Company, LLC* 135 S. Ct. 547, 504. The district court cited *Laughlin* in finding that the amount in controversy must be "affirmatively established" by the defendant at the time of the removal notice and that evidence presented outside of the plaintiff's petition or notice for removal was not permitted. *Owens v. Dart Cherokee Basin Operating Co. LLC*, No. 12-4157, 2013 WL 2237740 (D. Kan. May 21, 2013).

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<sup>2</sup> Appellate review of a remand order is discretionary and The Tenth Circuit, divided 2-1, denied review. *Dart Cherokee Basin Operating, Co., LLC v. Owens*, No. 13-603, 2013 WL 8609250 (10th Cir. June 20, 2013).

<sup>3</sup> In order to remove a putative class action with only state law claims to federal court, the "matter in controversy" must be greater than \$5,000,000, the class must have more than 100 members, and the parties must have minimal diversity. 28 U.S.C. §1332(d).

August 13, 2015

In finding that the removal notice must only contain a “short and plain statement,” in support of removal, the Court recognized that the plain language of section 1446 mirrors the language in Federal Rule of Civil Procedure 8(a)’s pleading standard. In looking to the respective legislative history, the Court further noted that correlation between the two statutes is not incidental, but purposeful. The Court reasoned that the liberal pleading standards under Rule 8(a) similarly applied to removal notices. Thus, the Court stated, “when a defendant seeks federal-court adjudication, the defendant’s amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court.”

The Court then looked to a subsequent section of the statute, section 1446(c)(2)(B), which states that “removal of the action is proper on the basis of an amount in controversy... if the district court finds, by a preponderance of the evidence, that the amount in controversy exceeds” the jurisdictional requirement. The Court found that this clarifies that evidence can be submitted by both parties to prove amount in controversy only if the defendant’s assertion is challenged. In so finding, the court noted that “a dispute about a defendant’s jurisdictional allegations cannot arise until *after* the defendant files a notice of removal containing those allegations.” The Court summarized the standard by stating that “a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold, and §1446(c)(2)(B) requires evidence only if the defendant’s allegation concerning the amount in controversy is contested by either the court or plaintiff.

#### IV. Case Law After *Dart*<sup>4</sup>

Unsurprisingly, recent case law has recognized *Dart*’s holding to require a defendant to simply provide a “plausible allegation” of the amount in controversy in the notice of removal. (See, e.g., *Kelley v. Sallie Mae, Inc.*, 2015 U.S. Dist. LEXIS 48704, 11 (N.D. W. Va. Apr. 14, 2015) (“Although the defendants only made a plain statement regarding the amount in controversy, it appears to be enough to meet the requirements set forth by the Supreme Court in *Dart*.”); *Castaneda v. Travelers Lloyds of Tex. Ins. Co.*, 2015 U.S. Dist. LEXIS 72895 (W.D. Tex. June 4, 2015) (“Defendant affirmatively alleged the amount in controversy exceeded \$75,000 and pointed out that Plaintiff’s jurisdictional pleadings asserted damages less than or equal to \$100,000. This is enough to satisfy Defendant’s initial burden...); *Roa v. TS Staffing Servs.*, 2015 U.S. Dist. LEXIS 7442 (C.D. Cal. Jan. 22, 2015).

While *Dart* focused on the notice requirement, it did not eliminate the need to prove that the federal court has proper jurisdiction of the case. To be clear, once the assertion has been contested by the plaintiff or court within a request for remand, the defendant must prove by a preponderance of the evidence that the jurisdictional requirement has been satisfied. See, e.g., *Archibold v. Time Warner Cable, Inc.*, 2015 U.S. Dist. LEXIS 68578, (C.D. Cal. May 27, 2015);

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<sup>4</sup> *Dart* has only been cited by one First Circuit case, *Hood v. Fresenius Medical Care Holdings, Inc.*; however, discussion related to appellate review and not evidentiary standards. *Hood v. Fresenius Medical Care Holdings, Inc.* (In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig.), 2015 U.S. Dist. LEXIS 26, (D. Mass. Jan. 2, 2015).

August 13, 2015

*Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 910, (2014); *Antal v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 66845, (N.D. W. Va. May 20, 2015).<sup>5</sup>

A recent case from the Northern District of West Virginia considered whether the parties could take discovery to contest removal. The court in *O'Brien v. Falcon Drilling Co.* concluded that "discovery is not required in this Court under *Dart*" and that it is discretionary. *O'Brien v. Falcon Drilling Co. LLC*, 2015 U.S. Dist. LEXIS 46219, (N.D. W. Va. Apr. 9, 2015). However, the court did not foreclose the possibility of granting discovery, stating "if further evidence is revealed through discovery in the state court, a filing by the plaintiffs, or some "other paper," and the defendants thereafter timely remove [the] case" the court may then grant discovery if it determines that it is needed. *Id.* at 17-18.

While *Dart* makes it easier for defendants to remove cases to federal court by clarifying removal notice requirements, the results may not materially differ from pre-*Dart* jurisprudence. If removal is challenged through a request for remand, the defendant will still have to prove beyond a preponderance of the evidence its basis to invoke the jurisdiction of the federal court.

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<sup>5</sup> This analysis applies equally in class action and non-class action cases. *See, e.g., Kelley v. Sallie Mae, Inc.*, 2015 U.S. Dist. LEXIS 48704 (N.D. W. Va. Apr. 14, 2015); *Hensley v. Dolgencorp, Inc.*, 2015 U.S. Dist. LEXIS 30986 (S.D. Ind. Mar. 13, 2015); *Sasso v. Noble Utah Long Beach, LLC*, 2015 U.S. Dist. LEXIS 25921 (C.D. Cal. Mar. 3, 2015).

# MEMORANDUM

TO: MA Judicial Conference: Civil Procedure Team  
FROM: Civil Procedures Prep. Team  
DATE: September 11, 2015  
RE: “Wait, Wait”: MA District Court Conference – Civil Procedures: Ascertainability Requirement for Class Certifications

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## I. Executive Summary

Courts in every Circuit recognize that Federal Rule of Civil Procedure 23 (“Rule 23”) incorporates an implicit “ascertainability” requirement.<sup>1</sup> There is, however, no standard in determining whether a class is properly ascertainable under Rule 23. The two primary approaches for determining ascertainability of class membership have arisen from case law out of the Third and Ninth Circuits. The Third Circuit applies a two-part test, requiring (i) objective criteria, and (ii) a reliable and administratively feasible mechanism for determining class membership. While the Court of Appeals for the Ninth Circuit has not yet weighed in on ascertainability, one line of case law out of the Ninth Circuit appears to apply a similar objective criteria to the Third Circuit, but has a more flexible standard in determining administrative feasibility. Finally, the First Circuit has consistently required objective criteria to prove ascertainability, which may include putative class member “say so” evidence, such as affidavits and self-identification. However, courts in the District of Massachusetts have denied certification due to certain administrative challenges.

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<sup>1</sup> See e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012) (noting that the class was sufficiently ascertainable); *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (“...the class must be currently and readily ascertainable based on objective criteria”); *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ([a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.”); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004) (requiring a “precise class definition”); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 567 (E.D. Tenn. 2014) (“the identity of class members must be ascertainable by reference to objective criteria.”); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 515 (7th Cir. 2006) (affirming denial of class certification because class was not “identifiable or definite”); *Eastwood v. S. Farm Bureau Cas. Ins. Co.*, 291 F.R.D. 273, 289 (W.D. Ark. 2013) (“in addition to Rule 23’s explicit requirements, there is an implicit requirement that class membership be ascertainable by some objective standard”); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004) (recognizing the ascertainability requirement as ability to identify class); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (“[i]f the plaintiff’s proposed class is adequately defined and clearly ascertainable, the plaintiff must then establish the four requirements listed in Federal Rule of Civil Procedure 23(a)”). But see *Daniels v. Hollister Co.*, 440 N.J. Super. 359, 113 A.3d 796 (App. Div. 2015) (holding that ascertainability “must play no role” in certification of low-value consumer class actions).

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

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## II. The Third Circuit's Two-Part Test for Ascertainability

The Third Circuit's two part test is “[f]irst, the class must be defined with reference to objective criteria...[s]econd, there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.” *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013), 2013 U.S. App., LEXIS 15959 (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

### A. Leading Cases

- *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012). Plaintiff unsuccessfully attempted to obtain certification consisting of any and all “current and former owners and lessees of 2006, 2007, 2008, and 2009 BMW vehicles equipped with run-flat tires manufactured by Bridgestone and/or BATO and sold or leased in the United States whose tires have gone flat and been replaced....”

BMW argued that the class was not ascertainable because the vehicles were made in Germany by a different company and BMW did not keep a “parts manifest” to track which vehicles had the affected tires. Additionally, BMW noted that not all cars on dealer lots that come in with the specific Bridgestone tires at issue would necessarily leave with those same tires. The court found that the class was not ascertainable because there was no way to know which cars that left the lots with the tires subsequently experienced flats that needed to be replaced. The court remanded the case and required a clear method of determining class members. The court cautioned against a method that would rely on “potential class members’ say so.” The court reasoned that declarations by absent class members without further “indicia of reliability” would be inadequate because they would lead to “serious due process implicatons.”

- *Hayes v. Wal-Mart Stores, Inc.*, 725 F3d 349, 355 (3d Cir. 2013). The court denied class certification of a putative class of consumers who purchased a particular service plan to cover “as-is” products bought at Sam’s Clubs in New Jersey, excluding purchasers falling into particular categories.

The court remanded the case to the District Court, stating that “Wal-Mart lacks records that are necessary to ascertain the class” because, although they kept records of transactions with price override and the purchase of a Service Plan, there was no way to determine how many of those transactions were for “as-is” items using Wal-Mart’s records. The court stated that, on remand, “plaintiff must offer some reliable and administratively feasible alternative...” to determine the specifics of each transaction and, thus, whether each customer would fit into the class definition. The court advised that the petition would not be successful if class membership was based on the “say-so of class members” or required “individualized fact-finding.”

August 14, 2015

- *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). The court denied certification defined as “all persons who purchased WeightSmart in Florida” because (a) it was unlikely that customers would have kept their receipts, and (b) Bayer sold its products exclusively to retailers and did not have records of individual purchasers. While recognizing that retailer records could be used to identify class members in certain cases, the court noted that there was “no evidence” that purchasers could be determined for the relevant period. The court recognized that “ascertainability mandates a rigorous approach at the outset” and denied the use of self-identifying consumer affidavits because this would not allow the defendants to properly challenge class membership, which is “a core concern of ascertainability.”

### **III. District Courts in the Ninth Circuit Have Been Inconsistent; *ConAgra* Appeal May Clarify the Standard**

The District Courts in California have applied various standards to determine ascertainability. Generally, courts appear to be following the objective standard applied by the Third Circuit, however, certain decisions suggest these courts are applying greater flexibility in the appropriate administrative mechanism for determining class membership. The pending appeal of the Northern District of California case of *Jones v. ConAgra* denying class certification may clarify the Ninth Circuit’s ascertainability requirements.

#### **A. California District Court Cases that Follow Third Circuit’s Reasoning**

One line of District Court cases involving lower-cost consumer items requires a reliable manner to ascertain all class members. This line of cases appears to deny class certification where there is no reliable manner to ascertain all of the class members, particularly cases involving individuals unlikely to keep receipts.

- *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011). The court denied certification of a class defined as smokers of Marlboro cigarettes for at least twenty pack-years because “[t]here is no good way to identify such individuals.” The court reasoned that that “membership must be determinable from objective, rather than subjective, criteria.” The court explained that the actual number of years an individual smoked is objective criteria but that it “depends on each individual’s *subjective estimate* of his or her long-term smoking habit...” and the defendant has no records to identify such information.

In evaluating class ascertainability, the court denied the use of records in Philip Morris’s database of customers who participated in their loyalty program because “it is unlikely that every potential class member chose to participate....” Ultimately, the court found that members “could not be identified through any reliable, manageable means.”

August 14, 2015

## **B. Certain Administrative Challenges Do Not Prevent Class Certification in Several California District Court Cases**

The other line of cases from the California District Courts has allowed certification despite the fact that there may be administrative difficulties in establishing the identity of all class members. These cases appear to favor policy arguments in favor of consumer class actions.

- *Ries v Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012). The court allowed class certification of “all persons in California who purchased an Arizona brand beverage” during a specified time period “which contained High Fructose Corn Syrup or citric acid...which were marked, advertised or labeled as being ‘All Natural,’ or ‘100% Natural.’” The court stated that “[t]here is no requirement that ‘the identity of the class members...be known at the time of certification.’” *Id.* (quoting *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477 (N.D. Cal. 2011)). Further, in response to defendant’s concerns that membership would require individual fact-finding, the court found that “[t]he challenges entailed in the administration of this class are not so burdensome as to defeat certification.”
- *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal., 2013). The court allowed class certification of any individual who purchased Kashi products that were labeled “Nothing Artificial” within a specified time period. Stating that “[b]ecause the alleged misrepresentations appeared on the actual packages of the products purchased, there is no concern that the class includes individuals who were not exposed to the misrepresentation.” The court also rejected the argument that it would be impossible to determine who bought Kashi products and found that “[a]s long as the class definition is sufficiently definite to identify putative class members” administrative challenges would not defeat certification.

## **C. Jones v. ConAgra Appeal Pending at the Ninth Circuit**

In 2014, the District Court for the Northern District of California denied class certification for three separate classes related to ConAgra food products. *Jones v. ConAgra Foods, Inc.*, N.D. Cal., Case No. 12-01633 (June 13, 2014). The denial of certification was based on numerous factors, including lack of ascertainability due to the following overbroad class definitions:

- Hunt’s tomato products: The court rejected subjective self-identification in finding that “it is hard to imagine that [class members] would be able to remember which particular Hunt’s products they purchased... and whether those products bore the challenged label statements.”
- PAM products: The court considered the allegedly misleadingly labeled and found “there is no good way to determine who bought the relevant products...” because “[i]t is unlikely that...customers would retain such receipts.”

August 14, 2015

- Swiss Miss products: The court found that “[t]he class is not necessarily overbroad, but it is not verifiable...” because it would depend on consumers’ subjective answers to questions regarding product purchases.

The *ConAgra* case is presently on appeal before the Ninth Circuit.

#### **IV. Case Law from Courts within the First Circuit**

The case law out of the First Circuit appears to apply an “objective” requirement similar to the Third Circuit in determining class ascertainability. While some courts have allowed self-identification, other courts have denied certification based on administrative challenges.

- *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271 (D.Mass 2000) (Keeton, J.). The court stated that ascertainability is impossible without “a cognizable class defined by stable and objective factors,” which requires a “demonstrable correspondence between the class definition and the requirements of proffered evidence to enable [the judge] to determine whether a particular individual belongs in the class”. The court denied certification, finding no ascertainability for a class defined as “all persons or entities who:
  - (1) make a claim that SunAmerica Life Insurance Co. (“SunAmerica”) made high-level management decisions based on misleading or fraudulent actuarial assumptions and projections that were not disclosed to marketing employees and agents; and
  - (2) having been presented with information based on the above actuarial assumptions and projections, purchased vanishing premium policies from SunAmerica between January 1, 1985 and June 30, 1989...”

The court analyzed the differing circumstances of each plaintiff’s claim, noted that each claim would require individual fact-finding, and ultimately stated that “claims are so disparate that no precise and administratively feasible class definition would include their claims.”

- *Donovan v. Phillip Morris USA, Inc.*, 268 F.R.D. 1 (D. Mass. 2010) (Gertner, J.). The court recognized that the class definition must be “administratively feasible” and based on “stable and objective factors.” The court, however, appears to contradict the approach adopted by the factually similar N.D. California case of *Xavier v. Philip Morris USA Inc.* (discussed above) by allowing class certification. The court found that, unlike the court in *Xavier*, consumer affidavits stating their smoking history would be appropriate and that the internal database of long-term customers kept by Phillip Morris would also be sufficient. As mentioned above, the court in *Xavier* specifically stated that smoking history, although objective, is

August 14, 2015

dependent on each individual's "subjective estimate" and denied class certification.

- *Shanley v. Cadle*, 277 F.R.D. 63 (D. Mass. 2011) (O'Toole, J.). The court denied class certification for a class defined as "[a]ll Massachusetts residents who Defendants collected or attempted to collect consumer debt against without a license to do so." The court reasoned that "in order for the Court to ascertain whether an individual was a member of the class it would require determination of additional facts particular to each putative class member." The court endorsed the "stable and objective factors" requirement set forth in *Kent*, stating that "legal judgments, rather than solely objective factual criteria, may be required" to determine whether each member's debt was "consumer debt" for the purposes of the complaint.
- *Bezdek v. Vibram USA Inc.*, 2015 U.S. Dist. LEXIS 5508 (D. Mass. Jan. 16, 2015) (Woodlock, J.). The court certified a class defined as "all persons that, during the Class Period, purchased in the United States certain FiveFingers footwear from Vibram and/or its authorized retailers including, without limitation, vibramfivefingers.com." In discussing numerosity of this class, the court acknowledged in a footnote that other circuits have been skeptical of certifying classes based on self-identification, but noted that "the law in the First Circuit does not dictate rejection of such a class."

# Memorandum

**TO:** Christine E. Devine & Kate P. Foley

**FROM:** Alexandra Mansfield

**DATE:** June 30, 2015

**RE:** Represented Parties  
*Massachusetts District Court Conference*

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## Introduction

Prior to communicating with another party while representing a client, an attorney must discern if that party is represented. If he is represented, the attorney must refrain from speaking about the subject matter of his representation, with very few exceptions. If he is not represented, the attorney must not imply that he is disinterested. If the party's interests are adverse to his client's, the only advice the attorney may give is to seek counsel. The rules implicated in communicating with represented parties are rooted in the policy of allowing counsel to maintain a mediating role and to protect the overreach of counsel with adverse interests. See Pratt v. National Railroad Passenger Corporation, 54 F. Supp. 2d 78, 79 (1999) (interpreting Rule 4.2 of the Massachusetts Rules of Professional Conduct, which is identical to Rule 4.2 of the ABA Model Rules of Professional Conduct (the "Model Rules")). This policy is helpful in understanding the courts' interpretations of these rules.

## Determining if a Party is Represented

Rule 4.2 of the Model Rules, which governs communications with represented parties, states that actual knowledge is required to determine if a party is represented. Comment 8 of this rule continues to state that this knowledge may be inferred from the circumstances. This is consistent with the definition of "knows" in Rule 1.0(f) of the Model Rules. Courts have

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interpreted this definition to allow for a good faith exception if an attorney does communicate with a represented party in the matter of representation. In Allstate Insurance Company v. Bowne, the court held that an attorney who spoke with someone he did not believe was currently employed by the defendant or could implicate the defendant had a reasonable basis for believing there was no representation issue. See 817 So. 2d 994, 998 (2002). Therefore, the statement obtained was not in violation of Rule 4.2. See id. The court noted that the attorney attempted to comply with the rule, and had no reason to believe the statements could be admissions on behalf of the represented defendant. See id. The rule prohibiting communications with a represented party only applies when an attorney knows the person is represented in the matter to be discussed; as a result, determining if someone is in fact represented and acting accordingly is essential to avoiding ethical violations.

#### If a Party is Represented

If a party is represented in the matter to be discussed, Rule 4.2 of the Model Rules states that the attorney must refrain from speaking to him about the subject matter when the attorney is representing a client in the same matter. The only exceptions to this rule are if the attorney receives the consent of the party's counsel, or if the attorney is allowed to communicate with the represented party by law or court order. It is important to note the limitation that this prohibition only applies to communication about the subject matter of the representation; this rule does not prohibit the attorney from speaking to a represented party outside the scope of the matter. See Comment 4 to Rule 4.2.

In interpreting this rule, the First Circuit held in United States v. Overseas Shipholding Group, Inc. that when a different matter is being discussed than the matter for which a party is represented, an attorney has no obligation to seek out the client's attorney, and may speak to him directly. See 625 F.3d 1, 14 (2010). Further, once a separate matter has been established, the court goes on to discuss the duties of the attorney, discussed in the following section.

#### If a Party is not Represented

If a party is not represented in the matter at hand, Rule 4.3 of the Model Rules states that an attorney may not state or imply that he is disinterested in the matter. If the party misunderstands the attorney's interest, the attorney must take immediate steps to correct the

misunderstanding. If the party's interests are adverse to his client's, the attorney may not give any advice to the party except that he should seek counsel. In Overseas Shipholding, the court held that since a separate matter was being discussed, the attorney was justified in speaking to a party represented in another matter. See 625 F.3d at 14. The court further held that this triggered Rule 4.3 of the Model Rules since the party's interests were adverse to his client's; as a result, the attorney could not give advice other than to retain counsel. See id. at 15. Since the attorney adequately disclosed the conflict of interest, and the party subsequently waived it, the attorney was able to represent the party since prior to his retention, his only advice was to seek counsel. See id. It should be noted, however, that if an attorney is communicating with a party that is not represented in the matter, yet subsequently discovers counsel has been retained, he must cease communication immediately. See Comment 3 to Rule 4.2.

#### When an Organization is Represented

A final issue to consider is whether a party with whom an attorney wants to communicate is a member of an organization that has retained counsel. Comment 7 to Rule 4.2 addresses this issue, and states that communication is only prohibited with a certain type of constituent. According to Comment 7, communication is prohibited with a constituent "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

In deciding how Rule 4.2 of the Model Rules applies to employees, the court in Clark v. Beverly Health and Rehabilitation Services, Inc. examined Comment 4 (which has since been replaced by Comment 7) and found that this prohibition only applies to current employees. See 440 Mass. 270, 274-275 (2003). The discussion applies to Comment 7 as well, since the court focuses on the present tense of the verbs used in this comment to conclude that the "no-contact" rule does not extend to former employees. See id. at 275. Though Rule 4.2 is meant to hold attorneys to the highest standard of professional conduct, it is not meant to bar disclosure of unfavorable facts just because they happened within the organization. See id. at 276. The court states that the communication should only be prohibited with "employees 'who are so closely tied with the organization or the events at issue that it would be unfair to interview them without

the presence of the organization's counsel.” See id. (citing Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347, 359 (2002)). For this reason, it is important to know what kind of position the employee holds in the organization, if any, before communicating with him about a matter of representation.

MEMORANDUM

June 24, 2015

**TO:** John Loughnane

**FROM:** Hayley N Ryan

**RE:** Admissibility of Drone Acquired Evidence

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Relevant Law

Under the Federal Rules of Evidence, all relevant evidence is generally admissible so long as it does not violate the Constitution, a federal statute, or any other federal rule of evidence. FRE 402. Whether any such piece of evidence does so, and is thus inadmissible, is a determination for the judge. FRE 104(a).

With respect to evidence acquired by Unmanned Aerial Vehicles (“UAVs” or “drones”), interception of any wire, oral, or electronic communication without the prior consent of at least one of the parties would violate the Federal Wiretap Act. 18 U.S.C. §§2510 et seq. The Federal Wiretap Act specifically bans the use of evidence obtained via illegal wiretapping to be used in any court of law. 18 U.S.C. §2515. Therefore, any auditory evidence obtained by drones without the consent of at least one of the parties would be inadmissible in court. Massachusetts’ law prohibiting wiretapping is stricter than federal law, requiring the consent of all parties to a communication prior to interception. M.G.L.A. 272 §99.

The question of admissibility is murkier when it comes to photographic or other types of evidence a drone could potentially obtain. Although private individuals conducting surveillance may subject themselves to possible liability arising out of state tort claims for trespassing or invasion of privacy, the use of evidence obtained by illegal methods is not prohibited in civil cases. *See United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021 (1976) (“...in the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.”); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479 (1984). Therefore, if not explicitly prohibited by a specific law, evidence obtained through drone surveillance may be admissible.

There are currently no federal statutes prohibiting the use of evidence acquired by privately operated drones. Pursuant to the FAA Modernization and Reform Act of 2012 (FMRA), UAVs are only allowed to operate if granted a §333 exemption by the FAA. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 128 Stat. 11. As of June 19, 2015, the FAA had granted 606 §333 exemptions. The FAA is required to issue regulations which integrate civil drones into the National Airspace System by September 30, 2015. FMRA §332(a)(3). Some states have passed laws regulating the use of UAVs, but most have concerned

only the public use of drones. None have spoken to the use of drone acquired evidence in civil cases. Massachusetts has yet to pass legislation regarding civilian drone use.

In February 2015, President Obama released a Presidential Memorandum requiring the Department of Commerce to develop a regulatory framework which would serve to protect the privacy concerns raised by the proliferation of commercial and privately operated drones. Memorandum No. 03727, 80 Fed. Reg. 9355 (Feb. 15, 2015). Also in February, the FAA released proposed rules for small UAVs. The proposed rules would allow private drones weighing less than 55 pounds to operate during daylight hours provided that the UAV remains within the line of sight of the operator, does not surpass 500 ft in altitude or 100 mph in speed, and does not fly over populated areas. Operation and Certification of Small Unmanned Aircraft Systems, FAA Docket No. 2015-0150 (proposed Feb. 15, 2015). The 60 day public comment period ended April 24, 2015.

#### Application to Hypothetical

As applied to the hypothetical, any wire, oral or electronic communications illegally intercepted by the drone would be inadmissible pursuant to the Federal Wiretap Act. However, any photographic evidence captured would most likely be admissible. That said, Mr. Angel would have potentially violated the FMRA because the drone would only be flying legally if it had been granted a §333 exemption and was specifically authorized to fly in the airspace over which Dr. Labrat conducted his meetings. Furthermore, Mr. Angel could potentially face trespassing and/or invasion of privacy claims by Dr. Labrat.

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