D.C. BAR LITIGATION COMMUNITY UPDATE

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Introduction

Greetings Litigation Community Members,

On behalf of the steering committee, we would like to thank you for your continued support during the 2017-2018 Bar programming year. We have been very excited about this year's events to date and the upcoming events and programs designed to enhance your knowledge and to expose you to litigation-related areas of law. Remember to check your email and the D.C. Bar website for dates, times, and locations of upcoming events.

If you would like to be more involved in the community, please sign up to serve on a subcommittee by sending an email to the subcommittee chair. You can locate their contact information at:

https://www.dcbar.org/communities/litigation/leadership.cfm

Community Quarterly Update

We are very excited to announce the continuation of our re-launch of the Litigation Newsletter, now entitled the "Quarterly Update." We will be publishing our newsletter quarterly. We invite community members to submit articles, book reviews, and practice tips if you would like to participate. We always need articles so this is your chance to be published. Please contact Kevin M. Clark or Anthony Coppola if interested.

Membership and Events

This group is reaching out to litigation practitioners to try to increase our membership. We currently have more than 3,000 members, and our goal is to reach 6,000 members. Please contact Denis Mitchell or Amy Neuhardt to assist in these efforts.

Recent D.C. Case Law Summaries

Reported by Denis C. Mitchell of Stein Mitchell Cipollone Beato & Missner LLP

* * * * *

Intentional Interference: Plaintiff can Prove Requisite Intent by Showing That Defendant Desired to Interfere or that Defendant Knew That the Interference Was Certain or Substantially Certain to Occur.

Vicarious Liability/Respondeat Superior: Evidence That Defendants Had a Right to Control Various Subcontractors Created a Jury Question on the Issue of Independent Contractor Versus Agent.

***Whitt* v. *American Property Construction, P.C.*, 157 A.3d 196 (D.C. 2017). Opinion by Fischer, joined by Blackburne-Rigsby and Ferren.**

FACTS: Plaintiff was a salon owner whose business depended on customers having access to the entrance of her salon, which was located in an alley adjacent to her landlord's building. Washington Gas, using general contractor American Property Construction ("APC"), undertook a construction project next to the building with the salon. The construction permit for

the project specified that the construction "will not block access via C Street or business entrances of the 7th Street alley." Despite this, over the course of construction, the alley became cluttered and obstructed. There were road signs, construction vehicles, red cones, yellow "caution tape," and construction materials strewn across the alley. There was also a portable toilet emitting foul smells. Plaintiff complained that she was steadily losing customers, but the situation did not improve. She had to close her business, incurring $265,000 in losses. Plaintiff filed suit against multiple defendants including Washington Gas and general contractor APC. To assist in presenting damages, Plaintiff's counsel created a summary of income. On the first day of trial, the trial judge issued several important rulings. First, he declined Plaintiff's proposed jury instruction regarding the intent element of tortious interference, which would have instructed the jury that intent can be proven if defendants were certain or substantially certain that their conduct would interfere with the business. Second, the judge disqualified the lawyer for Plaintiff who prepared the damages spreadsheet because she was likely to appear as a witness. Lastly, the judge ruled that the Economic Loss Doctrine barred Plaintiff's claims for economic damages arising from negligence. The trial judge directed the verdict for Washington Gas on the ground that there was insufficient evidence to demonstrate that Washington Gas had committed any of the acts which led to Plaintiff's damages, as there was no showing that the subcontractors were subject to Washington Gas' control. The judge likewise ruled that there was insufficient evidence to hold APC liable for the acts of subcontractors who had placed materials in the alley and did not allow the negligence claim against APC to go to the jury. On the verdict form, the jury answered "no" when asked whether APC had committed tortious interference with a business relationship. Plaintiff appealed.

OUTCOME: Reversed on substantive issues. Affirmed on the decision to disqualify Plaintiff's counsel.

REASONING: (1) The definition of intent in a claim for intentional interference is a question of first impression in the District of Columbia. The court, citing Restatement (Second) of Torts §766, Comment J, ruled that tortious interference with a business or contractual relationship can be proven "when the actor knows that the interference is certain or substantially certain to occur." Failure to give that instruction was reversible error.

(2) The Court of Appeals likewise held that the trial court erred in dismissing the negligence claim under the Economic Loss Rule. The court examined its decision in *Aguilar v. RP MRP Washington Harbour, LLC*, 98 A.3d 979 (D.C. 2014), which "left opened the possibility that the plaintiff could recover economic damages in a negligence case in the absence of personal injury or property damage if plaintiff 'had a special relationship with the defendant.'" In this

case, the defendants undertook obligations that would “implicate appellant’s economic expectancies.” The construction permit itself recognized that the defendants’ actions could impact Plaintiff’s business. Additionally, Plaintiff alleges and is seeking damages against two companies that “participated in extensive construction directly outside her business entrance over a multi-year period.” “It would be especially perverse if APC and Washington Gas could undertake this activity for their own profit while claiming immunity from damages if they negligently caused appellant to lose income.” These facts gave rise to a “special relationship” for the purpose of the Economic Loss Rule.

(3) The trial court appropriately disqualified counsel who prepared the damages spreadsheet from testifying. The spreadsheet was a central piece of evidence in the case. In light of the bar found in Rule 3.7 of the D.C. Rules of Professional Conduct on an attorney testifying in a case in which he/she serves as trial counsel, it was not an abuse of discretion to disqualify counsel. If Plaintiff finds a different way to prove her damages during the retrial of this case, disqualification may no longer be necessary.

(4) The trial court erred in concluding as a matter of law that the subcontractors who had obstructed the alleys were independent contractors as opposed to employees/agents of Washington Gas and APC. The testimony from a Washington Gas representative included statements that Washington Gas manages and is responsible for a subcontractor, that Washington Gas has construction supervisors that periodically prioritize the subcontractors’ work, and that Washington Gas’ supervisors have visited the site five or six times. Likewise, with regard to APC, there was evidence that APC was the general contractor, that an APC employee served as project manager, that a different APC employer was the “full-time superintendent” for the project, and that an APC employee was in control of scheduling manpower, getting all subcontractors to do what they need to do, and making sure that the subcontractors did their job appropriately. The Court of Appeals stated that the trial judge erred when he ruled “that there was no basis for assessing liability against APC for the actions of their subcontractors.” The court concluded that the jury should have been allowed to consider whether there was an agency relationship between APC and its contractors which would make APC liable in negligence.

* * *

Enforceability of Settlement Agreement: Trial Court Properly Enforced Settlement Agreement Despite Complaints by Settling Party of “Undue Influence” from His Lawyer; Mediation Conducted by Trial Judge Was Not “Procedurally Unconscionable.”

***Associated Estates LLC v. BankAtlantic*, 164 A.3d 932, (D.C. 2017). Opinion by Thompson, joined by Ruiz and Fisher.**

FACTS: Plaintiff filed suit in 2006 for breach of contract alleging $19 million in damages. After six years of discovery and motion practice, and an unsuccessful private mediation, the parties appeared at a status conference and the trial judge asked about the status of settlement negotiations. Upon learning that the parties were only $800,000 apart, the judge asked if the parties would agree to a settlement conference and a court-led mediation. The parties agreed and the court-led settlement conference took place. After the 7-hour settlement conference, the parties reached a settlement for $1.55 million. The judge brought the parties back into the court to put the settlement on the record. After doing so, the plaintiff became agitated and angry and shouted, "You all screwed me!" and then left the courtroom. Approximately 20 minutes later, after conferring with his counsel, all parties were back on the record. Once back on the record, the trial judge told the plaintiff: "Unless the people that are involved on both sides feel it was a voluntary decision, that they weren't forced into [settlement] in any way, and unless this is what you want," then there is no settlement and he should feel free to continue the litigation." After a pause, the plaintiff said he would "take the settlement." Several days later, the defendant sent a draft settlement agreement to the plaintiff's counsel, and the plaintiff refused to sign it. The defendant then moved to enforce the settlement. The plaintiff raised multiple arguments to oppose that motion. One argument focused on the conduct of plaintiff's attorney, who repeatedly over the months leading up to the settlement conference had told plaintiff that unless he paid his significant balance of attorney's fees, he would withdraw from the case. Plaintiff claimed that this created undue influence affecting the enforceability and the voluntary nature of the settlement. Plaintiff also alleged that the court-conducted settlement conference was an improper *ex parte* communication and that he had not been advised of the right to decline settlement discussions mediated by the trial judge. The trial court granted the motion to enforce settlement. The plaintiff moved for reconsideration, which was denied. Plaintiff then appealed, although his notice of appeal did not specify which order—the original order enforcing settlement or the denial of his motion for reconsideration—he was appealing from.

OUTCOME: Affirmed.

REASONING: The Court of Appeals first determined that the notice of appeal, although silent on which order it was appealing from, was sufficient to appeal not only the denial of the motion for reconsideration but also the underlying order to enforce the settlement. The court then turned its attention to the allegations of undue influence by the attorney. To establish undue influence, the plaintiff had to establish that the conduct "destroyed his free agency." There was no precedent in

this jurisdiction, or anywhere else that the court could find, for the proposition that one's own counsel could exert sufficient undue influence to set aside a settlement agreement (as opposed to merely giving the settling party a right to proceed against his own counsel for malpractice). It was undisputed that counsel had not been paid and that he said he would resign unless he was paid or the case was settled (which would allow him to be paid). This cannot be undue influence because the plaintiff could—and in fact later did—find replacement counsel. There is nothing "undue" about warning a client of imminent withdrawal when the client is not paying legal bills. The fact that the client was a savvy businessman and had set forth in an e-mail his rationale for settling, which included factors other than the alleged undue influence, was also emphasized by the court.

The court also rejected the argument that the court-led mediation was "procedurally unconscionable." A showing of procedural unconscionability requires proof that the process was "egregiously tainted" by impropriety. Here, the *ex parte* communications during the settlement conference did not come close to that standard. The Court of Appeals did "agree with [the plaintiff] that the preferable course might have been for [the trial judge] to obtain explicit consent from each side's representative to conduct [a] settlement conference through *ex parte* communications with the other side, but it was not unreasonable . . . to infer that [the] plaintiff . . . consented to the procedure." Further, the fact that the plaintiff entities outside general counsel—who was separate from litigation counsel—was present throughout undercut any argument of undue influence or unconscionability. The court concluded by stating that it "found no error or abuse of discretion in Judge Mott's rulings upholding the settlement agreement."

* * *

Statute of Limitations (SOL): SOL Begins to Run in Unjust Enrichment Claim When the Last Services Have Been Rendered and the Compensation is Wrongfully Withheld.

***Boyd v. Kilpatrick, Townsend & Stockton,* 164 A.3d 72 (D.C. 2017). Opinion by Belson, joined by Thompson and McLeese.**

FACTS: Defendants were a solo practitioner and law firm who represented classes of plaintiffs, including Native American and Black farmers, who alleged that they were wrongfully withheld compensation by the U.S. Government. Plaintiff /Appellant was the president of the National Black Farmers Association. He alleged that he was engaged by the defendant solo practitioner to lobby for legislation and was repeatedly informed by the solo practitioner that he would be compensated for his services. He also alleged that the solo practitioner was working as an employee of the defendant law firm. On December 8, 2010, President Obama signed into legislation a statute allowing compensation to plaintiffs and class members. Approximately one year later, when the plaintiff had not been paid,

he filed suit in federal court for breach of implied contract. That complaint was dismissed on September 2, 2013, as it was "devoid of factual details." Months later, on May 6, 2014, Plaintiff /Appellant filed suit in Superior Court, alleging unjust enrichment against the defendant law firm and solo practitioner and breach of a contract implied in fact. Defendants filed motions to dismiss, alleging that the statute of limitations for all claims began to run on the last date services were rendered, which was December 8, 2010, when the law was enacted. Plaintiff/Appellant appealed.

OUTCOME: Reversed as to the unjust enrichment count and affirmed as to dismissal of the breach of contract implied in fact.

REASONING:

1. Statute of Limitations and Unjust Enrichment. The statute of limitations on a claim for unjust enrichment begins to run when "the last services are rendered and compensation is wrongfully withheld." The dispositive question was: When did the withholding of compensation become unjust? The answer to that question is inherently factual and should not have been decided at the Rule 12 stage. The question to be decided—likely by a jury—is the amount of time that needs to elapse before the failure to pay becomes a rejection of the claim by the defendants. As such, reversal of summary judgment on these claims was not proper.

2. Statute of Limitations and Contract Implied in Fact. A claim for contract implied in fact accrued in this case when the compensation act was signed into law as no further action was taken by the plaintiff after that date. As such, summary judgment on these claims was appropriate.

3. Pleading Agency in the Context of Co-Counsel. The trial court properly ruled that the plaintiff had insufficiently alleged an agency relationship between the solo practitioner and the law firm. When lawyers in two separate firms act as co-counsel, they are not presumed to be engaged in a joint venture or to be in an employer-employee relationship. The plaintiff did not allege facts, other than conclusory allegations, that were sufficient to establish the existence of an employee or agency relationship. As such, the claim was properly dismissed.

Judge McLeese filed an opinion dissenting in part and concurring in part. Judge McLeese observed that, at this stage of the litigation, the facts alleged by the plaintiff should be taken as true, and therefore it was premature to dismiss the claims on statute of limitation grounds and to conclude that the plaintiff could not establish the existence of an agency relationship.

* * *

Summary Disposition: Trial Court Properly Denied Special Motion to Dismiss Defamation Claim Where Plaintiff Provided Evidence Sufficient to Withstand Summary Judgment

Competitive Enterprise Institute v. Mann, **150 A.3d 1213 (D.C. 2016). Opinion by Ruiz, joined by Beckwith and Easterly. Trial Judges: Combs Greene and Weisberg.**

FACTS: Plaintiff, Dr. Mann, is a well-known climatologist and creator of the "hockey stick" graph for demonstrating the rising temperature of the earth over time. He sued the National Review and several authors for defamation and intentional infliction of emotional distress based on articles and editorials which characterized his writings as "deceptions, fraudulent," and compared him to pedophile Jerry Sandusky at Penn State University. The defendants filed a special motion to dismiss under the Anti-SLAPP Act, D.C. Code §16-5502. The motion was denied by the trial court, as was the renewed motion. Defendants appealed.

OUTCOME: Reversed in part; affirmed in part.

REASONING: The Court of Appeals first concluded that it had appellate jurisdiction under the collateral order doctrine. It then turned to the standard of review for special motions to dismiss under the Anti-SLAPP Act. The standard requires that the plaintiff demonstrate he or she is "likely to succeed on the merits." That standard requires a plaintiff to come forward with evidence—even in response to a motion to dismiss—akin to the evidence to create a jury question at summary judgment. The Court crafted this standard after considering that an overly rigorous standard for the Anti-SLAPP Act would encroach upon the Seventh Amendment, while an overly lax standard for overcoming a motion to dismiss would undercut the purpose of the statute. The Court then turned its attention to the merits of the motion. One article had stated that Dr. Mann had engaged in "wrongdoing," "deceptions," "data manipulations," and "academic and scientific misconduct." It referred to him as the "Jerry Sandusky of climate science," stating that he was "molesting and torturing data in the service of politicized science." These statements go beyond "simply critiques of his methodology," and constitute "pointed accusations of personal wrongdoing" by Dr. Mann. As such, they are "capable of conveying a defamatory meaning and [are] therefore potentially actionable." Likewise, a second article—which accused Dr. Mann of "hockey stick deceptions" and "molesting and torturing data," and stated, "if an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?" —was again sufficiently personal such that, if proven false, could be actionable. An editorial in the National Review merely repeated the allegations in the two prior articles and referred to Dr. Mann as "poor Michael" and accused him of engaging in "pathetically lame chest thumping" when he threatened a lawsuit. These statements are clear statements of opinion, not statements of fact, and therefore cannot be defamatory.

The motion to dismiss as to these statements was therefore granted. Lastly, the Court determined that Dr. Mann had not pled or proven the requisite level of severe emotional distress, and therefore reversed the trial court's order denying the motion to dismiss on that count.

Allegation of a Fraudulent Copyright Registration with the Copyright Office is Not a Basis for Personal Jurisdiction in the District of Columbia

By Richard S. Toikka[*]

Generally, to establish personal jurisdiction over a non-resident, a court must engage in a two-part inquiry. First, examine whether jurisdiction is applicable under the state's long-arm statute, and second, determine whether a finding of jurisdiction satisfies the constitutional requirements of due process. *See GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000). The District of Columbia long-arm statute provides that a District of Columbia court has personal jurisdiction over any person as to a claim for relief arising out of certain enumerated contacts with the District. D.C. Code Ann. § 13-423(a). Moreover, the constitutional limits of due process are generally coterminous with the limits set forth in the D.C. long-arm statute. See *Harris v. Omelon*, 985 A.2d 1103, 1105 n.1 (D.C. 2009).

The Government Contacts Doctrine

In *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 813 (D.C. 1976) (en banc) the Court of Appeals for the District of Columbia sitting en banc upheld and affirmed the "long-standing and still vital doctrine that entry into the District of Columbia for the purpose of contacting federal governmental agencies is not a basis for the assertion of in personam jurisdiction." The court went on to state that this doctrine finds its source "in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal

[*] Richard S. Toikka is a partner at Toikka Law Group, LLP (http://www.toikkalawgroup.com). The material in this article also appears in two blog posts on the Toikka Law Group website. Toikka Law Group partners Richard Toikka and Russell Paige represented defendant Vignisson in *App Dynamic ehf v. Vignisson*, 87 F.Supp.3d 322 (D. D.C. 2015), discussed herein.

departments and agencies for the entire national citizenry." *Id.* The court also warned that to permit District of Columbia courts to assert personal jurisdiction over non-residents whose sole contact with the District consists of dealing with a federal instrumentality would "pose a threat to free public participation in government" and "also would threaten to convert the District of Columbia into a national judicial forum."

The U.S. District Court for the District of Columbia has applied the government contacts doctrine in a number of contexts to dismiss plaintiffs' suits against non-resident defendants. *See Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp.2d 13, 25 (D. D.C. 2014) (citing cases); *see also Morgan v. Richmond Sch. of Health and Tech., Inc.*, 857 F.Supp.2d 104, 108 (D. D.C. 2012) (citing cases). Included in these cases is *Freiman v. Lazur*, 925 F.Supp. 14, 24 (D. D.C. 1996), in which the court held that under the government contacts doctrine a defendant's registration of a copyright with the U.S. Copyright Office located in the District of Columbia could not be used as a basis for personal jurisdiction over him. This holding was reached over the plaintiffs' objection that the government contacts doctrine ought not to apply because defendant's contacts with the Copyright Office are as alleged "fraudulent in and of themselves and are found to cause harm to the plaintiffs." *Id.*

The U.S. Circuit Court of Appeals for the District of Columbia has on two occasions noted some tension between the government contacts doctrine as articulated en banc in *Environmental Research* in 1976 and in a subsequent 1978 panel decision in *Rose v. Silver*, 394 A.2d 1368, 1373-74 (D.C. 1978). *See Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 786-87 (D.C. Cir. 1983) (Rose appears to limit government contacts doctrine to activities implicating first amendment rights); *Companhia Brasileira Carbureto de Calico v. Applied Indus. Materials Corp.*, 640 F.3d 369, 372-73 (D.C. Cir. 2011) (same).

The Fraud Exception to the Government Contacts Doctrine

In *Naartex*, the federal appellate court applied the government contacts doctrine to defendants' personal appearances before the Interior Department in defense of their lease rights, noting that such activities would qualify even under the *Rose* test as a protected first amendment right to petition the government. 722 F.2d at 787. But the court noted in dictum that "a different case might be presented had [the plaintiff] made credible and specific allegations in the district court that [defendants] had used the

proceedings as an instrumentality of the alleged fraud." *Id.* In *Companhia*, the D.C. Circuit was presented with a case that was to test its prior dictum in that the plaintiff made credible and specific allegations that defendants had made a fraudulent petition to the U.S. International Trade Commission ("ITC") which resulted in the ITC assessing import duties against the plaintiff's goods. 640 F.3d at 373. Not wanting to resolve the issue without advice from the highest court in the District of Columbia, in *Companhia* the D.C. Circuit certified the following question to the District of Columbia Court of Appeals:

> Under District of Columbia law, does a petition sent to a federal government agency in the District provide a basis for establishing personal jurisdiction over the petitioner when the plaintiff has alleged that the petition fraudulently induced unwarranted governmental action against the plaintiff?

See Companhia Brasileira Carbureto de Calico v. Applied Indus. Materials Corp., 35 A.3d 1127, 1130 (D.C. 2012); *Companhia*, 640 F.3d at 371.

The D.C. Court of Appeals answered the question in the affirmative, essentially establishing a narrow fraud exception to the government contacts doctrine. 35 A.3d at 1135. However, the D.C. appeals court carefully worded its opinion to apply to the literal language of the certified question, including that "the petition fraudulently induced unwarranted action against the plaintiff." *Id.* at 1133-35. The court also conceded that the apparent conflict between its en banc holding in *Environmental Research* and its panel holding in *Rose* had created uncertainty as to the law. *Id.* at 1133 n.5. However, the court stated that it was not attempting to resolve this uncertainty and that its limited fraud exception is appropriate even if rationales apart from the first amendment support the government contacts doctrine. *Id.*

The Fraud Exception Does Not Apply to Allegations of a Fraudulent Copyright Registration

The D.C. Court of Appeals opinion in *Companhia* left open the question as to whether its annunciated fraud exception to the government contacts doctrine would apply to an allegedly fraudulent petition to a federal government agency, such as the Copyright Office, which did not take action against the plaintiff. Put another way, is the U.S. District Court's holding in *Freiman v. Lazur* that the government contacts doctrine applies to a defendant's allegedly fraudulent copyright registration still good law after the

holding of the D.C. Court of Appeals in *Companhia*?

The U.S. District Court for the District of Columbia answered this question in the affirmative. On April 10, 2015, U.S. District Court Judge James E. Boasberg issued a Memorandum Opinion and an Order in *App Dynamic ehf v. Vignisson* ruling that the government contacts doctrine barred personal jurisdiction over defendant Vignisson based on his allegedly fraudulent application for copyright registration filed with the Copyright Office. *See* 87 F.Supp.3d 322 (2015). In so doing, the court interpreted the fraud exception announced by the D.C. Court of Appeals in *Companhia* as limited to petitions to a federal government agency that fraudulently induce "unwarranted *government* action against the plaintiff" (quoting *Companhia* with emphasis supplied). *Id.* at 329. The court, finding that the Copyright Office had done nothing more than register a copyright, held that plaintiff's allegation of fraud does not fall within the *Companhia* fraud exception, and dismissed plaintiff's complaint without prejudice.

In dismissing plaintiff's complaint for lack of personal jurisdiction, the court agreed with defendant Vignisson that the D.C. Court of Appeals *Companhia* fraud exception was narrowly drawn and limited to the question certified to it by the federal court of appeals. *Id.* at 327-28.

As it was clear that the Copyright Office in the ex parte registration proceeding took no action against plaintiff App Dynamic ehf, a non-party to the registration proceeding, the court decided that the fraud exception did not apply. *Id.* at 328-29. The court also relied on two District Court decisions handed down after the D.C. Court of Appeals *Companhia* decision: *Morgan*, 857 F. Supp. 2d at 109 (holding fraud exception to government contracts doctrine inapplicable where no allegations [were made] that government agency committed any actions against plaintiff); *Shaheen v. Smith*, 994 F. Supp. 2d 77, 86 (D. D.C. 2013) (holding narrow fraud exception inapplicable because government agency—the SEC—did not take any action against plaintiff as a result of defendant's actions). *See App Dynamic ehf*, 87 F.Supp.3d at 328.

The court also refused plaintiff's request for jurisdictional discovery on the basis that plaintiff did not meet its burden to show how discovery would help establish personal jurisdiction. The court pointed out that plaintiff offered no specifics facts that could establish jurisdiction, and the Court found its request to be nothing more than a "speculative fishing expedition." By contrast, defendant presented to the court

two declarations explaining that all of his travels to the United States were not related to the subject matter of this suit and did not involve any travel to the District of Columbia. *Id.* at 329-331.

The court also pointed out that even if plaintiff could not obtain jurisdiction over defendant Vignisson in any U.S. court, plaintiff had alternative recourse to (i) the U.S. Copyright Office, which in the court's view has exclusive jurisdiction in the United States over cancelling a copyright registration, and (ii) an Icelandic court which the court stated would "presumably have the authority to determine the validity of [plaintiff's] contract and copyright claims." *Id.* at 331-32.

Choice of Law in Lawyers' Engagement Agreements*

By

Francesca Giannoni-Crystal and Nathan M. Crystal**

The engagement agreement is the most important document in the attorney-client relationship. Properly drafted engagements clarify roles, responsibilities, and expectations, minimize disputes, and protect lawyers from liability to the maximum extent possible. Provisions on fees and expenses are, of course, fundamental, but lawyers should consider a wide range of other topics, such as scope of engagement, authority of counsel, client responsibilities and cooperation, attorney liens, file preservation and storage, use of technology in handling cases, and withdrawal and termination. This article considers an important but usually-ignored

topic—choice of law ("COL") and choice of forum ("COF") clauses.

Choice of Law Principles in the Absence of COL or COF clauses.

Choice of law in disputes between attorney and client can arise in a variety of settings: malpractice, fee caps, lawyer liens, and standards for *quantum meruit* recovery, to name a few. It is impossible, however, to identify a general rule for choice of law that applies to *all* disputes between attorney and client. The interests and legal principles vary greatly depending on the context, meaning that each issue requires a separate analysis. This is true not only in those jurisdictions that apply a modern interest analysis approach, such as the District of Columbia, *see* Gary L. Milhollin, *The New Law of Choice of Law in the District of Columbia,* 24 Cath. U. L. Rev. 448 (1975), but also in those that apply more traditional criteria of conflict of laws.

The primary goal of an interest analysis approach is to determine, from the facts of each case, which jurisdiction has the most significant relationship to the situation. As a result, aspects of the attorney-client relationship might be governed by the laws of different jurisdictions. For example, one jurisdiction might be interested in regulating the conduct of lawyers that are admitted in that jurisdiction; another jurisdiction may be interested in determining the standard of care and remedies in a malpractice action brought by one of its citizens. Several jurisdictions may have an interest in temporary admission to practice.

For those jurisdictions that apply more traditional approaches (e.g., *lex fori*, which is used, for example, for the admissibility of evidence; *lex commissi delicti*, which is used for tort matters; and *lex loci solutinis,* place of performance, used for contracts), it is also quite evident that the several aspects of the relationship between lawyer and client

might not be governed by the same law: the conflict rule for the standard of care is the conflict rule for torts while the conflict rule for fee issues, for example, is the conflict rule for contracts.

Therefore, in the absence of COL or COF clauses, determination of the applicable law may be complex and may involve applying the laws of multiple jurisdictions to various aspects of the attorney-client relationship.

Enforceability of COL/COF clauses

Lawyers may ethically enter into engagement agreements that contain COF/COF clauses, and legally such clauses may be enforceable depending on the jurisdiction and the circumstances. However, court decisions across the jurisdictions show a spectrum of approaches from strict scrutiny of the enforceability of such clauses based on requirements of informed consent and public policy to treatment of such clauses like the ones found in agreements between commercial parties. For example, in *Brown v. Partipilo,* 2010 U.S. Dist. LEXIS 108106 (N.D. W. Va. Oct. 8, 2010), a federal court in the Fourth Circuit, held a forum selection and a choice of law clause was unenforceable for lack of informed consent and violation of public policy. In contrast to *Brown* in other cases attorneys have been successful in enforcing COL/COF clauses. In *Eaton & Van Winkle LLP v. Midway Oil Holdings Ltd*, 2010 N.Y. Misc. LEXIS 2594 (N.Y. Sup. Ct. Mar. 15, 2010), the court did not discuss any special considerations or public policies based on the COL/COF being inserted in retainer agreement. For example, it does not mention any informed consent requirement.

Generally speaking and without distinguishing among lenient and stringent jurisdictions, we can summarize the current state of the law as follows: When a lawyer's engagement agreement does not contain a

COL/COF clause, courts must engage in a choice-of-law analysis, which sometimes is complicated and time consuming. Even when the engagement agreement contains a COL/COF clause, a court may still consult its own choice-of-law/choice-of-forum principles and evaluate public policies of other jurisdictions that have an interest in the matter, although a court would be likely to give at least some weight to the COL/COF clause, depending on the jurisdiction.

Despite the current state of variation in the law among the jurisdictions, we believe that lawyers should make greater use of COL/COF clauses. Even in the most stringent jurisdictions, as said, if the lawyer obtains the informed consent of the client, such a clause is likely to be enforceable (absent a strong public policy against enforcement of the clause). However, the extensive judicial inquiry into the enforceability of such clauses required in certain jurisdictions and the absence of case law in many jurisdictions may discourage lawyers from including COL/COF clauses in their agreements. This situation creates uncertainty because parties cannot anticipate with confidence which law courts will apply to attorney-client disputes.

Recommended Approach to COL and COF clauses

As argued in more depth in the longer version of the article, we believe that COL /COF clauses—absent overreaching — serve fairness and efficiency goals and therefore should be favored. The standards applicable to COL/COF clauses should differ, however. Courts should generally enforce COL clauses if (1) the law chosen has a reasonable relationship to the engagement agreement, the parties, or the dispute, and (2) application of the chosen law does not violate a clear, strong public policy of the forum. COL clauses should not be subject to a requirement of informed

consent. The concept of informed consent, which is taken from the Rules of Professional Conduct, requires a lawyer to explain to the client the advantages, disadvantages, and alternatives to a proposed course of conduct. *See* ABA Model Rule 1.0(e) and comments 6 and 7). Such a level of explanation is both daunting to the lawyer and likely to be uninformative to the client, who may be overwhelmed with information. In fact, informed consent to COL clauses may be impossible because a lawyer would have to identify all the jurisdictions whose law might be chosen, the issues that could arise between lawyer and client, and the relative weight to be given to differing principles of law applicable to those issues.

COF clauses should be subject to the same requirements of reasonable relationship and no violation of public policy. By contrast, informed consent—if a jurisdiction wants to maintain it—is not misplaced in COF clauses and would promote fairness by protecting the client from the potential burden of having to litigate against an attorney in a jurisdiction other than the client's home jurisdiction. Moreover, lawyers will not find it particularly difficult to explain to their clients the consequence to the client of a COF clause that selects a forum other than that of the client's residence.

In sum, while we encourage lawyers to insert COL/COF in their engagement agreement (and in our longer article we offer drafting suggestions), we believe that courts should modify their approach in the ways indicated above, so that the enforceability of COL and COF clauses is clearer, lawyers have an incentive to always include such clauses, and clients receive fair treatment and the possibility of reduced fees flowing from savings in transaction costs.

*This article is a highly abbreviated version

of the article published by the authors in 121 Penn. St. L. Rev. 683 (2017).

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Predictive Coding Is Not Only for Big Firms and Big Cases

By Bruce Ellis Fein[†]

A common view holds that predictive coding is either not viable or not worth the expense and effort for discovery in cases involving tens of thousands rather than millions of documents. But predictive coding can yield substantial dividends in time, expense and accuracy even in such comparatively small cases, with ROI often exceeding 500%. It also allows small and mid-sized firms to handle cases involving discovery of massive scope which would otherwise be unmanageable. A handful of case studies illustrates these points.

First, a brief description of predictive coding for the uninitiated. Predictive coding uses computer software to categorize (apply tags to) documents as relevant, not relevant, hot, related to a particular issue, even privileged or not. It typically involves some variation of four basic steps. First, one or a handful of attorneys review a "training set" of documents, typically vendor-designated, from which the software "learns" how to categorize documents and assesses its own accuracy by comparison to the attorney reviewer categorizations. Second, the reviewing attorneys review additional training documents, and revisit potential errors flagged by the software from the first round of review. The software again assesses its own accuracy. If the accuracy materially improves with the new batch of documents, this step gets repeated until additional training sets yield no, or negligible, improvements in accuracy. Third, the software designates which documents belong in which categories and, potentially, which documents it is unable to assess accurately and therefore require further attorney attention. Fourth, attorneys review the software categorizations (typically a subset, such as all or a sampling of all documents categorized as relevant, potentially privileged documents, priority custodians, and the like) and, if applicable, produce the documents.

Is the overhead (in attorney training) and expense (typically a vendor service) worthwhile even for smaller firms and cases? Consider the following four case studies (full disclosure: I participated in each) involving small- to mid-size firms with big matters and, in one case, a big firm with a smaller matter.

Case No. 1: Mid-size firm reviews, culls trial exhibits from 70 million documents in 5 weeks. A mid-sized firm, in order to overcome a recalcitrant defendant, offered to process over 70 million of defendant's raw, unfiltered emails. The firm astutely deployed keyword searches to narrow the number of files to some 900,000, then trained predictive-coding software to winnow those down to 90,000 documents for attorney review. Having trained its sights on the most relevant subset of documents with technology rather than brute force with an army of contract attorneys, four or five high-level attorneys found the thirty or so exhibits that made a difference in its subsequent nine-figure victory at trial. The firm completed this work within approximately five weeks from receipt of the data, at a fraction of the cost compared to the many months and millions of dollars that a traditional review would have entailed.

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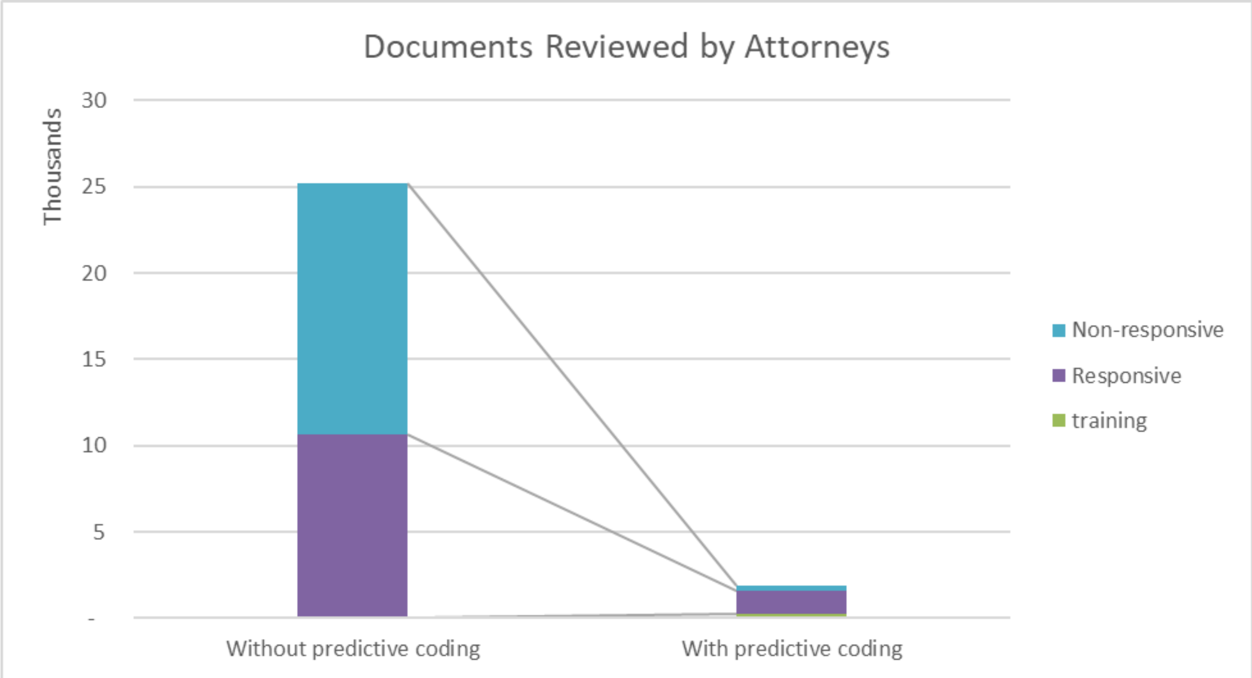
Case No. 2: Partner at small firm reviews 320 training documents, eliminates 85% extraneous matter, completes production from 300,000 client emails for less than $20,000. A partner at a fifteen-attorney firm spent a week reviewing about 320 vendor-prescribed training documents. This sufficed to enable the predictive-coding software to isolate for attorney review 90% of the relevant documents in a mere 14% of the original corpus of about 300,000 client emails at an expense of less than $20,000. Through this highly accurate, automated, near-instantaneous computer categorization of over 250,000 documents, the firm focused its time and the client's limited resources on superb lawyering rather than document review en route to settlement.

Case No. 3: Thirty-attorney firm predictively codes 300,000 documents, saves $100,000. See James R. Hietala, Jr., *Linguistic Key Words in E-Discovery*, 37 Am. J. Trial Advoc. 603 (Spring 2014).

Case No. 4: AmLaw 10 firm reduces cost by 83%, errors by 80%, and review burden by 93% in response to RFP involving 25,000 documents. An AmLaw 10 firm charged with responding to an RFP confronted a collection of 25,000 documents. The associate reviewed 250 training documents, enabling the predictive-coding software to categorize the 25,000 documents to a level of accuracy in excess of what contract attorneys typically achieve. The associate reviewed 1,500 of the auto-categorized documents, partly as a double-check and partly to learn the contents of the documents being produced. The entire production review was done in a little over a week. The firm realized approximately an 83% reduction in total cost, a 91% reduction in total time, and an 80% reduction in responsive documents erroneously omitted as compared with a typical contract-attorney review, as depicted in the charts at the end of this article.

As the foregoing matters show, not only massive discovery lends itself to predictive coding, and not only massive firms can use it. It is worth considering for small- to mid-size firms wishing to handle large discovery matters but unfamiliar or unable to cope with traditional methods of review (numerous contract attorneys consuming copious amounts of space, time, money, computer terminals, and supervision). It can also bear fruit for firms of any size handling cases with as few as tens of thousands of documents.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Without predictive coding
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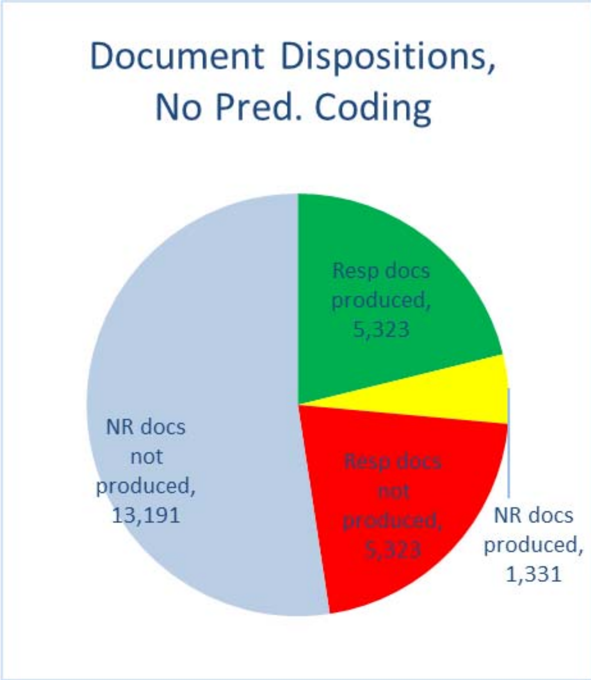
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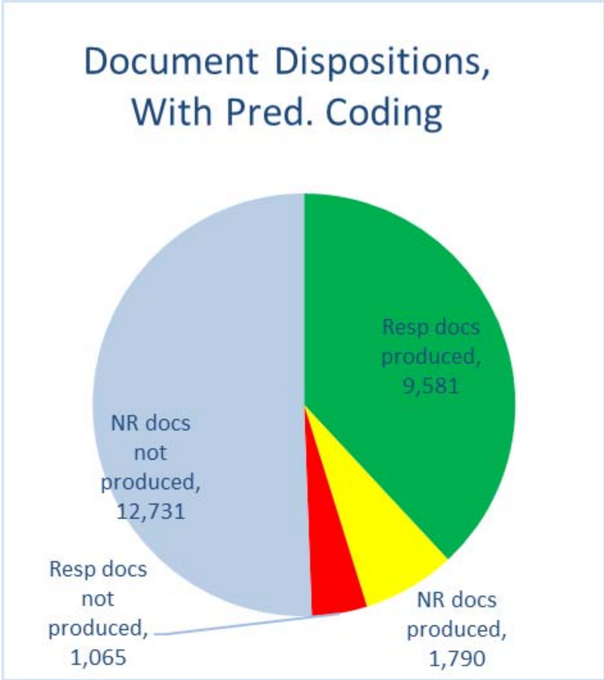
Resp docs not produced, 5,323
NR docs produced, 1,331


Document Dispositions, With Pred. Coding
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Resp docs not produced, 1,065
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