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of the New York State Bar Association

Inside

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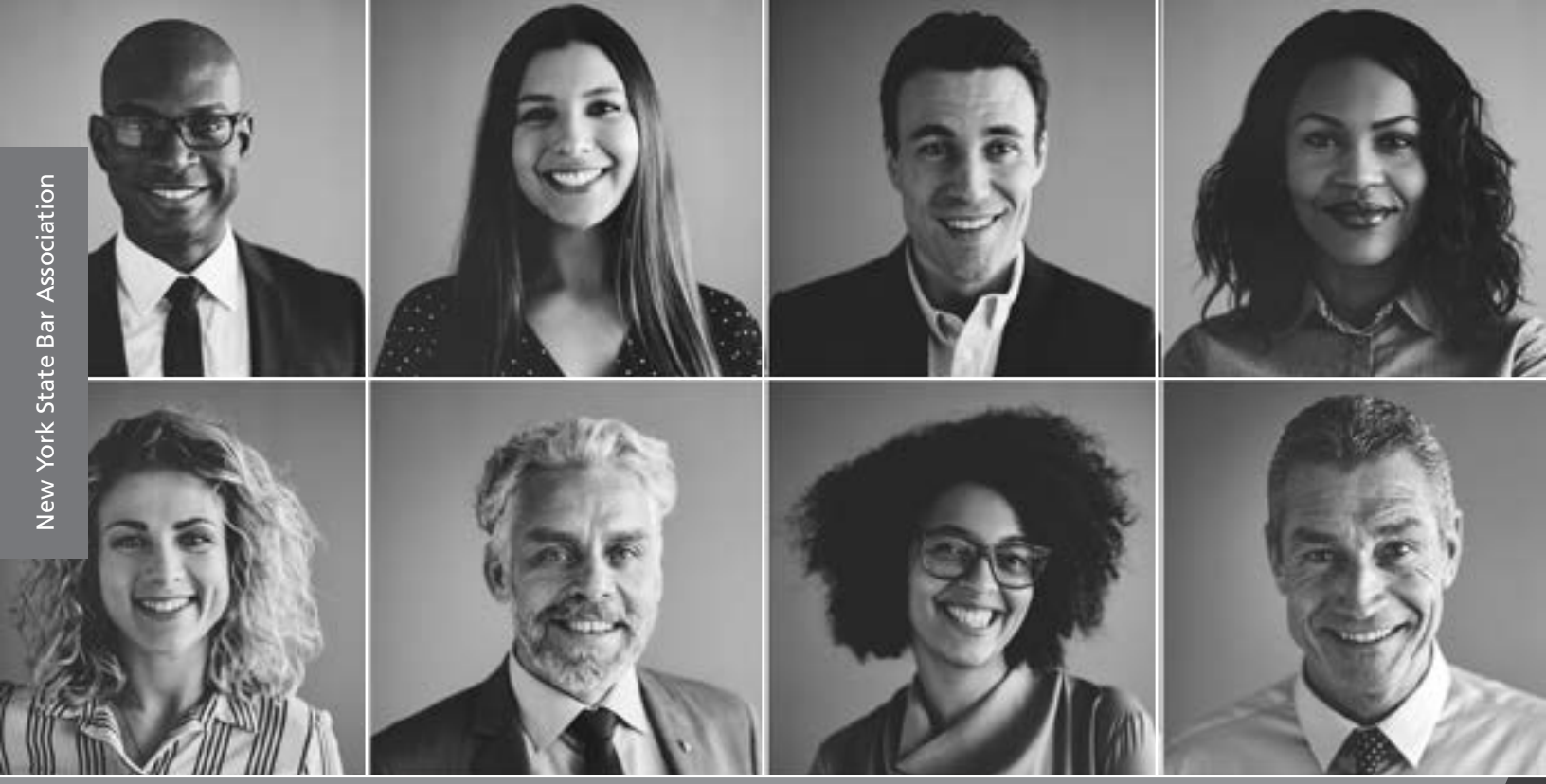

NYSBA Membership 2021 Renewal Is Now Open

NYSBA membership grants you access to exclusive benefits and to be part of monumental change. Whether it's adapting to the new virtual environment, participating in health law discussions, or speaking out on racial injustice, we are always looking to increase involvement via leadership and task force opportunities.

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NYSBA

Message from the Chair

By Jonathan B. Fellows

It has gotten warmer, and now cooler, and yet the COVID-19 pandemic continues to dominate our personal and professional lives. As I wrote to you last summer, we have been fortunate in Central New York to have been allowed to reopen our law offices and return in one small part to normalcy. I am keenly aware, however, that most of my colleagues in the Commercial and Federal Litigation Section are still working in their alternative locations.

The Section has tried to be of assistance to all of our members during these trying times. This issue of the *NY Litigator* includes several pieces addressing issues raised by the COVID-19 pandemic. Our Section Committees and members continue to present an impressive number of remote programs. Please check our page on the NYSBA website regularly and take advantage of these programs. I have missed travelling to New York City for our Executive Committee meetings, but the first two of my time as Chair, while conducted remotely, were nevertheless enjoyable for the remarks of Judge Sullivan in July and Justice Scarpulla in September. Judge Sullivan's remarks on his concern of the development of young lawyers during these times of remote working were a reminder that all of us more senior lawyers need to keep our younger colleagues in mind during these times. It was wonderful in our September meeting to share in the joy of Justice Scarpulla, a loyal friend of the Section, in her elevation to the First Department.

As the state courts cautiously reopen, members of the Section continue to weigh in on the future. Personally, over the past several weeks I have argued a state Supreme Court motion by Skype for Business, participated in a federal court settlement conference by Skype, argued an Article 78 petition in state Supreme Court in person (masked), argued in the Appellate Division in person (masked and seemingly miles away from the five Justices), and argued in the Second Circuit by Zoom. I was surprised how much more of a connection I felt with the Judges during the Second Circuit Zoom argument than I did during the in-person masked argument at the Fourth Department.

The Section continues to advocate for the opening of the courts, and most particularly for the necessary resources from the state to keep our Commercial Division a top court for the resolution of business disputes.

As the year progresses we continue to adapt our events. We have been forced to cancel the program we have held in the Southern District's ceremonial courtroom to honor the recipients of the Scheindlin Awards. We hope to honor the recipients in person at our Mock Trial event in April, but we shall see if we are able to conduct that event in person or adapt to a remote event.

The New York State Bar Association recently announced that the Annual Meeting will be fully remote. We, of course, cannot recreate our Gala Luncheon on Zoom. Nor can we have our reception at the Second Circuit library. We will conduct remote CLE programs on January 20, 2020, and will have a Zoom reception on the evening before. The new Chief Judge of the Second Circuit, Debra Livingston, has agreed to offer some informal remarks for the reception. Those of you who have attended our reception know that her predecessor as Chief Judge, Robert Katzmann, offered generous remarks the past several years.

I am writing this the day after the death of Justice Ginsburg. I have taken time over the past few hours to consider the arc of her career, and what it has taught us. I was blessed to have clerked for another trailblazing jurist, the late Phyllis Kravitch, who sat on the Eleventh Circuit after being the first woman elected to the bench in Georgia. Like Justice Ginsburg, Judge Kravitch was a top graduate of a top law school who could not find a job in a law firm, but ended up reaching the pinnacle of her profession. I was fortunate to learn much about overcoming challenges from Judge Kravitch. As I have stated before, the best work this Section has done during the time I have been a member is the work of our Women's Initiative Task Force. Its most recent report documented that progress toward equality for women in the courtrooms of our state remains slow, and highlighted the continuing work we must all do to remedy this situation. Today, however, I am imagining what my law firm would be like without my many female colleagues, what our courts would be like without the many women judges I have had the honor to appear before, and what this Section would be like without the many dynamic women who have led and participated in its success. May we honor Justice Ginsburg in our future work.

I want to thank all of the fellow officers, Dan Wiig, Ignatius Grande, Anne Sekel and Jessica Moller for all their work in keeping the Section going in these challenging times. I also want to thank the many former Section Chairs who have offered their support during the past few months. Finally, thanks to all of you who have stepped up to organize Section events, and to author pieces for our signature publication the *NY Litigator*. It is a pleasure to serve as Chair of a Section whose members have so enthusiastically stepped up to the challenge of these times.

Jonathan B. Fellows
Syracuse, NY
September 19, 2020

Judicial Profile: Hon. Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States

By Phil Schatz

This article is a reprint and appears in its original form. Reprinted with permission from the Federal Bar Association and *The Federal Lawyer*, May 2010.

On Nov. 16, 2009, the Foundation of the Federal Bar Association made Justice Ruth Bader Ginsburg an Honorary Life Fellow in a well-attended ceremony in the West Conference Room of the United States Supreme Court Building. After making brief remarks, Justice Ginsburg surprised the assembled lawyers by opening the floor for questions. Following an embarrassed pause—it is a rare talent to render a room of lawyers speechless—Justice Ginsburg fielded a wide variety of questions with the same candor and humor that made her what President Clinton has called "the Thurgood Marshall of the women's rights movement."

In connection with the ceremony, Justice Ginsburg consented to being profiled for *The Federal Lawyer*. She asked that the profile focus on the struggle for equal citizenship stature for men and women. Because of her heavy work schedule, she also asked that the profile be drawn from publicly available writings and interviews as well as Fred Strebeigh's highly recommended book, *Equal: Women Reshape American Law*, published last year by W.W. Norton & Company.

An Only Child of Immigrants

Joan Ruth Bader, nicknamed "Kiki,"[1] was born on March 15, 1933, and grew up in the working-class immigrant community of Flatbush, Brooklyn, a polyglot mixture of Italian, Irish, Jewish, and Polish families. Her father, Nathan, emigrated from Russia when he was 13 years old. He was a gentle and reserved man with a sly sense of humor, who developed a modest business manufacturing low-priced furs. Her mother, Celia, was born in the United States but conceived in Poland. She was a fierce intellect and prolific reader, who graduated from high school at the age of 15. She gave up her own dreams of college to help finance her brother's education at Cornell, and then she became a full-time wife and mother.

Touched by Tragedy

The death of Justice Ginsburg's older sister, Marilyn, from meningitis left Justice Ginsburg an only child at the age of two. She says that her father would have spoiled her rotten had it not been for her mother, who instilled both a love of reading and a drive to do the best she could with whatever talents God gave her. Celia made sure Justice Ginsburg did her homework and practiced her piano and regularly took her to a public library branch located over a Chinese restaurant, creating a permanent association between reading and the smell of Chinese food.

Celia was diagnosed with cervical cancer the year Justice Ginsburg entered James Madison High School. As was common in those days, the diagnosis was kept secret outside the family. Increasingly bedridden and in pain, Celia continued to encourage her daughter's reading and studies. Justice Ginsburg sometimes did her homework at her mother's bedside. Celia died the day before Justice Ginsburg's graduation from high school at the top of her class.

Justice Ginsburg survived these trying times by focusing on her studies. "I knew that she wanted[2] me to study hard and get good grades and succeed in life so that's what I did."[3] She calls her mother the bravest, strongest, and "perhaps the most intelligent person I ever knew."[4]

Philip Schatz is a litigation partner at Wollmuth Maher & Deutsch LLP. He is a long-time member of NYSBA and the Commercial and Federal Litigation Section, and a former Circuit Vice President and SDNY President of the Federal Bar Association. He is a volunteer mediator for the Commercial Division and the S.D.N.Y., and a regular teacher for the National Institute of Trial Advocacy.

She also credits her mother with two main life lessons: to be independent and to be "a lady" (that is, courteous in all situations). Later, when she was a lawyer arguing before the Supreme Court, Justice Ginsburg wore her mother's jewelry for inspiration. "I think of her often when I am in challenging situations."[5]

Falling in Love at Cornell

Armed with New York state and Cornell Scholarships, Justice Ginsburg entered Cornell in 1950. She graduated Phi Beta Kappa in 1954, with honors in government.

At Cornell, she re-affirmed her love for good prose, studying European literature with the novelist Vladimir Nabokov. His insistence on "the right words in the right word order" greatly influenced Justice Ginsburg's own writing. "He changed the way I read and the way I write," she says.[6] "To this day, I can hear some of the things that he said."[7]

She also fell in love with Martin Ginsburg, a mischievous kindred spirit who was one year ahead of her at Cornell, who now says that he spent most of his time playing on the Cornell golf team. "He was the first boy I ever met who cared that I had a brain," recalls Justice Ginsburg, and "we decided that whatever we would do, we would both do it."[8] They decided to become lawyers.

Uncle Sam interrupted the newlyweds' plan to attend Harvard University Law School together, activating Martin, who had just finished his first year, and posting him to Fort Sill in Oklahoma. Justice Ginsburg gave up her admission to the school to stay with her husband. A year later, she gave birth to their daughter, Jane Carol, who is now the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University Law School. The Ginsburgs' son, James, today the chief executive officer of Chicago's classical record company Cedille Records, was born 10 years later. In 1956, after two years in the Army, Martin returned to Harvard, and Justice Ginsburg joined him as an entering first-year law student.

Law school was essentially a men's club in 1956. Justice Ginsburg's class of 500 held only nine women. Women were objects of curiosity, if not condescension, frequently assumed to be trolling for lawyer-husbands. The pressure on the few women to prove their entitlement to attend law school was intense. "You felt that every eye was on you," Justice Ginsburg recalls. "Every time you answered a question, you felt you were answering for your entire sex."[9] During her very first day of classes, Justice Ginsburg was awed by the response to a question volunteered by journalist Anthony Lewis, then taking law classes as part of a university fellowship. She said to herself, "He is going to be my model. I am going to speak in class as often as he does."[10]

Cancer Strikes Again

Cancer again disrupted Justice Ginsburg's studies. Martin was diagnosed with advanced testicular cancer, then considered a death sentence. Twin surgeries and massive radiation left him effectively incapacitated for an entire term. He was awake only a few hours a day. Justice Ginsburg shouldered his studies on top of her own, in addition to meeting the demands of caring for their baby. "That's when I learned to work all night," she wryly remembers.[11] Despite this triple workload, Justice Ginsburg kept up with her work as a member of the *Harvard Law Review*. Miraculously, Martin recovered fully from his cancer. The couple learned from this experience that "nothing could happen that we couldn't cope with."[12]

No Law Firm Would Take Her

In 1958, Martin graduated and took a job as a tax attorney in New York City. (He is now one of the premier tax experts in the entire country.) Rather than be separated from her husband, Justice Ginsburg transferred to Columbia Law School, where she again made *Law Review*.

Although she graduated at the top of her class in 1959, no law firm would hire her. "The traditional law firms were just beginning to turn around on hiring Jews," she remembers. "But to be a woman, a Jew, and a mother to boot—that combination was a bit too much."[13] Indeed, she was able to get only a judicial clerkship (with Hon. Edmund L. Palmieri of the Southern District of New York) through the back channel cajoling of her mentor and friend, constitutional law scholar Gerald Gunther. After her clerkship, Justice Ginsburg studied Swedish law as part of her work at the Columbia Law School Project on International Civil Procedure, and she co-authored a book on Swedish civil procedure for which she subsequently received an honorary doctorate from the University of Lund in 1969. In 1963, she became an assistant professor at the Rutgers School of Law in Newark, teaching civil procedure and conflicts of laws.

The Turning Point—*Reed v. Reed*

From 1868 to 1971, the 14th Amendment was not understood to guarantee equal rights and opportunities for women. During this period, the U.S. Supreme Court "never saw a gender classification it didn't like."[14] In 1970, a group of women law students asked then-Professor Ginsburg to teach a course on women and the law. She read everything available, which, she says, "proved not to be a burdensome venture." Her teaching put her in the vanguard of the emerging women's rights movement, and she worked closely with a network of professors, practitioners, and idealistic young women law students seeking to change the law.

In 1971, Professor Ginsburg uncharacteristically asserted herself, volunteering to act as co-counsel in briefing for the Supreme Court case *Reed v. Reed*. *Reed* presented an equal protection challenge to an Idaho law stating that,

in choosing among persons equally entitled to administer a decedent's estate, men must be preferred over women. Justice Ginsburg's brief (following Justice Brandeis, among her "favorite lawyers of all time") is stocked with extralegal quotes and citations (including Swedish economist and Nobel laureate Gunnar Myrdal, French writer Simone de Beauvoir, Norwegian playwright Henrik Ibsen, and French political thinker Alexis de Tocqueville). Her brief was central in convincing the Burger Court that equal protection demands that laws concerning gender "must rest upon some ground of difference having a fair and substantial relation to the legislation, so that all persons similarly circumstanced shall be treated alike."[15] *Reed* was the first Supreme Court decision to invalidate a law as discriminatory on the basis of sex.

The ACLU Women's Rights Project

In 1972, Justice Ginsburg was named director of the just formed Women's Rights Project (WRP) of the American Civil Liberties Union. The mission statement of the WRP was "to advance, simultaneously, public understanding, legislative change, and change in judicial doctrine."[16] The selection of legislative targets was aided substantially, if inadvertently, by Solicitor General Erwin Griswold's 1973 appendix to a petition for certiorari cataloging federal statutes that differentiated on the basis of sex. The selection of judicial targets was less precise—cases arose from multiple sources across the country—but Justice Ginsburg's preference was to pick cases that would challenge the common belief among male judges that sex-based laws operated benignly in women's favor. Such judges thought, "Who wants to serve on juries? Women don't have to serve on juries. Who wants to work in a bar? We're going to save women from that."[17]

To change the law, Professor Ginsburg sought to change these judges' perceptions, selecting cases with strong facts and sympathetic plaintiffs, male and female, to demonstrate "that arbitrary differentials based on sex hurt *everybody*—men, women, and children. And that was the strategy, to build case by case."[18]

During her tenure on the WRP from 1972 to her elevation to the bench in 1980, Professor Ginsburg helped author 34 briefs and personally argued six cases before the Supreme Court, including the following:

- *Frontiero v. Richardson*, 411 U.S. 677 (1973), which held constitutionally infirm federal statutes granting male service members housing and medical benefits for their spouses but denying those benefits to females unless they could show that their husbands were dependent on them for financial support;
- *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), a case dear to Justice Ginsburg's heart, which held that widowers as well as widows are entitled to Social Security benefits when a wage earner dies leaving a minor child in need of care;
- *Craig v. Boren*, 429 U.S. 190 (1976), the first articulation of "heightened scrutiny" for gender discrimination, overturning an Oklahoma statute that permitted young women, but not men, to buy 3.2 percent beer when they turned age 18;
- *Califano v. Goldfarb*, 430 U.S. 199 (1977), invalidating "archaic and overbroad" gender-based assumptions in the payment of Social Security benefits; and
- *Duren v. Missouri*, 439 U.S. 357 (1979), invalidating a Missouri statute exempting women from jury duty, effectively overturning *Hoyt v. Florida*, 368 U.S. 57 (1961).

As evidence of the compassion and interest in others that underlies Justice Ginsburg's somewhat reserved exterior, she developed personal relationships with many of the people she represented that continued long after her elevation to the Supreme Court.

Appointed to the Court of Appeals

In 1980, President Jimmy Carter named Professor Ginsburg to the U.S. Court of Appeals for the District of Columbia Circuit. (In the words of her husband's impish biography on the Fried Frank law firm's Web site, where he is of-counsel, she "was a lawyer before she found better work.") Only one Republican on the Senate Judiciary Committee, Sen. Strom Thurmond of South Carolina, voted against her nomination. This time it was Martin's turn to move to accommodate his spouse, giving up his tenured professorship at Columbia Law School and lucrative private practice at a leading New York City firm to join his wife in Washington, D.C. "I have been supportive of my wife since the beginning of time, and she has been supportive of me," he says. "It's not sacrifice; it's family."[19]

Taking a Seat on the High Court

In 1993, when Justice Byron White retired, President Clinton nominated Ruth Bader Ginsburg to become the second woman on the Supreme Court, joining Sandra Day O'Connor. In her confirmation hearings, she answered questions frankly and fully but refused to predict how she would rule on hypothetical Supreme Court cases. She said, "Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously."[20] But she did explain her approach to judging:

> My approach, I believe, is neither "liberal" nor "conservative." Rather, it is rooted in the place of the judiciary […] in our democratic society. The Constitution's preamble speaks first of We, the People, and then of their elected representatives.

> The Judiciary is third in line, and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law and without fear about the animosity of any pressure group.[21]

The Senate confirmed her nomination by a vote of 96-3. Serving on the Supreme Court, she said, "is the highest honor, the most awesome trust, that can be placed in a judge."[22]

The addition of a second woman to the Court not only led to equal access to public restroom facilities (unbelievably, the Supreme Court's public bathrooms, at that time, were open for men but not for women before 9 a.m.) but also incrementally expanded the Court's outlook. "A system of justice is richer for diversity of background and experience,"[23] says Justice Ginsburg.

The Culmination of Change

As a member of the Court, Justice Ginsburg had the honor of writing the 7-1 majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996), which opened the state-sponsored Virginia Military Institute (VMI) to women and effectively concluded the equal protection revolution begun by *Reed*. Justice Ginsburg regards the VMI case "as the culmination of the 1970's endeavor to open doors so that women could aspire and achieve without artificial constraints."[24] Her opinion held that gender-based distinctions are subject to "heightened scrutiny" requiring an "exceedingly persuasive justification" to survive an equal protection challenge, the functional equivalent of strict scrutiny. The VMI case "was not really about women," Justice Ginsburg has explained. "Instead, VMI was about a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men."[25] The sole dissenter on the VMI case was Justice Scalia, who is Justice Ginsburg's closest colleague on the Court. "No matter how overworked and tired I feel, he can always say things that make me laugh."[26] Their friendship persists even as their ideologies may clash. "I love him. But sometimes I'd like to strangle him."[27]

Moving Forward

During her tenure on the Court, the ideological balance has shifted rightward. Justice Ginsburg takes a philosophical view of the shift. "You know that these important issues are not going to go away. They are going to come back again and again. There'll be another time, another day."[28] One change that she still hopes for is an express recognition in the Constitution (like Justice Hugo Black, she carries a copy of the Constitution with her at all times) of gender equality. Ours is the "oldest written constitution still in force in the world," and it "contains no express provision regarding discrimination on the basis of gender."[29]

A more pressing problem concerns Justice Ginsburg's recent surgery for pancreatic cancer, one of the deadliest cancers known. The cancer was caught early, and her chances for recovery are hopeful. Justice Ginsburg is fundamentally an optimist and says that "you never know in life whether something is going to work out to your advantage even if it seems to be a terrible impediment."[30] Like her inability to find work at a New York law firm, so devastating at the time, which turned out to be a blessing in disguise. "So many times, what seemed to be ill fortune turned out to be, instead, a stroke of luck."[31] As one of her heroes, Abigail Adams, said, "It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties."[32]

Endnotes

1. "Kiki" has a short first "i" and is pronounced "kicky."
2. Danielle Burton, *10 Things You Didn't Know About Ruth Bader Ginsburg*, US NEWS & WORLD REPORT (Oct.1, 2007) (hereafter cited as 10 Things), available at www.usnews.com/articles/news/national/2007/10/01/10-things-you-didnt-know-about-ruth-bader-ginsburg.html (accessed March 11, 2010).
3. Ruth Bader Ginsburg, interview by Brian Lamb, C-SPAN, June 1, 2009, (hereafter cited as Lamb Interview), available at supremecourt.c-span.org/assets/pdf/RBGinsburg.pdf (accessed March 11, 2010).
4. Lamb Interview, *supra*, note 2.
5. Ruth Bader Ginsburg, *Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at Equality Principle*, presentation at Loyola (Chicago) Law School Summer Program in Rome (July 2009) (hereafter cited as Loyola Remarks).
6. Debra Bruno, *Justice Ginsburg Remembers Her First Steps in the Law*, Legal Times, (Nov. 13, 2007) (hereafter cited as Bruno Interview), available at www.law.com/jsp/article.jsp?id=1194861838591 (accessed March 11, 2010).
7. Ruth Bader Ginsburg, interview by Bryan Garner, *Law Prose*, 2006–2007 (hereafter cited as Garner Interview), available at www.lawprose.org/interviews/supremecourt.php?vid=ginsburg_part_1&vidtitle=Associate_ Justice_Ruth_Bader_Ginsburg_Part_1 and _Part_2 (accessed March 11, 2010).
8. Ruth Bader Ginsburg, interview by Larry Josephson, *Only in America: 350 Years of the American Jewish Experience* (Sept. 2, 2004 (hereafter cited as Josephson Interview), available at www.onlyinamerica.info/ginsburg.shtml (accessed March 11, 2010).
9. Emily Bazelon, *The Place of Women on the Court*, New York Times (July 7, 2009), available at www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html (accessed March 11, 2010).
10. Bruno Interview, *supra*, note 6.
11. Bruno Interview, *supra*, note 6.
12. Bruno Interview, *supra*, note 6.
13. *10 Things*, *supra*, note 3.
14. Elaine McArdle, "'I remain optimistic about the potential of the United States,' Ginsburg tells Gender and the Law Conference," *Harvard Law School Web site*, March 24, 2009, available at www.law.harvard.edu/news/spotlight/civil-rights/ginsburg-.html (accessed March 10, 2010)
15. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

16. Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1441 (2002) (hereafter cited as Remarks for Celebration).
17. Ruth Bader Ginsburg, interview by Nina Totenberg, *NOW with Bill Moyers*, PBS (May 3, 2002), available at www.pbs.org/now/transcript/transcript116_ full.html (accessed March 11, 2010).
18. Ruth Bader Ginsburg, interview by Sandy Ogilvy, National Archive of Clinical Legal Education, Columbus School of Law (Aug. 17, 2007), available at lib.law.cua.edu/nacle/Transcripts/Ginsburg.pdf (accessed March 11, 2010).
19. Stephen Labaton, *The Man Behind the High Court Nominee*, N.Y. Times (June 17, 1993), available at www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html?pagewanted=1 (accessed March 11, 2010).
20. Ruth Bader Ginsburg, excerpts from "Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States," Hearings Before the Committee on the Judiciary, U.S. Senate, 103rd Congress, at 53–56 (1994), available at www.uscourts.gov/outreach/topics/sctwo.html (accessed March 11, 2010).
21. *Id.*
22. Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1453 (1998), quoting *The Supreme Court: Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. Times, June 15, 1993, at A1.
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24. Loyola Remarks, *supra* note 5.
25. Loyola Remarks, *supra* note 5.
26. Joan Biskupic, *Ginsburg, Scalia Strike a Balance*, USA Today (Dec. 25, 2007), available at www.usatoday.com/news/washington/2007-12-25-ginsburg-scalia_N.htm (accessed March 11, 2010).
27. Joan Biskupic, *Justice Scalia, Revealed*, WOWOWOW: The Women On The Web (Nov. 24, 2009), available at www.wowowow.com/politics/justice-scalia-revealed-409449 (accessed March 11, 2010).
28. *A Conversation with Justice Ruth Bader Ginsburg*, 56 REC. ASS'N B. CITY N.Y. 1, 19 (2001).
29. Loyola Remarks, *supra*, note 5.
30. Bruno Interview, *supra*, note 6.
31. Ruth Bader Ginsburg, Interview for *Questions Presented, Ruth Bader Ginsburg '59*, available at www.law.columbia.edu/magazine/153269/ruth-bader-ginsburg-59 (accessed March 11, 2010).
32. *Remarks for Celebration*, *supra*, note 16.

Protecting Privilege in Cyberspace, the Age of COVID-19 and Beyond

By Melanie L. Cyganowski, Erik B. Weinick and Aisha Khan

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Introduction

The COVID-19 pandemic has accelerated companies' reliance on outside consultants to secure their virtual workspaces, and has ushered in a new reliance on a different set of consultants to secure their physical workspaces from the virus and other threats. Unfortunately, even the most diligent organizations may still encounter a breach of those defenses, and litigation will surely follow. Counsel for plaintiffs in those lawsuits will almost certainly seek discovery of any analysis or reports performed by outside counsel in advance of, or following, such incidents. When that litigation reaches the discovery phase, a critical question will arise—are the reports prepared by those outside consultants, either before or after the precipitating event, discoverable? Or, are they instead protected by attorney-client privilege or the work-product doctrine? This article seeks to answer that question through an examination of relevant case law and a discussion of recommended best practices for the engagement of outside technical consultants in both the cyber and health spheres.[1]

It is often said that it is not a question of *if*, but rather a question of *when*, an individual or entity will be the victim of a cyber-intrusion,[2] and unfortunately, that same maxim may hold true when it comes to COVID-19, unless the hoped-for vaccine is developed and successfully deployed in short order. In the interim, as to their electronic systems, organizations should conduct routine pre-breach assessments of their hardware and software systems, organizational systems, policies, and governance in order to maintain resilience and minimize the risk or severity of cyberattacks (while maximizing the speed and extent of post-incident recovery).[3] These investigations produce documents and communications containing valuable information regarding a company's cybersecurity posture.[4] Likewise, with respect to physical spaces, outside consultants are guiding organizations on how to re-shape their environments and processes so as to limit the spread of not only COVID-19, but other contagions as well. These pre-incident recommendations take written form, as will post-incident analyses developed following an outbreak, cyber-incident, or other type of adverse event.

Unfortunately, these proactive analyses can be a double-edged sword. On the one hand, companies that fail to conduct pre-breach assessments can be accused of failing to engage in a bare minimum of cybersecurity vigilance.[5] On the other hand, companies that routinely conduct pre-breach assessments run the risk of having their assessments exposed in court, if litigation following a breach ensues.[6] While there is no bright-line nationally accepted rule on whether privileges may attach to these reports, caselaw does provide insight as to how companies can maximize the chances that their assessments will remain shielded by the work-product doctrine and/or the

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attorney client privilege (sometimes referred to by technology professionals as "legal shield"). These principles are applicable in the physical realm as well, such as when companies engage health care or environmental experts to advise how to protect workers and others returning to physical spaces.

Relevant Case Law and Key Takeaways

The Development of Work-Product Doctrine and Attorney-Client Privilege Principles

Courts confronting work-product doctrine questions often begin their analysis with *United States v. Adlman*.[7] There, the Internal Revenue System (IRS) sought production of a document that had been ordered by Adlman, Sequa Corporation's attorney and Vice President of Taxes. Specifically, Aldman had directed an outside accountant and lawyer to evaluate the tax implications and potential for litigation concerning a possible restructuring. The documents in question analyzed legal challenges the IRS would likely bring against the reorganization and resulting tax refund claim.[8] In considering the protection afforded to dual-purpose documents, meaning those serving both business and litigation purposes, the Second Circuit held that a document created *because of* anticipated litigation, which revealed information regarding the potential litigation, would not lose work-product protection simply because it was intended to assist business decision-making which depended upon the likely outcome of anticipated litigation.[9] Importantly, the Second Circuit held that application of a "because of" test is the appropriate standard for determining whether a document should be shielded from production.[10] Specifically, "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)" meaning it is protected by the work-product doctrine.[11] On the other hand, documents prepared in the ordinary course of business, or those that would have been prepared in a substantially similar form, regardless of the potential for litigation, are not protected by the work-product doctrine.[12]

In addition to work product, reports by retained consultants or experts may also be entitled to protection as an attorney-client communication. In the seminal case on attorney-client privilege, *Upjohn Co. v. United States*, the Supreme Court held that the privilege applies to communications between counsel and retained experts assisting counsel in providing legal advice to their clients.[13] The Court noted that "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[14] *Upjohn* built upon the ruling of an earlier case, *United States v. Kovel*. In *Kovel*, the Second Circuit held that the privilege could be extended to an accountant hired by an attorney to assist the attorney in understanding their client's complex tax story; the attorney subsequently relied upon the accountant when providing legal advice to the client.[15] The Second Circuit Court concluded that "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege was designed to permit."[16] Therefore, the attorney-client privilege is not waived by disclosure to a third party—if transmission to the third party facilitates an attorney's ability to provide legal advice to his or her client.

These principles were seen again in *United States v. Schwimmer* and *In re Grand Jury Subpoenas*. In *Schwimmer*, the Second Circuit noted that the attorney-client privilege may cover "communications made to certain agents of an attorney . . . hired to assist in the rendition of legal services" such as the communications at issue between a client and an accountant retained by counsel to assist in rendering legal services to a pair of co-defendants.[17] In *In re Grand Jury Subpoenas,* the defendant's counsel hired a public relations firm to garner favorable publicity for the client in the hopes of prosecutorial leniency.[18] The court determined that retaining the firm was necessary for lawyers "to perform some of their most fundamental client functions," notably seeking to narrow charges brought against their client.[19] Ultimately, the court held that communications between the lawyer and the retained consultants were protected by the attorney-client privilege because the public relations role was necessary to achieve a legitimate litigation goal, and the attorneys' ability to advocate for their client would have been undermined if the attorneys could not engage in candid conversations with their consultant-agents. Thus, in order for the consultant's and lawyer's communications to be privileged, the consultant's role must be to assist the lawyer in providing informed client advice or achieving a litigation goal.

Work-Product Doctrine and the Attorney-Client Privilege in the Context of Cybersecurity

In the cybersecurity context, while there is not a yet a bright-line rule on when the work of retained technical consultants is protected from disclosure in litigation, a recent string of cases has provided guidance. First, in *In re Premera Blue Cross Customer Data Sec. Litigation,* the court considered whether a document prepared by Premera's retained consultant, Mandiant, would have been created in substantially similar form "but for" the prospect of litigation.[20] Mandiant had *already* been working for Premera, when it discovered malware in Premera's system.[21] Premera subsequently hired outside counsel, which entered into a *new* agreement under which Mandiant's work would be supervised by that outside counsel.[22] The court applied the "because of" test and held that the documents were discoverable because the amended statement of work *did not* otherwise change the scope of Mandiant's work from what was described in the original pre-malware discovery services agreement between Mandiant and Premera.[23] As in non-cybersecurity cases,

courts will assess the totality of circumstances to decide whether the document in question was prepared because of the anticipated litigation and would not have been created in a substantially similar form but for the prospect of litigation.[24]

Mandiant's pre-breach activities and services were also at issue in *In re Dominion Dental Services. USA, Inc. Data Breach Litigation*.[25] There, Dominion Dental had retained Mandiant before a cyber-incident which led to litigation. Following discovery of the intrusion, outside counsel entered into a new statement of work with Mandiant, which included essentially the same deliverables and duties as the pre-breach statement of work.[26] The court held that the defendants failed to demonstrate that the Mandiant report would not have been produced in substantially the same form but for the prospect of the present litigation. The key factor in this outcome was that the new, post-breach statement of work was nearly identical to the original, pre-incident, statement of work.[27] As in *Premera*, the third-party expert's analyses were not protected from discovery because of the lack of distinction between the consultant's pre and post-incident work.

Thus, in order for the consultant's and lawyer's communications to be privileged, the consultant's role must be to assist the lawyer in providing informed client advice or achieving a litigation goal.

This distinction between pre and post-incident work is critical and was further highlighted by *Genesco, Inc. v. Visa U.S.A., Inc.*, where the defendants prevailed in keeping documents created by a consultant following an incident protected from discovery. The court denied Visa's discovery requests for the analyses, reports, and communications between Genesco and the cybersecurity firms it retained following a data breach. There, Genesco's outside counsel retained a forensic firm to assist with an investigation into how a cyber-attack occurred.[28] The court held that the report in question was protected as work-product because it was prepared by the outside consultant at the direction of the breached company's outside counsel, and also constituted attorney-client communications because it was prepared to assist the company's counsel in providing legal advice—comparable to the protections afforded to communications with accounting consultants helping attorneys translate complex topics for their clients and enabling them to provide their clients with informed advice. As a result, the communications and documents served a primarily legal purpose.[29]

Similarly, in *In re Experian Data Breach Litigation*, documents created by a consultant following a breach were protected from disclosure. As in other cases, the Court began its analysis with the "because of" test, paying particular attention to "factors such as the timing of the retention of the non-testifying expert in relation to the litigation at issue and the existence of evidence including…engagement letters."[30] While the consultant, Mandiant, had been retained prior to the breach, the court noted that the consultant's pre-breach work for the defendant was distinct from the post-breach work it was performing for Experian's outside counsel following the breach. Furthermore, the retention of outside counsel immediately followed discovery of the breach, further supporting a determination that this retention was in anticipation of post-breach litigation. Importantly, the consultant's report was used by the party's in-house and outside counsel to develop its litigation strategy. This highlights the value in drawing a distinction between the use of a consultant's reports for legal, as opposed to routine business purposes.

A widely reported and different outcome was seen recently in *In re: Capital One Consumer Data Security Breach Litigation.* In July 2019, Capital One learned that a hacker stole sensitive information from its cloud platform, impacting about 100 million customers.[31] Following the incident, Capital One hired outside counsel to help prepare for an expected onslaught of litigation.[32] As part of its litigation plan, Capital One's outside counsel hired Mandiant, a firm the reader will now be familiar with.[33] However, Capital One (like Premera and Dominion Dental before it) had already retained Mandiant, in the normal course of its business, *prior* to the breach.[34] Following the breach, outside counsel and Mandiant entered into a new services agreement, whereby Mandiant would investigate the breach and issue a report detailing the specifics of the breach.[35] Mandiant conducted its investigation and sent a report to outside counsel, which then sent the report to Capital One's legal team and its Board of Directors. [36]

During discovery, the plaintiffs moved to compel production of the Mandiant report, arguing that Mandiant had been retained for business purposes, and, therefore, the report was not shielded from production. The district court judge affirmed the magistrate judge's ruling that the report must be disclosed to the plaintiffs.[37] The District Court judge emphasized that the post-breach engagement letter between Capital One's outside counsel and Mandiant did not require Mandiant to perform work that was substantially different from the work it had already undertaken as part of its ongoing business relationship with Capital One, which dated back to 2015.[38] The court noted that Capital One would likely have asked for such a report to be prepared, even if it was not anticipating litigation, thus failing the "because of" test. Additionally, the

retention of outside counsel was not, by itself, enough to turn a document into work product.[39] In addition, as of this writing, the plaintiffs are also actively seeking a root cause analysis (RCA) conducted by PwC following the breach.[40] Capital One argues that this RCA is protected as work product, because it was prepared to assist Capital One in responding to the onslaught of litigation stemming from the breach.[41] Capital One also argues that plaintiffs have not demonstrated a "substantial need" for the RCA, especially considering the voluminous productions already made by Capital One—which includes their own internal RCAs.[42]

Implications Beyond the Cybersecurity Context

While some may view the *Capital One* decision as a watershed moment and inconsistent with prior decisions regarding post-breach analysis, further review demonstrates consistency with prior decisions such as the line of cases discussed above. The decisive factor in *Capital One* was the "because of" test, as the court concluded that the Mandiant report would have been generated even in the absence of litigation. This highlights the need for organizations to consciously and explicitly segregate their ongoing cyber-vigilance (and COVID-19-vigilance) from their post-incident response. That segregation between pre- and post-incident work may include, if necessary, retention of different consultants for each task even though one of the benefits of utilizing an existing consultant is their built-in familiarity with the company's systems and processes. Thus, for organizations that are large enough, they might consider having two sets of consultants—one for ongoing work and one on standby for post-incident response (but which has already familiarized itself with the organization ahead of time so as to be able to "hit the ground running" once the alarm is sounded). If that is not possible, at *minimum*, outside counsel should retain its usual consultant under a new statement of work in which the consultant's duties are clearly and substantially distinct from the consultant's pre-incident services for the company.

As discussed, the foregoing considerations are not necessarily limited to cyberspace, as the COVID-19 pandemic has highlighted another important role for outside consultants advising on the mitigation of virus spread in the physical realm. While the litigation trajectory for COVID-19-related claims is in its infancy, it is not premature to begin to consider potential discovery issues by examining analogous cases. For example, the pandemic has already given rise to workplace safety litigation, with allegations of employers failing to adequately protect their employees from on-the-job coronavirus transmission.[43] Large employers such as Walmart and Trader Joe's have already experienced outbreaks of COVID-19 among their employees.[44] There are also pending putative class actions in which plaintiffs seek injunctions requiring employers to adopt and enforce specific safety protocols before expecting employees to return to work, and the advice provided to companies by outside consultants regarding these issues can certainly impact the outcome of those litigations.[45]

Recommendations and Conclusion

In sum, practitioners should give careful consideration to the discoverability of reports and analyses created by their clients' outside consultants, both before and after an incident has occurred. While such consultants can play vital roles, such as in dealing with the cybersecurity and health issues discussed herein, their work can become critical evidence against the very organization they were intended to help, should litigation arise following a negative incident. Despite some "conventional wisdom" to the contrary, simply copying counsel on correspondence is far from sufficient to ensure availability of some type of privilege or "legal shield." At minimum, regardless of whether the work is proactive or reactive, consultants should be retained through outside counsel (not just in-house counsel) and their work parameters should be clearly defined. Where possible, the proactive work should be part of counsel's effort to provide the organization with legal advice on compliance with legal obligations (such as regulations or contractual covenants). Should a negative incident (such as a cyber intrusion or a COVID-19 outbreak) occur, and reactive work becomes necessary, a new and distinct engagement agreement should be created if the incident may give rise to litigation. Most importantly, the services under the engagement should be as closely geared towards the anticipated litigation as possible, and not simply be an analysis that the organization would have undertaken if it did not contemplate litigation.

Endnotes

1. As of this writing, Congress was considering so-called COVID liability shields for businesses, but the outcome of such legislation, and if enacted, its actual scope, remains far from certain.
2. For purposes of this article, a cyber-intrusion or cyber-incident shall be considered any unauthorized access to an organization's electronic systems or information.
3. Gurpreet Dhillon, *What to do before and after a Cybersecurity Breach?*, American University (2015), https://www.american.edu/kogod/research/cybergov/upload/what-to-do.pdf.
4. *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context*, 21 Sedona Conf. J. 1 (forthcoming 2020).
5. *Id*.
6. *Id*.
7. *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).
8. *Id*. at 1195.
9. *Id*.
10. *Id*. at 1202.
11. *Id*. at 1195.
12. *Id*. at 1202.
13. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
14. *Id*. at 390.
15. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

16. *Id*. at 922.
17. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).
18. *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).
19. *Id*. at 330.
20. *In re Premera Blue Cross Customer Data Sec. Litig.*, 296 F. Supp. 3d 1230 (D. Or. 2017).
21. *Id*. at 1245.
22. *Id*.
23. *Id*.
24. *Id*. at 1246.
25. *In re Dominion Dental Servs. USA, Inc. Data Breach Litig.,* 429 F. Supp. 3d 190 (E.D. Va. 2019).
26. *Id*. at 191.
27. *Id*. at 192; *Courts Caution that not all Data Breach Investigation Reports are Privileged*, Bass, Berry & Sims (July 6, 2020), https://www.bassberry.com/news/not-all-data-breach-investigation-reports-are-privileged/.
28. *Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168 (M.D. Tenn. 2015).
29. *Id*. at 190.
30. *In re Experian Data Breach Litig.*, 2017 WL 4325583, at *2 (C.D. Cal. May 18, 2017).
31. *In re Capital One Consumer Data Sec. Breach Litig*., No. 1:19MD2915 (AJT/JFA), 2020 WL 2731238, at *1 (E.D. Va. May 26, 2020), *aff'd*, No. 1:19MD2915 (AJT/JFA, 2020 WL 3470261 E.D. Va. June 25, 2020).
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*. at 2.
37. *In re Capital One Consumer Data Sec. Breach Litig*., No. 1:19MD2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020).
38. 2020 WL 3470261 at *6.
39. 2020 WL 2731238, at *5.
40. Ben Kochman, *Capital One says PwC Data Breach Report Should Stay Private*, Law360, August 17, 2020, https://www.law360.com/articles/1301846/capital-one-says-pwc-data-breach-report-should-stay-private.
41. *Id*.
42. *Id*.
43. Jeffrey Horton Thomas, *Trends in COVID-Related Employment Actions*, JD Supra (July 10, 2020), https://www.jdsupra.com/legalnews/trends-in-covid-related-employment-39948/.
44. Shawn Goggins, *Coronavirus Outbreak at Wenatchee Walmart Forces Shutdown of Store until Saturday* (July 23, 2020), http://www.ifiberone.com/columbia_basin/coronavirus-outbreak-at-wenatchee-walmart-forces-shutdown-of-store-until-saturday/article_ebe2b2e2-cd2d-11ea-b814-5fa828514646.html; Fiona Kelliher, *San Jose Trader Joe's Coronavirus Outbreak Grows to Eight Cases* (July 23, 2020), https://www.mercurynews.com/2020/07/23/san-jose-trader-joes-coronavirus-outbreak-grows-to-8-cases/.
45. *Id*.

Ethical Duties Related to Remote Working

By Carrie H. Cohen and Chan-young Yang

Carrie H. Cohen

In response to the COVID-19 pandemic, shelter-in-place and closure of non-essential businesses, including law firms, have resulted in many attorneys practicing law in home offices or some other remote or virtual settings. The "new normal" of remote lawyering has serious implications related to the legal profession's ethical mandate to serve clients competently and confidentially, even under such unprecedented circumstances. Set forth below is a discussion of the ethical implications of the new paradigm of remote legal representation in light of the duties of competence, confidentiality, and supervision under the New York Rules of Professional Conduct (the "Professional Rules" or "Rule(s)") and recommendations of specific measures that lawyers working remotely should consider in order to comply with such duties.

Relevant New York Rules of Professional Conduct

Lawyering from home implicates at least three important Professional Rules and corresponding duties: Rule 1.1 on the duty of competence; Rule 1.6 on the duty of confidentiality; and Rules 5.1 and 5.3 on supervisory responsibilities. Under these Professional Rules, attorneys in a remote work environment must conduct themselves in the following manner:

- Evaluate the benefits and risks of the remote-work technology they use to work on client matters and to store and transmit confidential information (Rule 1.1);
- Make reasonable efforts to safeguard confidential information against unauthorized disclosure by the attorneys or their supervisees and against unauthorized access by third parties, such as household members (Rule 1.6); and
- If managing or supervising others, make reasonable efforts to ensure that other attorneys and non-attorneys comply with the above Rules (Rules 5.1 and 5.3).

Duty of Competence

Chan-young Yang

Under Rule 1.1 ("Competence"), an attorney should provide "competent representation to a client," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[1] To maintain the requisite knowledge and skill, an attorney should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."[2] In other words, attorneys should, at minimum, educate themselves about the pros and cons of the home-office technology used in storing client data and communicating confidential information, and update their technological knowledge so as to competently handle client information while working from home.

Duty of Confidentiality

Under Rule 1.6 ("Confidentiality of Information"), an attorney "shall not knowingly reveal confidential information … obtained during or relating to the representation of a client," absent informed client consent or other applicable exceptions.[3] An attorney thus "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to," such confidential information.[4] Comment 16 to this Rule further specifies that these reasonable efforts should safeguard against (1) inadvertent or unauthorized disclo-

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sure by the attorney or other persons participating in the representation or otherwise subject to the attorney's supervision, and (2) unauthorized access by third parties.[5] The attorney also may have to implement special security measures beyond the scope of this Rule, if required by client demands or by court orders or other laws.[6]

Notably, unauthorized disclosure or access is not in itself a Rule violation, as long as the attorney has made reasonable efforts to preserve confidentiality.[7] Comment 16 lists the following nonexclusive factors to evaluate the reasonableness of such efforts: (1) the sensitivity of the information; (2) the likelihood of disclosure without additional safeguards; (3) the cost of employing additional safeguards; (4) the difficulty of implementing these safeguards; and (5) the adverse impact of these safeguards on the lawyer's ability to represent clients (e.g., software rendered excessively difficult to use).[8]

Accordingly, attorneys working from home must consider the above factors and make reasonable efforts to ensure that any unauthorized persons, such as family members or social visitors, do not access confidential documents stored in a home office or overhear confidential communications.

Supervisory Responsibilities

Under Rule 5.1 ("Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers"), a law firm and individual lawyers with management responsibility shall make "reasonable efforts to ensure" that all attorneys in the law firm comply with the Rules, which encompass the duties of competence and confidentiality.[9] Similarly, an attorney with direct supervisory authority of another attorney shall make reasonable efforts to ensure that attorney's compliance with the Rules.[10] Further, under Rules 5.1 and 5.3 ("Lawyer's Responsibility for Conduct of Nonlawyers"), a supervisory attorney (or a managing attorney at a law firm) may be found liable for a Rule violation incurred by his or her supervisee (or an employee at the law firm), regardless of whether the supervisee is an attorney or non-attorney.[11]

Consistent with these Rules, law firms, managing partners, and supervisory attorneys must make reasonable efforts to ensure that their employees and supervisees (whether lawyers or not) who work from remote locations maintain the confidentiality of client information and communications.

Examples of Best Practices

In light of the above Rules, what specific measures of "reasonable efforts" may attorneys implement while working from remote locations? Consider the below examples of best practices recommended by the Pennsylvania Bar Association's Formal Opinion 2020-300[12] and the New York State Bar Association's Cybersecurity Alert.[13]

First, attorneys should enhance the physical and online security of their workspace by taking the following actions:

- using a Virtual Private Network (VPN) to create a private remotely-accessed digital workplace, where only authorized persons can access client data;
- avoiding public internet or free Wi-Fi susceptible to the risk of unauthorized access by hackers or malware installation; and
- securing laptops and devices with encryptions, strong passwords, multi-factor authentication, frequent software updates, firewalls, and anti-virus and -malware software programs.

[L]aw firms, managing partners, and supervisory attorneys must make reasonable efforts to ensure that their employees and supervisees (whether lawyers or not) who work from remote locations maintain the confidentiality of client information and communications.

In addition, attorneys should maintain the privacy of confidential communications that take place in their home office by engaging the following conduct:

- maintaining a dedicated private area within the home office where conferences and conversations with clients or regarding client matters are held;
- making reasonable precautions to ensure that family residents or visitors do not overhear ongoing client-related communications or have access to written correspondence;
- avoiding the installation or use of smart devices that may access and record nearby conversations (e.g., Amazon Alexa, Google voice assistant) in locations where work-related communications may take place;
- using secure video-teleconferencing technology with rigorous security protocols (e.g., password-protected meetings, targeted invitation); and
- employing methods of encryption or password protection for written electronic communications that contain particularly sensitive information or data.

Conclusion

It is increasingly important to recognize the vital institutional role law firms play in ensuring that individual lawyers comply with their professional duties in this new era of remote lawyering. Indeed, the Professional Rules require that law firms and managing partners make reasonable efforts to facilitate such compliance. They may do so by providing their employees with necessary technological assistance and trainings on remote legal representation. Further, as noted earlier, lawyers are only required to make "reasonable efforts" to comply with the Professional Rules. The "reasonableness" of certain confidentiality safeguards depends on balancing factors such as the actual cost or difficulty of implementing such safeguards. Firm-wide institutional support is crucial in this regard, because it would render technologically feasible—hence more "reasonable"—certain security measures (e.g., firm-wide VPN or data backup infrastructure) that would otherwise be unreasonably costly to attorneys at the individual level. But, even small firms and solo practitioners would be wise to be aware of the ethical considerations of working remotely and take steps to safeguard their clients' confidential information.

Endnotes

1. Rule 1.1(a).
2. Comment 8 to Rule 1.1.
3. Rule 1.6(a). Confidential information consists of "information gained during or relating to the representation of a client, whatever its source," that is (1) protected by the attorney-client privilege, (2) likely embarrassing or detrimental to the client if disclosed, or (3) requested to be kept confidential by the client. *Id.*
4. Rule 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b)"). Rules 1.9(c) and 1.18(b) address information protected with respect to former and prospective clients.
5. Comment 16 to Rule 1.6.
6. *Id.*
7. *Id.*
8. *Id.*
9. Rules 5.1(a) and 5.1(b)(1).
10. Rule 5.1(b)(2).
11. Rules 5.1(d) and 5.3(b).
12. *See Ethical Obligations for Lawyers Working Remotely*, Pennsylvania Bar Association Committee on Legal ethics and Professional Responsibility Formal Opinion 2020-300 (Apr. 10, 2020).
13. *See Cybersecurity Alert: Tips for Working Securely While Working Remotely*, Technology and the Legal Profession Committee of the New York State Bar Association (Mar. 12, 2020).

Why Has the National Mood Turned So Nasty and Is There a Remedy? The Economic Theory of Interdependence May Provide an Answer and Judicial Restraint May Be the Key

By Hon. Charles E. Ramos (Ret.)

In his book *The Economic Consequences of the Peace*,[1] published at the end of World War I, the noted economist John Maynard Keynes argued to the victorious powers that they should refrain from punishing Germany. His rationale was that the only way to guarantee that another war would not follow would be to foster trade and economic cooperation between the previously warring powers in order to achieve a state of economic interdependence between them.[2] His reasoning was that as nations traded with each other, they had a greater interest in building a mutually profitable relationship that arises from trade.[3]

Keynes believed that economic power was at least as formidable as military power, but that it was a force for peace which unlike an army, paid for itself.[4] In the simplest of terms, Keynes argued that if Germany's principal trading partner after World War I was France, killing French citizens in a subsequent war would be understood as being very bad for business.[5] Hence, a powerful motivation for peaceful relations would be the result of economic interdependence.[6]

We know that Keynes' theory was largely ignored by world leaders. World War II followed in predictable due course with almost exactly the same participants as World War I. That mistake resulted in the death of 85 million people.[7]

Having learned a painful lesson from history, the Marshall Plan,[8] which was put in place at the end of the Second World War, applied the reasoning of Keynes. The United States assisted in the rebuilding of Western Europe as a single commercial enterprise with the warring parties in a state of economic interdependence. This has largely resulted in 75 years of relative peace in Western Europe, from 1945 until today. Such a period of sustained peaceful cooperation is unprecedented and difficult to find elsewhere in history.

Keynes's vision of interdependence has become relevant yet again, but not the economic interdependence that arises out of trade. Rather it is relevant in the form of political interdependence arising out of compromise. Of course, today we do not face the prospect of war in Europe but we are experiencing a level of domestic struggle that threatens American democracy more than any military adversary ever did.

Hon. Charles E. Ramos

We are at risk of becoming tribal. We are losing a united sense of purpose which has manifested itself in, among other things, a lack of civility in our public discourse on nearly every social issue. Our political leaders treat one another as enemies rather than as colleagues. No one on either side of the political divide gives an inch when we no longer appear to share common interests. The polarization in Congress is leading us into this new national mood.

This breakdown of our national mood has been blamed on individual politicians and their political parties. That is the blame-game that is typical of American politics. But what is happening is more fundamental. We feel we do not need each other and much of the cause is institutional.

We, as members of the Bar, need to consider that one of the contributing, if not principal, causes of this breakdown may be our own judicial system, right up to the Supreme Court of the United States.

Without intending to do so, our modern judiciary may be undermining many of the opportunities for political compromise that used to typify politics. Republicans no longer feel they need support from Democrats and vice versa. Consider for a moment a hot button issue such as reproductive rights. In *Roe v. Wade*, the U.S. Supreme

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Court recognized that although the Constitution does not explicitly mention any right of privacy, the Court held that reproductive rights are founded in the Fourteenth Amendment's concept of personal liberty, and encompasses a woman's decision whether or not to terminate her pregnancy.[9]

The late Hon. Ruth Bader Ginsburg herself was critical of the leap that *Roe v. Wade* represented, and publicly opined that the decision "seemed to have stopped the momentum on the side of change."[10] She remarked that she would have preferred that abortion rights be secured more gradually, in a process that included the legislatures and the courts.[11] She was also troubled by the fact that the focus in *Roe v. Wade* was on the right to privacy, rather than on women's rights.[12]

The consequences of this lack of political interdependence is the creation of a culture that indeed must be "canceled."

Of course, there are issues that demand judicial determination. However, take the issue of the right of women to vote, which was ultimately resolved in the political arena. Both women and men were elevated by amending the Constitution because we emerged more united as a nation. The true marker of political interdependence is a sense of a shared benefit that arises from working together.

When *Roe v. Wade* and similarly divisive issues are decided by the courts, that erodes the need to find common purpose. Instead, these opportunities are struck aside and the public concludes that national policy is set by a majority of the U.S. Supreme Court. Notwithstanding the fact that most of us do not quarrel with the determination in *Roe v. Wade*, the obvious loss we suffer as a nation is the erosion of the political process.

The true marker of political interdependence is a sense of a shared benefit that arises from working together.

Putting aside those who favor or oppose a woman's right to choose, one needs to concede that judicial resolution of this issue came at a steep political cost, namely, the loss of the societal benefit that arises out of mediating a political compromise on such an issue, and a missed opportunity to reach a political solution, difficult and time consuming as it might have been. Particularly after *Roe v. Wade*, there appears to be a limited need to reach compromise on key issues that could have promoted a sense of shared purpose, civility and even friendship among the members of Congress. After *Roe v. Wade*, the right to an abortion has become a political issue focused on a physician's right to perform the procedure rather than about women's right to choose.

Multiply the effect of the judicial resolution of *Roe v. Wade* by the number of controversial issues determined by the courts over the years and you have a nation increasingly ruled by judicial fiat rather than the democratic process. Simultaneously with the erosion of this process is the rise of social media and the growing reliance upon such platforms as primary news sources. On social media, anyone can post their ideas and everyone is entitled to their own version of the facts.

Why should politicians compromise with members of the opposition when a lawsuit will settle the issue? No need for members of Congress to work with each other . . . just vilify. If members of Congress are unable to compromise, why should the people? If we also cannot agree upon what is true, we have completely lost the sense that we are politically interdependent and a unified country.

The judiciary is the only branch of government that retains a modicum of respect and esteem from broad swaths of America. Many trust only the judicial branch to be a (mostly) fair arbiter of controversies and have little faith in either of the other two branches of government. It is sad to note that many would rather rely on an activist court than on "the best Congress money can buy."

The members of Congress must again come to the realization that they need to deal with one another to reach consensus in order to achieve anything resembling progress. But it is clear that Congress needs help. Only the judiciary can supply what is needed by being far more circumspect with regard to the issues chosen for determination.

Some advocates for social justice may not agree with this call for judicial restraint. The commonly held belief is that activist judges tend to be liberal, so social justice will prevail in the courts. Putting aside that the judicial branch of government is the most undemocratic of the three branches, those who disagree should consider that the Supreme Court has now become, in President Trump's term, conservative by a count of six to three. What if even only five of the seven justices decide to be activists for "right-wing" causes? Activism in the law is a sword that can cut both ways.

The best solution is more of the judicial restraint which many in the judiciary already practice every day. Judges at all levels have resisted the temptation to impose whatever their notion of justice is and have referred matters for legislative action unless there exists in law or the Constitution a clear mandate to determine that dispute. Notwithstanding the fact that cases dealing with issues such as reproductive rights are rare, the impact of their judicial determination has been a factor in destroying our national unity. Every time issues like these are decided by the judiciary, the opportunity for political compromise is lost, as is the realization of political interdependence.

There is an ominous story I wish to share out of my own wife's family. She had a great-great-grandfather who was born in England but had emigrated to Ohio as a young man. He was a builder and was sent to Louisiana to work on a project in the late 1840s. He was an abolitionist and unfortunately for him, an outspoken one. For his views against slavery that he voiced while residing in New Orleans, he was murdered, and his body was sent back to Ohio in a box. He might be considered one of the earlier casualties in what soon after became the Civil War.

Could history be in the process of repeating itself, yet again? Could this division we are in the midst of lead to a much larger violent conflict?

It is sad that some in America seem to want it.

It is time for the judiciary, at every level, to resist the temptation to legislate and to thereby force Congress to engage in the game of tug of war that breeds compromise, civility and a renewed appreciation of the wondrous document that our Constitution is.

Endnotes

1. 1919, Keynes, John M., *The Economic Consequences of the Peace*, London: Macmillian & Co., Limited 7th ed, page 211-212.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. "International Programs—Historical Estimates of World Population—U.S. Census Bureau," https://www.census.gov/popclock/.
8. *The Marshall Plan—Summary and Significance*, Encyclopedia Britannica, Hogan (1987), https://www.britannica.com/event/Marshall-Plan.
9. *Roe v. Wade,* 410 U.S. 113, 152-153 (1973).
10. *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, M. Heagney (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit.
11. *Id.*
12. *Id.*

The Parameters of Electronic Communication Discovery by Foreign Litigants

By Carrie H. Cohen and Chan-young Yang

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Global use of U.S.-based electronic communication service providers (ECSPs) has proliferated[1] such that many foreign disputes necessarily involve communications sent or received through, for example, Gmail, Yahoo, and Hotmail. The ability to obtain discovery from these service providers in aid of foreign litigation thus has become a hotly litigated issue. This article first will discuss the legal framework of judicial assistance to foreign proceedings under 28 U.S.C. § 1782 ("Section 1782") and then explore how Section 1782 discovery from ECSPs may implicate privacy concerns under the Stored Communications Act (SCA)[2] and the First Amendment right to anonymous speech.

The Legal Framework of Section 1782 Discovery

Under Section 1782, a district court has discretion to order a person (individual or entity) within its jurisdiction to produce a testimony, statement, document, or other thing "for use" in foreign proceedings.[3] The federal statute thereby enables foreign litigants to gather evidence through the U.S. federal discovery system—the scope of which is "far broader than in most (maybe all) foreign countries."[4] Section 1782 has "twin aims" of furthering international comity: (1) providing efficient means of discovery to international litigants in federal courts, and (2) encouraging foreign countries by way of example to reciprocate such assistance to U.S. courts.[5] Foreign litigants frequently have sought Section 1782 discovery for use in various foreign fora, such as Canada, Australia, England, Japan, China, South Korea, Cambodia, the Netherlands, and Switzerland.

Upon a foreign litigant's Section 1782 application,[6] courts consider three statutory prerequisites and four discretionary factors. Section 1782 provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." The statute thus has the following three statutory prerequisites that district courts first evaluate (1) whether the person from whom discovery is sought "resides or is found" in the district; (2) whether the discovery is "for use" in the foreign proceeding; and (3) whether the application is made by the foreign tribunal or any "interested person."[7]

Once the statutory requirements are met, courts then may consider four discretionary factors, also known as the *Intel* factors: (1) whether the person from whom discovery is sought is "a participant in the foreign proceeding" or the evidence sought is "unobtainable absent" Section 1782 aid; (2) the nature of the foreign tribunal and proceedings, and the "receptivity" of the foreign government, court, or agency to Section 1782 assistance; (3) whether the Section 1782 request conceals an attempt to "circumvent foreign proof-gathering restrictions" or other foreign or U.S. policies; and (4) whether the subpoena contains "unduly intrusive or burdensome requests."[8]

Importantly, courts look to the Federal Rules of Civil Procedure to guide their Section 1782 analysis: "To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."[9] For instance, the Second Circuit recently held that the "resides or is found" language should be broadly construed to reach the full limits of personal jurisdiction consistent with due process, pursu-

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ant to the Federal Rules of Civil Procedure.[10] The same court also echoed an earlier Eleventh Circuit ruling that Section 1782 discovery may reach evidence located overseas, because Rule 45 of the Federal Rules of Civil Procedure authorizes extraterritorial discovery as long as the information sought is within the subpoenaed parties' possession, custody, or control.[11]

Likewise, the "for use in a foreign tribunal" requirement mirrors the relevance requirement of Rule 26(b)(1) of the Federal Rules of Civil Procedure. That is, the evidence sought need not be admissible to be discoverable under Section 1782,[12] but the applicant still needs to show that it is "relevant" to the claims or defenses in the foreign proceeding.[13] This relevance requirement dovetails with the fourth *Intel* factor, or whether the subpoena contains "unduly intrusive or burdensome requests." Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery must be relevant and "proportional to the needs of the case," considering the importance of the issues at stake, the importance of the discovery in resolving them, and "whether the burden or expense of the proposed discovery outweighs its likely benefit."[14] Section 1782 requests thus are unduly intrusive and burdensome, if overbroad or fishing for irrelevant information.[15]

Several courts have invalidated Section 1782 subpoenas on ECSPs on the grounds of irrelevancy and over-breadth. In *Rainsy v. Facebook Inc.*, a court in the Northern District of California denied a Section 1782 application for third-party discovery from Facebook for use in defamation proceedings in Cambodia.[16] The court denied the application in part because several requests (e.g., Facebook users' advertising payment information, communications with Facebook, communications on unrelated topics) were unrelated to the defamation actions in Cambodia and included no temporal or topical limitations.[17] On similar grounds, another court in the same district granted anonymous non-party movants' motion to quash a Section 1782 subpoena served on Google, which sought their personal Google account information in connection with defamation claims in Canada.[18] The court engaged in a Rule 26(b) analysis, and quashed the subpoena because the applicant had failed to show any obvious connection between the subpoenaed Google accounts and the allegedly defamatory statements at issue in the Canadian litigation.[19]

The SCA and First Amendment Implications of Section 1782 Subpoenas on ECSPs

When ECSPs are involved, Section 1782 subpoenas may require additional considerations other than the above seven factors. Subpoenas on ECSPs seeking contents of electronic communications may implicate service users' right of privacy under the SCA. Subpoenas seeking to identify authors of online anonymous speech may also trigger scrutiny under the First Amendment.

The SCA Protection of Contents of Communications

Civil subpoenas on ECSPs are subject to the SCA, or Title II of the Electronic Communications Privacy Act (ECPA) of 1986, which prohibits ECSPs from knowingly disclosing contents of electronically stored communications. The SCA mandates that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[20] Congress legislated the SCA in 1986, in response to potential privacy concerns left unaddressed by the Fourth Amendment in the advent of the Internet.[21] The SCA applies to Section 1782 subpoenas, including ones seeking discovery from foreign citizens.[22]

The key question is whether a given subpoena would force an ECSP to disclose the "contents of a communication" in violation of the SCA. The term "contents" is defined as "any information concerning the substance, purport, or meaning."[23] The Ninth Circuit held that the term refers to the "intended message conveyed" *by* the communication, and excludes the automatically generated "record information" *about* the communication (e.g., subscriber number or identity, names, addresses).[24] The same court, however, also agreed with a First Circuit decision that subscription information may constitute the contents of the subscribers' communications *to* ECSPs, where the subscribers "enter[ ] their personal [ ] information into a form provided by a website."[25] Likewise, the court acknowledged, Google search URLs may reveal the contents of the searchers' communications *to* Google (e.g., choice of search engine, search terms).[26]

Two rulings from the Northern District of California further illuminate on the scope of the SCA's reach.[27] First, in *Optiver v. Tibra*, the court partially granted the foreign defendant's motion to quash a Section 1782 subpoena on Google, which sought information about Gmail communications for use in a commercial litigation in Australia.[28] The court allowed discovery of purely non-content metadata, but it quashed the requests seeking (1) subject lines of communications and (2) information about communications narrowed by specific search terms. In so doing, the court held that the SCA forbade discovery of communicative contents "no matter how insignificant."[29] Second, in the aforementioned case of *Rainsy*, the court ruled that the SCA prohibited Section 1782 discovery from Facebook of (1) communications between and among certain users and (2) identities of users who "liked" a certain Facebook page.[30] Notably, the court reasoned that "liking" is a form of speech that communicates the substantive message of approval, and the speaker's identity is an "important component" of this message.[31]

The First Amendment Protection of Online Anonymous Speech

Where a Section 1782 subpoena on an ECSP specifically seeks identifying information of anonymous speakers (akin to Facebook "likers" in *Rainsy*), courts also may evaluate the subpoena's "potential chilling effect" on First Amendment rights under the fourth *Intel* factor.[32]

It is well established that the First Amendment protects anonymous speech.[33] In the Ninth Circuit, online anonymous speech "stands on the same footing" as other traditional forms of anonymous speech.[34] Anonymous speech is subject to varying degrees of protection, depending on whether it is political, religious, or literary speech (highest), commercial speech (intermediate), or unprotected speech such as fighting words, obscenity, and defamation.[35] Courts have devised a variety of First Amendment standards to assess whether the requested discovery merits unmasking an anonymous speaker's identity. Several of these standards require a showing that the underlying claim would survive a motion to dismiss; a *prima facie* showing of the underlying claim; or a showing that the claim would survive a hypothetical motion for summary judgment.[36]

Courts have devised a variety of First Amendment standards to assess whether the requested discovery merits unmasking an anonymous speaker's identity.

In evaluating the First Amendment implications of Section 1782 discovery, courts in the Northern District of California have routinely applied two standards known as the *Jommi* test and the *Highfields* test. Under the *Jommi* standard, courts evaluate whether there is "good cause" to permit identification of an anonymous speaker under Rule 26(d) of the Federal Rules of Civil Procedure.[37] Under the *Jommi* test, courts consider whether the Section 1782 applicant (1) identifies "a real person subject to suit" with sufficient specificity; (2) identifies "all previous steps" taken to identify this party; (3) demonstrates that the foreign action can "withstand a motion to dismiss"; and (4) shows that the discovery is likely to reveal identifying information.[38] The third "motion to dismiss" factor is of central importance, as it invites substantive albeit preliminary analysis of the anonymous statements at issue and the governing law.[39]

Under the *Highfields* test, courts evaluate the potential chilling effect of Section 1782 discovery on the First Amendment right to anonymous *commercial* speech.[40] To satisfy this test, the plaintiff-applicant must show the following: (1) "a real evidentiary basis" for believing that the defendant has engaged in wrongful conduct that has caused real harm to the plaintiff; and (2) that the balance of each party's "competing interests" weighs in favor of discovery.[41] For the first prong, the applicant must go beyond mere pleadings and allegations, and must adduce "*competent evidence* [that,] if unrebutted, tend[s] to support a finding of *each* fact that is essential to a given cause of action."[42] "[I]f, but only if," the applicant makes this evidentiary showing does the court proceed to assess the balance of harms to each party that would be caused by the discovery.[43]

The Northern District of California case in *In re Yasuda* is illustrative. The court denied, on reconsideration, Twitter's motion to quash a Section 1782 subpoena seeking the anonymous defendant's identity for use in defamation proceedings in Japan.[44] In the prior order granting Twitter's motion, the court initially held the *Jommi* test unsatisfied because the applicant Yasuda had provided no support that his defamation claim could withstand a motion to dismiss under Japanese law.[45] The *Highfields* test also had not been satisfied because the anonymous tweets at issue were found legitimate commercial speech, the First Amendment implications of which would outweigh any harm to Yasuda.[46] On reconsideration, however, the court reversed course upon a newly-submitted Tokyo district court order finding that the anonymous statements were defamatory under Japanese law. The court found that this foreign judicial order not only satisfied the "motion to dismiss" threshold, but also demonstrated that the tweets were in fact defamatory speech, in which the anonymous defendant had no protectable First Amendment interest to outweigh the now-proven real harm to Yasuda.[47]

Conclusion

Section 1782 can be a broad discovery tool for foreign litigants, especially because it can provide access to electronic communications and information from U.S.-based ECSPs. Section 1782 discovery from ECSPs, however, has well-defined and multi-layered boundaries. Litigants seeking to obtain Section 1782 discovery or defend against subpoenas for such discovery must become familiar with the articulated standards for such discovery, and be guided by the limiting principles of the Federal Rules of Civil Procedure, the SCA, and the First Amendment.

Endnotes

1. Google alone accounted for 1.5 billion global email users as of late 2019. *Google's Rocky Path to Email Donation*, CNBC (Oct. 26, 2019), https://www.cnbc.com/2019/10/26/gmail-dominates-consumer-email-with-1point5-billion-users.html?.
2. 18 U.S.C. §§ 2701, *et seq.*
3. 28 U.S.C. § 1782(a).
4. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011).
5. *Mees v. Buiter*, 793 F.3d 291, 297–98 (2d Cir. 2015) (quotation omitted).
6. Applicants may submit an *ex parte* application for Section 1782 subpoenas. The subpoenaed parties (or potential intervenors) then can raise objections or bring motions to quash the subpoenas. *In re Frontier Co., Ltd.*, No. 19-MC-80184-LB, 2019 WL 3345348, at *2 (N.D. Cal. July 25, 2019) (citation omitted).
7. 28 U.S.C. § 1782(a).
8. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

   For the first factor, the dispositive question is whether discovery is unobtainable but for Section 1782 aid, rather than who provides such discovery. *In re Ex Parte App. of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039-40 (N.D. Cal. 2016). The second factor generally does not weigh against discovery, unless the foreign tribunal or government has expressed unwillingness to receive Section 1782 assistance. *See, e.g., id.* at 1040-41 (finding this factor weighing against discovery where the foreign agency filed an amicus brief stating no need or use for requested discovery). The third factor also tends to favor discovery where there is "nothing to suggest" otherwise. *In re Google Inc.*, No. 14-MC-80333-DMR, 2014 WL 7146994, at *3 (N.D. Cal. Dec. 15, 2014).
9. 28 U.S.C. § 1782(a).
10. *In re del Valle Ruiz*, 939 F.3d 520, 527-28 (2d Cir. 2019).
11. *Id.* at 533 (citing *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016)).
12. It also need not be admissible in the *foreign* proceeding. *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 77, 82 (2d Cir. 2012).
13. *Rainsy v. Facebook Inc.*, 311 F. Supp. 3d 1101, 1110 (N.D. Cal. 2018).
14. *In re Ex Parte App. of Qualcomm Inc.*, 162 F. Supp. 3d at 1043 (quoting Fed. R. Civ. P. 26(b)(1)).
15. *Id.*
16. 311 F. Supp. 3d at 1116.
17. *Id.* at 1113.
18. Order Granting Mot. to Quash at 13, *In re App. of West Face Capital Inc.*, No. 3:19-mc-80260-LB, (N.D. Cal. Mar. 22, 2020), ECF No. 33.
19. *Id.* at 12 (finding that "under Rule 26(b), the discovery is not obviously relevant to a claim or defense, proportional, or important").
20. 18 U.S.C. § 2702(a)(1).
21. *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.* ("*Optiver v. Tibra*"), No. C 12-80242-EJD (PSG), 2013 WL 256771, at *1 (N.D. Cal. Jan. 23, 2013) (quotation omitted).
22. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 727-28 (9th Cir. 2011).
23. 18 U.S.C § 2510(8).
24. *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106-1107 (9th Cir. 2014); *see also, e.g., Obodai v. Indeed, Inc.*, No. 13-80027-MISC-EMC, 2013 WL 1191267, at *3 (N.D. Cal. Mar. 21, 2013) (finding that subscriber information and IP address data of Google accounts are non-content).
25. *Id.* at 1107 (citing *In re Pharmatrak, Inc.*, 329 F.3d 9, 15, 18-19 (1st Cir. 2003)).
26. *Id.* at 1108 (citation omitted).
27. Because prominent ECSPs, such as Google, Yahoo, Facebook, and Twitter, are headquartered in the Northern District of California, this article necessarily largely cites case law from this district and the Ninth Circuit.
28. 2013 WL 256771, at *1.
29. *Id.* at *2.
30. 311 F. Supp. 3d at 1114-15.
31. *Id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)). *Gilleo* is a freedom-of-speech case, and the *Rainsy* court's reliance thereon suggests potentially relevant interactions between the SCA and the First Amendment right to anonymous speech. *Rainsy*, however, did not entertain this possibility.
32. *In re PGS Home Co. Ltd.*, No. 19-MC-80139-JCS, 2019 WL 6311407, at *3 (N.D. Cal. Nov. 25, 2019).
33. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).
34. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).
35. *Id.* at 1773, 1777; *In re Yasuda*, No. 19-MC-80156-TSH, 2020 WL 759404, at *6 (N.D. Cal. Feb. 14, 2020) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002)).
36. *In re Anonymous Online Speakers*, 661 F.3d at 1175-76.
37. Some courts have framed the *Jommi* test as a Rule 26(d) (rather than First Amendment) standard by which courts may authorize early discovery of unknown parties. *See, e.g., In re Hoteles City Express*, No. 18-MC-80112-JSC, 2018 WL 3417551, at *3 (N.D. Cal. July 13, 2018) (citations omitted); *but see In re Yasuda*, 2020 WL 759404, at *5 (noting that "the First Amendment protects the [unknown] speaker from being unmasked" unless the *Jommi* test is satisfied).
38. *In re Ex Parte App. of Jommi*, No. C 13-80212-CRB (EDL), 2013 WL 6058201, at *4 (N.D. Cal. Nov. 15, 2013) (quoting *Columbia Ins. v. Seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999)).
39. *See, e.g., In re Hoteles City Express*, 2018 WL 3417551, at *3 (denying a Section 1782 application because of insufficient information regarding the statements at issue and the governing law in foreign defamation proceedings).
40. *Music Grp. Macao Commer. Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 983 (N.D. Cal. 2015).
41. *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005).
42. *Id.*
43. *Id.* at 976.
44. *In re Yasuda*, 2020 WL 759404, at *1; *see also In re Frontier Co., Ltd.*, 2019 WL 3345348, at *3, *5 (granting a Section 1782 application for discovery from Cloudflare for use in Japanese defamation litigation because the anonymous statements at issue were defamatory *per se*); *but see In re PGS Home Co. Ltd.*, 2019 WL 6311407, at *1, *6 (granting Twitter's motion to quash a Section 1782 subpoena on Twitter for use in Japanese defamation litigation because the anonymous statements at issue were legitimate commercial speech protected by the First Amendment).
45. *In re Yasuda*, No. 19-MC-80156-TSH, 2019 WL 7020211, at *4 (N.D. Cal. Dec. 20, 2019), *on reconsideration*, 2020 WL 759404 (N.D. Cal. Feb. 14, 2020).
46. *Id.* at *6.
47. *In re Yasuda*, 2020 WL 759404, at *6.

(Un)specific Personal Jurisdiction

By Ryan Hersh

New York's long-arm statute and constitutional due-process principles together limit a New York court's ability to exercise so-called "personal jurisdiction" over an out-of-state corporate defendant.[1] Designed to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum,"[2] United States Supreme Court cases teach that due-process principles permit the court to exercise personal jurisdiction over the manufacturer in two ways: First, it may exercise "general personal jurisdiction" over the manufacturer "essentially at home" in New York, no matter a plaintiff's claims.[3]

Second, the court may exercise so-called "*specific* personal jurisdiction" over the manufacturer where "the *suit* . . . aris[es] out of or relat[es] to the defendant's contacts with" New York.[4] At first blush, whether it does might seem a rather simple inquiry. Compared, however, with the question whether the manufacturer is "essentially at home"—simply determining, in most cases, whether the manufacturer is incorporated or maintains a principal place of business—in New York, the difficulties surrounding the inquiry become clear.

In those instances, the court must consider whether exercising specific personal jurisdiction comports with constitutional due-process principles. To do so, it asks whether the manufacturer has "certain minimum contacts" with New York so "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[5] And the manufacturer, in turn, generally has "certain minimum contacts" with New York when "it purposefully avails itself of the privilege of conducting activities" with New York.[6] A plaintiff (or their counsel), however, can virtually *always* develop an argument to permit a court to infer that the manufacturer has *a* contact with New York: a nationwide marketing campaign directed at consumers in New York, an online website accessible from New York, or a nationwide distribution system through which their product ultimately finds its way into New York. Whatever the contact, however, it *alone* is virtually irrelevant, as the dispositive question is whether the manufacturer purposefully initiated the contact—the marketing campaign, the online website, or the distribution system—with New York.

But whether it did isn't always clear. Early decisions from Supreme Court, Appellate Division created uncertainty, but a Court of Appeals opinion from last year addressing the issue should provide some comfort to an out-of-state product manufacturer defending product liability claims in a New York court. Over a strong dissent, the Court of Appeals held that an Ohio retailer who sold a product to a third party who, in turn, resold the product to a New York resident did not purposefully direct its products at New York residents, despite the Ohio retailer's supposed knowledge of the third party's intention to resell the product in New York.

Two companion cases before the Court, both involving a plaintiff injured in a Ford Motor Company car manufactured out of state, have the potential to change all this. The two cases share similar and simple facts: A plaintiff injured in a Ford car manufactured and first sold out of state brought product liability claims against Ford in state court.[7] Ford unsuccessfully moved to dismiss, arguing that the plaintiffs' claims did not arise out of or relate to Ford's in-state activities because it manufactured and first sold the car out of state.[8] The courts disagreed, rejected Ford's motions, and held they could exercise personal jurisdiction over Ford because it sold the same model cars to in-state dealerships, collected in-state data on those cars, and advertised to in-state residents.[9] The states' highest courts affirmed; Ford petitioned the Court to grant certiorari, and it did.[10]

The Court should reverse the decisions below, hold that a court may exercise specific personal jurisdiction over an out-of-state manufacturer *only* where its contact with New York caused a plaintiff's claims, and provide much-needed guidance to lower courts addressing due process considerations in challenges to *specific* personal jurisdiction.

Background

Seventy-five years ago, the Court issued an opinion addressing whether a Washington court had power to decide whether a Delaware-incorporated, Missouri-headquartered footwear manufacturer with a Washington salesforce had to pay into Washington's unemployment-compensation fund.[11] Finding it did, the Court reasoned that the manufacturers' 13-person, Washington-based salesforce "establish[ed] sufficient contacts or ties with [Washington] to make it reasonable . . . according to our traditional [notions] of fair play and substantial justice" to exercise personal jurisdiction over the manufacturer.[12] In doing so, the Court announced an early version of the modern-day framework courts use when analyzing personal-jurisdiction issues:

> [D]ue process requires only that in order to subject a defendant to a judgment . . ., if he not be present within the territory of the forum, he have *certain minimum con-*

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> *tacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice*.[13]

Early Views

In the years immediately following, many state legislatures, including the New York legislature, drafted and enacted personal-jurisdiction statutes.[14] New York Civil Practice Law and Rule 301 incorporated the four historical bases of personal jurisdiction: Based on a manufacturer's physical presence, domicile, consent, or principal place of business, it permitted a "court [to] exercise [personal] jurisdiction over persons, property, or status as might have been exercised heretofore."[15] And Rule 302, drawing upon the Court's precedents, permitted a court to exercise personal jurisdiction over a manufacturer where a plaintiff's claims "aris[e] from" the manufacturer's acts enumerated in the statute, including "transact[ing] any business within" New York.[16]

It said nothing about constitutional due process considerations, causing courts to struggle to consider on a case-by-case basis whether due process considerations permitted them to exercise specific personal jurisdiction over a manufacturer that manufactured a product outside New York, sold the product outside New York, but faced product liability claims arising from the product's use in New York.

Take, for example, a First Department product-liability opinion issued the year after Rule 302 became law. After a freak hardware accident left a construction worker dead, the worker's estate representatives brought product liability claims against the Michigan-based hardware manufacturer.[17] Despite recognizing the manufacturer "did not send its product directly into [New York]," the First Department held the "constitutional limitations of due process satisfied" because of the manufacturer's other actions: The manufacturer sold "a number of identical [hardware] items" to "a New Jersey manufacturer" that ultimately included the manufacturer's products in its own products used in New York.[18]

Addressing fairly similar material facts, the Second Department 18 years later found personal jurisdiction improper over a Rhode Island-based hardware manufacturer.[19] There, a plaintiff injured in New York brought product liability claims against the manufacturer.[20] Like the Michigan-based manufacturer, the Rhode Island-based manufacturer did "not ship any of its products [directly] into New York"; instead it too sold its products to a third-party manufacturer that, ultimately, sold its products to New York.[21]

Current State of the Law

A court in New York today engages in a two-part analysis in determining whether exercising personal jurisdiction over an out-of-state manufacturer comports with due process principles: First, it "must have 'certain minimum contacts with [New York],'" and second, the "suit [must] not offend traditional notions of fair play and substantial justice.'"[22]

The Court of Appeals last year clarified this analysis in a case involving an Ohio-based gun retailer who sold a gun in Ohio that, through a series of third-party transactions, ultimately found its way to New York, landed in a gang member's hands, and became the vehicle for carrying out a deadly shooting:

> [A] New York court may not exercise personal jurisdiction over [an out-of-state manufacturer] unless two requirements are satisfied: the action is permissible under the long-arm statute and the exercise of jurisdiction comports with due process. . . . If either the statutory or constitutional prerequisite is lacking, the action may not proceed. Due process requires that a [manufacturer] have certain minimum contacts with the forum and that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . . [T]he mere likelihood that a product will find its way into the forum cannot establish the requisite connection between [the manufacturer] and [New York] such that the [manufacturer] should reasonably anticipate being haled into court there.[23]

Applying this to the facts before it, the court found personal jurisdiction improper over the Ohio gun retailer because he did not purposefully direct his gun to New York: True, the "firearms sold . . . in Ohio eventually reached New York," but the retailer at no point "initiated a business relationship with a New York-based distributor . . . to sell products in New York."[24]

A strong dissent would have come down the other way.[25] In its view, the retailer knew the third party "intended to re-market" the gun in New York, "effectively acted as a distributor" of the retailer's guns in New York, and therefore "purposefully direct[ed] his activities at [New York] residents."[26]

Its logic is flawed. First, the dissent's conclusion equates knowledge with purpose; it assumes that a retailer who knows a third party intends to resell its product in New York purposefully directs its product to New York. Second, the dissent imputes onto the retailer the third party's intent to resell the retailer's product to New York residents. Doing both seems highly questionable, considering the dissent should ask "what is reasonable" given the retailer's contacts with New York.[27]

The Ford Motor Co. Cases

Despite the strong dissent, the Court of Appeals' opinion should provide some comfort to an out-of-state

product manufacturer defending product liability claims in New York. This, however, could be short lived pending the outcome of two companion cases pending before the Court.

The Facts

In 2015, Markkaya Jean Gullett ("Gullett") and Adam Bandemer ("Bandemer") were each involved in an automobile accident involving a Ford car.[28] Gullett, driving a Ford Explorer on a Montana highway, lost her life after the Explorer lost stability, rolled into an off-road ditch, and flipped upside down.[29] Bandemer, a passenger in a Crown Victoria on a Minnesota road, suffered a brain injury after the Crown Victoria rear ended a snow plow, ended up in an off-road ditch, and failed to deploy its airbags.[30] Gullett and Bandemer's estate's representative (the "Plaintiffs") brought product liability claims against Ford in Montana and Minnesota, respectively.[31]

Significantly, however, neither car was designed, manufactured, or sold in the states where the accidents occurred. Ford designed the Crown Victoria in Michigan, assembled it in Canada, and sold to a Ford dealership in North Dakota.[32] It designed the Explorer in 1996, assembled it in Kentucky, and sold it to a Ford dealership in Washington.[33] Both cars ultimately arrived years later in Montana and Minnesota, respectively.[34]

On these bases, Ford moved to dismiss both cases for lack of personal jurisdiction.[35]

Ford's Motions to Dismiss

In support of its motions, Ford argued that it had done nothing in either state giving rise to the claims against it.[36] After all, it explained, its conduct with respect to the cars at issue occurred outside the states.[37] Therefore, it concluded, the Plaintiffs' claims categorically neither arose out of nor related to Ford's in-state activities.[38]

Interpreting broadly the Court's specific personal jurisdiction cases, both courts found that Ford's in-state advertisements, sales, and services related to the Plaintiffs' claims, held jurisdiction proper, and accordingly denied the motions.[39] The states' highest courts affirmed, Ford petitioned the Court to grant certiorari, and it did.[40]

Analysis

Both courts reached the incorrect result for several reasons. First, their decisions fashioned new bright-line rules effectively permitting a court to exercise personal jurisdiction over an out-of-state manufacturer virtually whenever its product(s) ultimately find their way into the state. This makes little practical or legal sense. For one thing, they assume a manufacturer intends to benefit from the laws of any state because the manufacturer markets or advertises in every state. This effectively faults the manufacturer from attempting to grow its business, which is particularly problematic nowadays with online marketing and advertising designed to tap into markets in every state. For another thing, their decisions conflate general with specific personal jurisdiction, flying in the face of the Court's precedents distinguishing the two:

> A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State. Specific jurisdiction, on the other hand, depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. . . . In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.[41]

Second, both courts' decisions promote a plaintiff to forum shop when choosing where to assert product liability claims. If courts do not require that a manufacturer's in-state activities caused a plaintiff's product liability claims, then they implicitly encourage plaintiff to bring suit in only the most plaintiff-friendly jurisdictions. This negatively impacts not only the manufacturer, but also the court system: It fails to provide the manufacturer from acting "to alleviate the risk of burdensome litigation;" and it exposes the already-overburdened court system to high volumes of litigation.[42]

This need not be the case, and the solution is simple. The Court should hold that a court may exercise specific personal jurisdiction over an out-of-state manufacturer where its contact with the state *caused* the plaintiff's claims. Doing so will reduce the frequency with which New York courts issue decisions, like those issued in the *Ford Motor Co.* cases, prolonging existing uncertainty in this area of law.

Conclusion

The Court 75 years ago established an early version of the framework courts today use to decide personal-jurisdiction issues. Neither its opinion then nor its subsequent opinions have clarified the framework, despite having issued many. Indeed, the Court four years ago failed to reach a unanimous conclusion in a seemingly straightforward personal jurisdiction case. This, in turn, has left state courts unsure how to apply the Court's framework to a case's facts. Recent New York cases illustrate this reality. Next year, the Court will again have an opportunity to clarify its personal jurisdiction framework. It should seize the opportunity.

Endnotes

1. *Williams v. Beemiller, Inc.*, 130 N.E.3d 833, 835 (2019) ("[A] New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute . . . and the exercise of jurisdiction comports with due process."); *see also* U.S. Const., amend. XIV; N.Y. C.P.L.R. 301, 302 (McKinney 2018); *Bristol-Myers Squibb Co. v. Super*. Ct., 137 S. Ct. 1773, 1779 (2017).
2. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1780.
3. *See Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014). "Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion).
4. *Bristol-Myers Squibb*, 137 S. Ct. at 1780.; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).
5. *Beemiller*, 130 N.E.3d at 835 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 320 (1945)).
6. *Id.* (quoting *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000)).
7. *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 751 (Minn. 2019); *Ford Motor Co. v. Lucero*, 443 P.3d 407, 410 (Mont. 2019).
8. *See id*.
9. *Id*.
10. *Id*.
11. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 320 (1945).
12. *Id*. (emphasis added).
13. *Id*. at 323–24.
14. M. Hutter et al., *What Happens in Vegas Stays in Vegas: Asserting a Tort Claim in New York Courts Against a Foreign Corporation Arising from a New Yorker's Out-of-State Accident Post-Daimler*, 82 Alb. L. Rev. 1139 (2019).
15. David D. Siegel & Patrick M. Connors, N.Y. Prac., ch. 18 at 165 (6th ed. 2018).
16. N.Y. C.P.L.R. 302(a)(1).
17. *Johnson v. Equit. Life Assur. Soc'y of U.S.*, 22 A.D.2d 138, 139 (1st Dep't 1964).
18. *Id.* at 140.
19. *Martinez v. Am. Standard*, 91 A.D.2d 652, 653 (1982).
20. *Id*.
21. *Id*.
22. *Rushaid v. Pictet & Cie*, 68 N.E.3d 1, 11 (2016) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 320 (1945)).
23. *Williams v. Beemiller, Inc.*, 130 N.E.3d 833, 835 (2019).
24. *Id.* at 529–30.
25. *Id.* at 555 (2019) (Fahey, J., dissenting).
26. *Id.* at 555–56, 558.
27. *LaMarca*, 95 N.Y.2d at 217.
28. *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 748 (Minn. 2019); *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 443 P.3d 407, 411 (Mont. 2019).
29. *Id.*
30. *Bandemer*, 931 N.W.2d at 749; *Montana Eight Jud. Dist. Ct.*, 443 P.3d at 411.
31. *Id*.
32. *Bandemer*, 931 N.W.2d at 749.
33. *Montana Eighth Jud. Dist. Ct.*, 443 P.3d at 411.
34. *Bandemer*, 931 N.W.2d at 750; *Montana Eighth Jud. Dist. Ct.*, 443 P.3d at 411.
35. *Id*.
36. *Id*.
37. *Bandemer*, 931 N.W.2d at 752; *Montana Eighth Jud. Dist. Ct.*, 443 P.3d at 413.
38. *Id*.
39. *Id.*
40. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 140 S.Ct. 917 (Mem) (2020) (granting writs of certiorari as to and consolidating both cases).
41. *Goodyear Dunlop Tires Ops. v. Brown*, 564 U.S. 915, 919 (2011).
42. The Court many years ago warned against issuing such decisions, observing that manufacturers deserved "clear notice" from courts on jurisdiction where they could face suit so they could "act to alleviate the risk of burdensome litigation." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A Contractor Must Request a License Before Commencing Excavation Work

By Christopher E. Vatter

The New York City Department of Buildings Code, set forth in the New York City Administrative Code Title 28[1] (BC), imposes certain safeguards and obligations upon those who undertake excavation work on properties located in New York City, including strict liability[2] for damages caused by such excavation activities.[3] In order to diminish the harshness of this rule, the BC[4] and other statutes[5] provide that an adjoining property owner "shall" afford a license to the owner or contractor who is performing excavation activities in order to allow them to protect the adjoining owner's property during excavation.[6]

The Appellate Division, Second Department, has recently clarified the interplay between BC § 3309.2 (License to Enter Adjoining Property) and BC § 3309.4 (Soil or Foundation Work Affecting Adjoining Property).[7] The Appellate Division has now held that in the absence of a request for a license, a plaintiff is no longer required to demonstrate what if any actions it took to protect and preserve its property.[8] The Appellate Division's decision makes clear that an owner or contractor who is performing excavation activities on their property must request a license from the adjoining property owner or suffer the consequences if its excavation activities damage the neighbor's property. The relevant statutes and facts are summarized below.

Relevant Statutes

BC § 3309.2 provides in pertinent part that:

> [t]he responsibility of affording any license to enter adjoining property shall rest upon the owner of the adjoining property involved . . . . Nothing in this chapter shall be construed to prohibit the owner of the property undertaking construction or demolition work from petitioning for a special proceeding pursuant to Section 881 of the *Real Property Actions and Proceedings Law*.

BC § 3309.4 provides that:

> Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license.

BC § 3309.4, quoted above, imposes strict or absolute liability upon a "person who causes" an excavation to be made.[9]

Relevant Facts

In late October 2015, one of the defendants, a contractor, was retained by the owner of real property located in Bayside, New York, to begin excavation work "to install the foundation for the underground parking garage."[10] Prior to the excavation, the defendant, architect, notified the plaintiffs, including the owner of the adjoining property, that the "General Contractor is about to start excavation on the existing vacant lot to build a new 3 story building at the address above indicated . . . . It may cause some noises and inconvenience while construction is going on."[11] The defendants did not request a license to enter onto the plaintiffs' property prior to beginning the excavation work.[12] As a result of these excavation activities, the plaintiffs' building sustained damages.[13]

After the plaintiffs' building was damaged, the parties attempted to negotiate a temporary license to provide the defendants with access to the plaintiffs' building to make temporary repairs to stabilize the building. However, a temporary license was ultimately not executed.[14]

As a result of these damages, the plaintiffs commenced an action against the defendants[15] alleging claims

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for, among other things, "a violation of BC § 3309."[16] The plaintiffs moved for summary judgment. As part of their motion for summary judgment, "[t]he plaintiffs argued, among other things, that the defendants were strictly liable under BC § 3309.4 for causing excavation work to be done that proximately caused damages to the subject premises. They contended that, despite the requirements of BC § 3309, the defendants never sought a license from the plaintiffs to enter onto the subject premises."[17] The Supreme Court granted the plaintiffs summary judgment against the defendants on all of their claims, including finding that the defendants violated BC § 3309.4.[18] The defendants appealed.[19]

The defendants "advance several grounds why, in their view, the plaintiffs were not entitled to summary judgment on the issue of liability on these causes of action. Most notably, the defendants contend that the plaintiffs, in moving for summary judgment, failed to make a *prima facie* showing that the plaintiffs provided a license to the defendants within the meaning of the section."[20]

In the event that the adjoining property owner refuses to grant a license upon request, the obligation to protect his property remains with him and not the contractor or owner performing the excavation work.

Prior to the Appellate Division's decision, there was "case law supporting the proposition that a plaintiff moving for summary judgment on the issue of liability on a cause of action alleging a violation of BC § 3309.4 must show, *prima facie*, that the plaintiff granted the requisite license for the defendant to access, inspect, and protect its property."[21]

In the event that the adjoining property owner refuses to grant a license upon request, the obligation to protect his property remains with him and not the contractor or owner performing the excavation work. In particular, the Appellate Division with respect to this burden shifting explained that:

> To enable a party who causes an excavation to be made to comply with its obligation to protect adjoining property, BC § 3309.4 imposes on the adjoining property owner the responsibility of affording a license to enter, inspect, and perform such work on the adjoining property as is necessary to protect it during the work. Where a license, though duly requested, is refused or is not provided by the adjoining property owner, the obligation to protect the adjacent property devolves to the adjoining property owner.[22]

However, the Appellate Division concluded that the contractor or owner performing the excavation work must request a license; otherwise "an adjoining property owner has no occasion to afford a license in accordance with this section where no request for a license has been made."[23] The Appellate Division ultimately held that where no license is requested in accordance with BC § 3309.2, a plaintiff is not required to demonstrate that it granted the license or what steps it took to protect its own property.[24] In particular, the Appellate Division held that:

> [W]here, as here, a plaintiff presents evidence showing, prima facie, that no request for a license was made to the plaintiff in accordance with BC § 3309 before the excavation work began, a plaintiff moving for summary judgment on the issue of liability on a cause of action alleging a violation of BC § 3309.4 need not demonstrate, prima facie, that the plaintiff granted the requisite license, or, in the absence of a license, what, if any, actions it took to protect its premises.[25]

The Appellate Division in reaching this decision explained that: "[t]o permit the defendants to defeat the plaintiffs' summary judgment motion by pointing to the absence of a license may lead to an absurd result in cases alleging a violation of BC § 3309.4."[26] In particular, the Appellate Division explained that:

> Namely, an excavator who follows the provisions of BC § 3309, such as providing notification and seeking a license, and who is afforded a license, will be subject to strict liability for damages caused by the excavation, while an excavator who does not follow the provisions of BC § 3309 may escape liability since, in the absence of a license, the duty to protect adjoining property devolves to the adjoining property owner.[27]

Conclusion

The Appellate Division's decision makes it clear that it is imperative that before a contractor or property owner undertakes excavation activities that they seek to obtain a license from the adjoining property owner and that they take the necessary preventive steps to protect the adjoining property owner from damage.

Endnotes

1. S*ee* New York City Building Code [Administrative Code of City of NY, tit 28, ch 7] BC § 3309 *et seq*.
2. (*Am. Sec. Ins. Co. v. Church of God of St. Albans*, 131 A.D.3d 903, 905 [2d Dep't 2015] (holding that the New York City Building Code § 3309.4 imposes absolute liability for property damage caused by adjoining excavation work, "like its predecessor Administrative Code § 27-1031(b)(1)."); *see also Yenem Corp. v 281 Broadway Holdings*, 18 N.Y.3d 481, 491 [2012]).
3. BC 3309.4 provides strict liability against those persons who causes the excavation or the person who made the decision to excavate (*i.e.*, the owner and contractor). *See generally Bd. of Mgrs. of Manhattan Place Condominium v. 616 First Ave., LLC*, 2018 N.Y. Slip Op 31045[U], *4-5 [Sup. Ct., N.Y. County 2018]) ("The Appellate Division, First Department has also consistently held that a § 3309.4 strict liability claim may not be maintained against a party that establishes '"that [it] was neither the [party] who made the decision to excavate nor the contractor who carried out the physical excavation work.'"), *citing Am. Sec. Ins. Co.*, 131 A.D.3d at 905; *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 541 [1st Dep't 2014]; *Coronet Props. Co. v. L/M Second Ave.*, 166 A.D.2d 242, 243 [1st Dep't 1990]; *Rosenstock v Laue*, 140 A.D. 467, 470 [1st Dep't 1910].
4. BC § 3309.2.
5. *See also* Real Property Actions and Proceedings Law (RPAPL) § 881 which permits an owner performing construction activities on its property to obtain a license from the adjoining property owner and that the adjoining property owner is required to provide such a license. (N.Y. Real Prop. Acts. Law § 881 (McKinney's 2019).
6. *Famous Formaggio Pizzeria, LLC. v. Procida Constr. Corp.*, 59 Misc. 3d 661, 667 [Sup. Ct., Bronx County 2018].
7. 211-*12 N. Blvd. Corp. v. LIC Contr., Inc.*, ___A.D.3d___, 2020 N.Y. Slip Op 04134, *1 [2d Dept 2020]).
8. *Id.*, *citing Chan v. Begum*, 153 A.D.3d 1223, 1225 [2d Dep't 2017]; BC § 3309.4.
9. *Famous Formaggio Pizzeria, LLC.*, 59 Misc. 3d at 666 citing *Chan*, 153 A.D.3d at 1225; *Am. Sec. Ins. Co.*,131 A.D.3d at 905; *87 Chambers, LLC*, 122 A.D.3d at 541; *Yenem Corp.*, 18 N.Y.3d at 489.
10. *211-12 N. Blvd. Corp.*, 2020 NY Slip Op 04134, *4.
11. *Id.* at *3.
12. *Id.* at *2.
13. *211-12 N. Blvd. Corp. v. LIC Contr. Inc.*, 2017 N.Y. Slip Op 33222[U], *1 [Sup. Ct., Queens County 2017].
14. The Appellate Division rejected "the defendants' contention that the plaintiffs did not meet their prima facie burden on these causes of action because the temporary license agreement in the record was not executed" holding that "BC § 3309.4 calls for a license being afforded to enter onto and protect adjoining property before excavation work begins." (*211-12 N. Blvd. Corp.*, 2020 N.Y. Slip Op 04134, *5).
15. The plaintiffs also named defendants' architect as a defendant in this action. However, the Supreme Court denied the plaintiffs' motion for summary judgment as against the architect. (*211-12 N. Blvd. Corp.*, 2017 N.Y. Slip Op 33222[U], *1).
16. *Id.* at *6.
17. *Id.* at *1.
18. *Id.* at *1.
19. *Id.* at *7.
20. *Id.*.
21. *Id.* at *8, *citing Chan*, 153 A.D.3d at 1223; *O'Hara v. New School*, 118 A.D.3d 480 [1st Dep't 2014]); *see also Reiss v. Professional Grade Constr. Group, Inc.*, 172 A.D.3d 1121 [2d Dep't 2019].
22. *211-12 N. Blvd. Corp.*, 2020 N.Y. Slip Op 04134, *18.
23. *Id.* at *18-19.
24. *Id.* at *2.
25. *Id.* at *14-15.
26. *Id.* at *19.
27. *Id.*

The Federal Procedure Committee Report

THE FIFTH AMENDMENT PRIVILEGE

I. INTRODUCTION

This report explores the invocation of the Fifth Amendment of the United States Constitution in civil and criminal cases. The report is focused on federal cases, as New York State cases do not diverge from, and are consistent with, the principles set forth in federal authority.[1]

Part II of the Report provides an overview of the Fifth Amendment privilege, who can invoke the privilege, when the privilege can be invoked, how to properly invoke the privilege, and what information the privilege protects.

Part III of the Report provides an analysis of the consequences of invoking the Fifth Amendment privilege so that the reader can properly advise his or her client. Part III includes a discussion of the effects of invocation in a criminal case versus a civil case, what an adverse inference is, when it will be applied, the role of an adverse inference in the context of a summary judgment motion, the need for corroboration in order to prove liability, and what happens when a civil and criminal case is pending at the same time. Part III also provides examples of how adverse inferences apply to different factual scenarios such as when a non-party, employee, or individual in a separate proceeding invokes his or her Fifth Amendment privilege. Lastly, Part IIII discusses how and when a Court will allow a party to revoke his or her Fifth Amendment privilege.

II. OVERVIEW

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be compelled in any criminal case to be a witness against himself" thereby protecting an individual from being compelled to give self-incriminating testimony whether in a criminal or civil proceeding. While this privilege was originally conceived as a right deemed so important that it warranted constitutional protection,[2] the privilege is not limitless. Thus, when a person invokes his or her Fifth Amendment privilege during a civil proceeding, it is important for all interested counsel to understand certain key concepts, including who can invoke the privilege, when the privilege can be invoked, how to properly invoke the privilege and the scope of the privilege.

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[1] *See Carver Fed. Savings Bank v. Shaker Gardens, Inc.*, 167 A.D.3d 1337, 1340-41 (3d Dep't. 2018) (discussing the required records exception and citing to federal decisions); *Kuriansky v. Bed-Stuy Health Care Corp.,* 135 A.D.2d 160, 179 (2d Dep't 1988), *aff'd*, 73 N.Y.2d 875 (1988) (requirement that defendant in a civil forfeiture proceeding be required to disclose financial information to oppose forfeiture order did not violate the Fifth Amendment) (citing to *Baxter v. Palmigiano,* 425 U.S. 308, 331 (1976)), and *United States v. White,* 589 F.2d 1283, 1286) (5th Cir. 1979). New York cases often discuss the assertion of the Fifth Amendment privilege in the context of oral testimony, and hold that the Fifth Amendment "does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence," *Access Capital, Inc. v. DeCicco*, 302 A.D.2d 48, 51 (1st Dep't 2002), *citing United States v. Rylander*, 460 U.S. 752, 761 (1983). This principle was recently affirmed by the New York Court of Appeals in *Andrew Carothers, M.D. P.C. v. Progressive Ins. Co.,* 33 N.Y.3d 389, 407 (2019) (a witness who asserts the Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial) (*citing Baxter, supra*).

[2] *See generally*, Gray, *Evidentiary Privileges* (6th Ed. 2015) at 135-137.

A. Persons Who Can Invoke The Privilege

"[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."[3] Pursuant to the "collective entity doctrine,"[4] the Fifth Amendment privilege only extends to natural persons. Juridical entities, such as corporations,[5] partnerships,[6] and unincorporated associations,[7] cannot assert the privilege.

Importantly, the collective entity rule does not depend on the entity's size.[8] Thus, courts throughout the United States have consistently held that a custodian who is the sole shareholder, officer, member, manager, or employee of a company cannot properly invoke their Fifth Amendment privilege to shield the production of corporate documents, even if that person is served with a subpoena in their individual capacity.[9] This is because the custodian is deemed to be producing documents in his or her representative, and not individual, capacity, and therefore, "no evidentiary use of the 'individual act' of production [can be used] against the individual."[10] Additionally, while custodians must produce records held in a representative capacity, they may assert the Fifth Amendment privilege to avoid disclosure of information which is within their personal knowledge and is of testimonial rather than a documentary or corporate nature.[11]

To determine whether a custodian is entitled to protection under the Fifth Amendment, courts assess whether the entity in question has an "established institutional identity" independent of the individuals behind it, whether the entity maintains a "distinct set of organizational records," and whether the subpoenaed records are in fact organizational records held by an individual merely in a representative capacity, "such that it is 'fair to say that the records demanded are the records of the organization rather than those of the individual.'"[12] Thus, the collective entity doctrine does not apply to a sole proprietorship because there is no difference between the business and the owner.[13]

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[3] *Braswell v. United States*, 487 U.S. 99, 104, 108-109 (1988) ("...without regard to whether the subpoena is addressed to the corporation, or…to the individual in his capacity as custodian,… a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds…").

[4] *Id*.

[5] *Id*.; *see also Curcio v. United States*, 354 U.S. 118 (1957) (*citing Hale v. Henkel*, 201 U.S. 43 (1906)).

[6] *Bellis v. United States*, 417 U.S. 85, 88 (1974) (holding partner could not assert Fifth Amendment protection to thwart production of partnership records).

[7] *United States v. White*, 322 U.S. 694, 699 (1944) (holding labor union officer could not claim his privilege against compulsory self-incrimination to justify refusal to produce the union's records pursuant to a grand jury subpoena).

[8] *Bellis*, *supra*, at 100 ("It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be").

[9] *See*, *e.g.*, *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006) ("…the act-of-production doctrine is not an exception to the collective-entity doctrine even when the corporate custodian is the corporation's sole shareholder, officer and employee."); *Account Servs. Corp. v. U.S. (In re U.S.)*, 593 F.3d 155, 158 (2d Cir. 2010) (concluding that a one-person corporation cannot avail itself of the Fifth Amendment privilege); and *Reamer v. Beall*, 506 F.2d 1345, 1346 (4th Cir. 1974) (sole shareholder and employee of corporation could not invoke the Fifth Amendment privilege). The act of production doctrine is discussed in greater detail, *infra* II (D).

[10] *Braswell*, 487 U.S. at 100, and *infra* II (D).

[11] *Curcio*, *supra*, 354 U.S. at 1149-52 (custodian could not be compelled to testify as to the whereabouts of non-produced records of an association)

[12] *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 258-60 (3d Cir. 2015) (quoting *Bellis*, *supra*); *see also United States v. B & D Vending, Inc.*, 398 F.3d 728, 734 (6th Cir. 2004).

[13] *Braswell*, 487 U.S. at 104.

There is, however, a disagreement among the Circuits as to whether the Fifth Amendment can be asserted by former employees served with a request for the production of corporate records that remain in their possession after their employment has been terminated. While some Circuits have permitted the assertion of the Fifth Amendment by former employees in that situation,[14] others have rejected it.[15]

Because companies can only act through their individual representatives, situations invariably arise where a corporate official or employee has information responsive to discovery demands served upon their employers which may implicate those individuals in criminal conduct if that information is personal but may relate to corporate documents, including the location of such corporate documents.[16] Therefore, those corporate officials or employees will typically seek to invoke their Fifth Amendment privilege and refuse to testify as corporate representatives in the civil proceeding to avoid potential self-incrimination in a criminal proceeding.

This was the case in *United States v. Kordel*,[17] where two corporate officers sought to appeal their criminal convictions, arguing that the government had improperly used their interrogatory responses in a civil proceeding to obtain incriminating evidence in parallel criminal proceedings. On appeal, the Sixth Circuit reversed the lower court's verdict and held that the officers' interrogatory responses submitted on behalf of the organization were obtained involuntarily in violation of the Fifth Amendment. However, the Supreme Court reversed the Sixth Circuit, holding that the Fifth Amendment had not been invoked by either officer and the government's conduct was proper. In issuing its ruling, the Supreme Court held that if a corporation is presented with interrogatories, it must appoint an agent who can furnish the requested information without fear of self-incrimination.[18] This obligation cannot be satisfied by appointing agents who invoke their Fifth Amendment, as that would in effect "…secure for the corporation the benefits of a privilege it does not have."[19]

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[14] *See*, *e.g.*, *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 183-184 (2d Cir. 1999) (holding that former employees were no longer custodians of their former employer and thus could assert the Fifth Amendment privilege in response to subpoenas served after the employees' resignation seeking to compel the production of corporate property that remained in the former employees' possession); *United States v. McLaughlin*, 126 F.3d 130, 133 n. 2 (3d Cir. 1997) (observing in dicta that "a former employee, for example, who produces purloined corporate documents is obviously not within the scope of the *Braswell* rule"); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995) (holding that the collective entity rule does not apply to a former employee of a collective entity who is no longer acting on behalf of that entity).

[15] *See*, *e.g.*, *In re Grand Jury Subpoena Dated Nov. 12, 1991, FGJ 91-5 (MIA)*, 957 F.2d 807, 812 (11th Cir. 1992) ("We hold that a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated."); *In re Sealed Case (Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991) ("Just as corporate records belong to the corporation and are held for the entity by the custodian in an agency capacity, … so government records do not belong to the custodian, in this case the [former employee], but to the government agency. Their production thus falls outside the Fifth Amendment Privilege.").

[16] For example, an employee may refuse to testify about the location of corporate documents not in the witness' possession where the testimony would result in the witness' self-incrimination. *Grand Jury Subpoena Dated April 9, 1996 v. Smith*, 87 F.3d 1198, 1203 (11th Cir. 1996) (citing *Curcio, supra*).

[17] 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970).

[18] *Id.*, at 767.

[19] *Id.*, at 767-68.

While it should not be difficult for larger organizations to appoint a representative who does not fear self-incrimination, this can represent a challenge for smaller entities, where all officers or employees may be directly implicated in wrongful conduct. Accordingly, the Supreme Court in *Kordel* recognized that there may be situations in which no individual is able to respond or testify on behalf of a corporation due to fear of self-incrimination. While the Court refused to rule on this "troublesome question," it nevertheless noted that the appropriate remedy in such a case would be a protective order under Fed. R. Civ. P. 30(b) or a stay of civil discovery pending resolution of the criminal proceedings.[20]

In practice, however, this situation rarely arises. A corporation has broad discretion to appoint an agent of its choice to comply with discovery requests and may rely on outside parties where its own officers or employees are likely to invoke the Fifth Amendment.[21] Indeed, a corporation's failure to designate a representative who is able to testify without fear of self-incrimination may be sanctionable.[22] Nevertheless, based on a case-by-case analysis, the courts do occasionally grant stays or issue protective orders where a corporate party cannot appoint an agent to testify on its behalf without being subjected to a real and appreciable risk of self-incrimination.[23]

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[20] *Id.*, at 767-68; *see also* Section 3(C)(iii) of this Report.

[21] *See*, *e.g.*, *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210, fn1 (8th Cir. 1973) ("…the case is unlikely ever to arise since Rule 33(a) allows any agent of the corporation, even its attorney, to answer interrogatories on behalf of a corporation.") (quoting Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2018); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984) ("… a corporation may be required to supply a new agent should all existing employees refuse to testify on self-incrimination grounds."); *U.S. S.E.C. v. First Jersey Sec., Inc*., 843 F.2d 74, 77 (2d Cir. 1988) ("We previously have approved of the practice […] of compelling the corporation to designate someone who can produce the requested records without risk of self-incrimination. If necessary, the corporation must appoint an agent especially for the purpose of producing the materials."); *Central States v. Carstensen Freight Lines, Inc*., No. 96 C 6252, 1998 WL 413490, at *4 (N.D. Ill. July 17, 1998) (ordering corporate party to appoint an individual other than the sole shareholder, employee and officer to verify the corporate party's responses to interrogatories); *eBay, Inc. v. Digital Point Solutions, Inc.*, No. C 08-4052 JF (PVT), 2010 WL 147967 (N.D. Cal. Jan. 12, 2010) (rejecting argument that discovery may not be compelled if a corporation could not appoint an individual with sufficient knowledge since any agent, irrespective of first-hand personal knowledge, may be appointed); and *U.S. S.E.C. v. A Chicago Convention Ctr., LLC*, No. 13 C 982, 2013 WL 4010585 (N.D. Ill. Aug. 5, 2013) (denying request for protective order where a corporate defendant's officers invoked the Fifth Amendment and directing it to appoint an agent, such as its corporate counsel, to respond to interrogatories, based on a review of the corporate records).

[22] *See*, *e.g.*, *Worthington Pump Corp. (U.S.A.) v. Hoffert Marine, Inc.*, No. A 79–3531, 1982 WL 308871 (D.N.J. Feb.19, 1982) (imposing sanctions on corporation for discovery failures following officers' assertion of the Fifth Amendment privilege); *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766 (9th Cir. 1995) (affirming Rule 37(b)(2) sanction where corporate party had willfully violated the court's orders by failing to make a good faith attempt to designate a representative who could testify on corporation's behalf without asserting the Fifth Amendment); *Bank of Am., N.A. v. First Mut. Bancorp of Ill.*, No. 09 C 5108, 2010 WL 2364916 (N.D. Ill. June 14, 2010) (awarding costs and attorneys' fees where corporate party failed to appoint a Rule 30(b)(6) witness who would not invoke the Fifth Amendment).

[23] *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987) (vacating order denying stay and remanding to assess *inter alia* corporate party's ability to appoint an agent to respond to interrogatories); *Cole v. Am. Capital Partners Ltd., Inc.*, No. 06-80525-CIV, 2007 WL 9706176 (S.D. Fla. Nov. 8, 2007*), report and recommendation adopted*, No. 06-80525-CIV, 2007 WL 9706177 (S.D. Fla. Dec. 3, 2007) (recommending protective order where, despite a good faith attempt, no individual could be located to represent the corporation without the risk of self-incrimination); *State Farm Mut. Auto. Ins. Co. v. Grafman*, No. 04-CV-2609 (NG) (SMG), 2007 WL 4285378 (E.D.N.Y. Dec. 1, 2007) (staying corporate parties' obligation to respond to interrogatories or produce Rule 30(b)(6) witnesses so long as they could certify that no one aside from individuals with pending

B. When Can An Individual Invoke The Privilege

The Fifth Amendment privilege can be invoked in a criminal or a civil litigation[24] to protect against actions or testimony that are considered "testimonial" in nature. The Fifth Amendment privilege cannot be invoked to protect non-testimonial acts, such as trying on clothing, providing a blood sample, or providing a handwriting example.[25] To be considered testimonial, the action or testimony must itself "explicitly or implicitly, relate [to] a factual assertion or disclose information that incriminates."[26]

To come within the confines of the Fifth Amendment privilege, the action or testimony sought to be protected does not necessarily need to directly incriminate the individual. If the action or testimony "would furnish a link in the chain of evidence needed to prosecute,"[27] the individual being questioned can assert his or her Fifth Amendment privilege. The Fifth Amendment privilege applies when appearing for a hearing, deposition, trial, or interview but may also apply in responding to document demands or interrogatories.[28]

C. How Is The Privilege Invoked By An Individual

While there is no specific language that needs to be used to invoke the Fifth Amendment privilege, it must be raised in a timely manner so that it is not waived. Moreover, the Fifth Amendment privilege must be asserted in response to each question posed. In other words, blanket refusals are not recognized and are ineffective.[29]

While a waiver must be knowing and voluntary,[30] it does not have to be express or written and can occur where an individual voluntarily answers incriminating questions. In those types of instances, a court may require an individual to answer additional questions on matters he or she is deemed to have waived, the subject matter of the case, or to ensure that the facts have not been

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indictments were available); *Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum Fin., Inc*., No. 2:09-CV-0954 FCD EFB, 2009 WL 2136986, at *3 (E.D. Cal. July 15, 2009) (stay was warranted where the Fifth Amendment rights of every director or officer of a corporate defendant were implicated and the latter was "…likely to be greatly prejudiced in its ability to meaningfully defend itself"); *Medical Inv. Co. v. International Portfolio, Inc.*, No. Civ. 12-3569, 2014 WL 2452193 (E.D. Pa. May 30, 2014) (granting stay where the only individual who could speak on corporate defendant's behalf would be subjected to "real and appreciable risk of self-incrimination"); and *State Farm Mut. Auto. Ins. Co. v. Healthcare Chiropractic Clinic, Inc.*, No. 15-CV-2527 (SRN/HB), 2016 WL 9307608 (D. Minn. Apr. 26, 2016) (granting motion to stay Fed. R. Civ. P. 30(b) (6) deposition where it was difficult to conclude whether an individual other than a corporate party's sole owner could testify without risk of self-incrimination).

[24] *See* Sections 3(A) and 3(B) of this Report which discusses how the consequences of invoking the Fifth Amendment privilege varies based upon whether the invocation is during a criminal or civil trial.

[25] *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).

[26] *United States v. Sweets*, 526 F.3d 122, 127 (4th Cir. 2007) (*quoting Doe v. U.S.*, 487 U.S. 201, 210 (1988)).

[27] *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

[28] The Fifth Amendment privilege will only apply if the act of production doctrine is applicable **and** the foregone conclusion doctrine and/or the required records doctrines do not apply. *See infra* II (D). This list is not exclusive.

[29] *See North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486-87 (4th Cir. 1987); *Matter of Grand Jury Subpoena*, 739 F.2d 1354, 1359 (8th Cir. 1984).

[30] *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).

distorted by the individual making a strategic decision as to when to stop testifying.[31] In evaluating whether an individual has waived his or her right to refuse to answer further questions, courts have considered whether answering additional questions would increase the possibility that the individual would be prosecuted or convicted.[32]

D. Types Of Information Protected By The Privilege

The Fifth Amendment privilege does not attach to the voluntary creation of documents, whether corporate[33] or personal, because they are not created under compulsion.[34] The fact that the records are in a party's possession is irrelevant to the determination of whether the creation of the records was compelled. As the Supreme Court noted in *Fisher v. United States,* 425 U.S. 391 (1971), a sole proprietorship situation, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination.[35] Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought.[36] "[T]he privilege protects a person only against being incriminated by his own compelled testimonial communications."[37] Thus, tax returns containing incriminating evidence cannot be withheld.

However, the "act of production doctrine" may apply in cases where the very act of producing such documents may constitute a compulsory authentication of incriminating documents.
The act of production doctrine has been explained as follows:

> Although the contents of documents are not privileged, the mere act of producing them may be if production provides link[s] in the chain of evidence needed to prosecute that individual. Production may tacitly concede the existence of the item, the producer's possession or control over the item, and might serve to authenticate the item. Accordingly, the act of producing documents may require

[31] *See United States v. Monia*, 317 U.S. 424, 427 (1943); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2d Cir. 1979). "There is no doubt that a waiver of the fifth amendment's privilege against self-incrimination may, in an appropriate case, be inferred from a witness' prior statements with respect to the subject matter of the case, without any inquiry into whether the witness, when he made the statements, actually knew of the existence of the privilege and consciously chose to waive it." *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

[32] Courts are hesitant to rule that an individual waived their Fifth Amendment privilege implicitly. For example, in order to conclude that an individual waived their Fifth Amendment privilege, the Second Circuit requires that "the witnesses' prior statements [must] have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth" and "the witness [must have] had reason to know that his prior statements would be interpreted as a waiver." *Cartier, a Div. of Richemont N. Am., Inc. v. Micha, Inc.*, No. 06 Civ. 4699 (D.C.), 2008 WL 2061386, at *2 (S.D.N.Y. May 12, 2008) (*quoting Klein v. Harris*, 667 F.2d 274, 287 (2d. Cir. 1981)).

[33] As further explained in Section 2(A) of this Report, corporations cannot assert the Fifth Amendment privilege; therefore, the Fifth Amendment privilege does not extend to their corporate records.

[34] *United States v. Doe*, 465 U.S. 605, 610-611(1984) (no compulsion present where voluntarily created documents do not compel person to "restate, repeat, or affirm the truth of the contents of the documents sought"); *In re Grand Jury Subpoena Duces Tecum dated Oct. 29, 1992*, 1 F.3d 87, 90 (2nd Cir. 1993).

[35] *Fisher v. United States,* 425 U.S. 391, 396 (1971).

[36] *Id*. at 409.

[37] *Id.*

> incriminating testimony if the existence or location of the documents is unknown to the government, or the act of producing the documents implicitly authenticates them, *and* in so doing, provides a link in the chain of incrimination.[38]

Whether the act of production doctrine applies requires a two-step inquiry. The court must first determine whether the production of documents is testimonial in nature, and, if it is, the party asserting the privilege in a non-representative capacity must show that the production would be incriminating.[39]

Even if the act of production doctrine applies, if either the foregone conclusion doctrine or the required records doctrine applies, the Fifth Amendment privilege will not apply. The foregone conclusion doctrine applies to the production of records if the existence, location, or authenticity of the records is a foregone conclusion, such that the act of production does not supply a necessary link in the chain of incriminating evidence.[40] The required records doctrine applies if the documents to be produced (i) are legally required for a regulatory purpose; (ii) are of the kind that the regulated party customarily keeps; and (iii) have assumed "public aspects" that render it analogous to public documents.[41]

III. CONSEQUENCES OF INVOKING THE FIFTH AMENDMENT PRIVILEGE

This section of the Report focuses on the consequences of invoking the Fifth Amendment privilege, which varies by whether the privilege is invoked in a criminal or civil proceeding and whether it is invoked by a party or non-party witness.

A. Criminal Cases

The Supreme Court has held:

> The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the

[38] *In re Schick*, 215 B.R. 4, 9 (Bankr. S.D.N.Y. 1997) (internal citations omitted); *United States v. Fox*, 721 F.2d 32, 36 & 40 (2d Cir. 1983).

[39] *Id*. Of course, the act of production doctrine does not apply to documents held in a representative capacity. *Supra* at II (D).

[40] "Specifically, the act of production communicates at least four different statements. It testifies to the fact that: i) documents responsive to a given subpoena exist; ii) they are in the possession or control of the subpoenaed party; iii) the documents provided in response to the subpoena are authentic; and iv) the responding party believes that the documents produced are those described in the subpoena." *U.S. v. Hubbell*, 167 F.3d 552, 567-68 (D.C. Cir. 1999) (*citing Fisher v. U.S.,* 425 U.S. 391, 410 (1976) (footnotes omitted).

[41] *AAOT Foreign Economic Ass'n (VO) Technostroyexport v. International Dev. and Trade Servs., Inc.* No. 96 CIV. 9056 (JAK)(ATP), 1999 WL 970402, *7 (S.D.N.Y. Oct. 25, 1999), *see generally In re Grand Jury Subpoena dated February 2, 2012*, 741 F.3d 339, 342-352 (2nd Cir. 2013) (discussing extensively the requirements needed to invoke "required records exception" in the context of the Bank Secrecy Act).

> innocent who otherwise might be ensnared by ambiguous circumstances.[42]

Thus, in criminal cases, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt,"[43] and prohibits the finding of any adverse inferences.[44]

B. Civil Cases

Civil cases are more complicated. Thus, in the landmark case, *Baxter v. Palmigiano*,[45] the Supreme Court recognized that the Constitution does not prohibit a fact-finder from drawing an adverse inference from a prison inmate's silence during prison disciplinary proceedings. In its decision, the Court referenced the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[46] Since *Baxter*, lower courts as well as the Supreme Court have regularly cited *Baxter* to support the imposition of an adverse inference in civil cases where a party invokes the Fifth Amendment privilege.[47]

It is well settled in the Second Circuit that an adverse inference may be drawn against a civil litigant who asserts the Fifth Amendment privilege when called to testify in a civil proceeding. In *Brink's Inc. v. City of New York*,[48] the Second Circuit affirmed the district court's holding that the invocation of the Fifth Amendment privilege by the corporate defendant's employee was "admissible and competent evidence" and the instruction to the jury was appropriate that a "witness ha[s] a constitutional right to decline to answer on the ground that it may tend to incriminate him. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness' interest." Since *Brink's*, federal courts in the Second Circuit have continued to permit adverse inferences against litigants asserting their Fifth Amendment rights in all manner of civil proceedings.[49]

A court evaluating whether to permit the fact-finder to consider a party's refusal to testify must ensure that the probative value of the witness's invocation of the Fifth Amendment privilege is not "substantially outweighed by the danger of unfair prejudice" under Federal Rule of Evidence 403.[50] The balancing of probative value against unfair prejudice is largely left to the discretion of trial judges, but courts in the Second Circuit have consistently held that prejudice in the sense

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[42] *Slochower v. Board of Higher Ed. of City of New York*, 350 U.S. 551, 557–58 (1956).
[43] *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976) (holding that "it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case"); *Mitchell v. United States*, 526 U.S. 314, 317 (1999) (holding that a sentencing court may not draw an adverse inference from a criminal defendant's silence).
[44] *Wechsler v. Hunt Health Sys., Ltd*., No. 94 Civ. 8294 (PKL), 2003 WL 21998980, at *2 (S.D.N.Y. Aug. 22, 2003).
[45] 425 U.S. 308, 320 (1976).
[46] *Id*. at 318 (*citing* 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961))
[47] *See e.g., McKune v. Lile*, 536 U.S. 24 (2002), and *Morales v. Turman*, 430 U.S. 322 (1977).
[48] 717 F.2d 700, 707–10 (2d Cir. 1983).
[49] *See* Section 3(B)(2) of this Report.
[50] *See Brink's*, 717 F.2d at 710.

of being "damning" to a party's case or bolstering the opposing party's position is not "unfair" within the meaning of Rule 403. To be "unfair," the prejudice resulting from a jury considering the Fifth Amendment invocation must be "inflammatory."[51]

The Second Circuit has also made clear that there are no "hard and fast rule[s]" governing when and how an adverse inference should be applied in the wake of a Fifth Amendment invocation, and that "how [the court] should react to any motion precipitated by a litigant's assertion of the Fifth Amendment in a civil proceeding . . . necessarily depends on the precise facts and circumstances of each case."[52] Thus, the Second Circuit has held that devising an appropriate remedy for a Fifth Amendment assertion should be left to the discretion of the trial court.[53]

1. Imposition Of An Adverse Inference

If a court determines that an individual's invocation of the Fifth Amendment privilege may be admitted into evidence and considered by the trier of fact, the question becomes what is the permissible inference to be drawn. New York federal courts have given some guidance on this issue. First, an adverse inference must relate to a specific question asked and not answered on Fifth Amendment grounds.[54] Second, the inference, if permitted, is limited to the answer to the specific question asked that, had it been answered, would have been unfavorable to the witness. Third, the inference is permissive, not mandatory, and it must be left to the discretion of the fact-finder -- both whether to draw the inference, and, if so, how much weight to give it based on the facts and circumstances of the case.[55]

2. When Is An Adverse Inference Appropriate

At what procedural stage or stages may an adverse inference be applied based on an invocation of the Fifth Amendment privilege? The short answer is: whenever a factual determination is necessary or permitted, whether by a court or a jury. Federal courts in the Second Circuit have permitted an adverse inference in the context of a motion for a preliminary injunction,[56] a motion for the appointment of a receiver,[57] contempt motions,[58] motions to amend a complaint,[59] motions to dismiss,[60] bench trials,[61] and jury trials.[62]

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[51] *See, e.g., Brink's*, 717 F.2d at 710; *United States v. Jimenez*, 789 F.2d 167, 171 (2d Cir. 1986) ("What 'prejudice' as used in Rule 403 means is that the admission is, as the rule itself literally requires, 'unfair' rather than 'harmful.'"); *United States v. Muyet*, 958 F. Supp. 136, 141 (S.D.N.Y. 1997) ("All evidence that tends to incriminate a defendant is prejudicial, in the sense that it is harmful to his case, but Rule 403 only precludes the admission of evidence that is unfairly prejudicial.").

[52] *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 85 (2d Cir. 1995).

[53] *Id.*

[54] As described above in Section 2(C) of this Report, blanket or nonspecific invocations are not sufficient and therefore nonspecific adverse inferences are not permitted.

[55] *LiButti v. United States*, 107 F.3d 110, 120-25 (2d Cir. 1997)

[56] *S.E.C. v. McGinn, Smith & Co.*, 752 F. Supp. 2d 194, 209 (N.D.N.Y. 2010), *order vacated in part on reconsideration sub nom. S.E.C. v. Wojeski*, 752 F. Supp. 2d 220 (N.D.N.Y. 2010), and *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011), and *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011); *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000); *S.E.C. v. Musella*, 578 F. Supp. 425, 430 (S.D.N.Y. 1984).

[57] *United States v. Ianniello*, 646 F. Supp. 1289, 1300 (S.D.N.Y. 1986), *aff'd,* 824 F.2d 203 (2d Cir. 1987).

3. Application Of An Adverse Inferences In A Motion For Summary Judgment

Summary judgment motions present special circumstances due to the well-settled rule that a party opposing summary judgment is entitled to the benefit of all reasonable inferences in his or her favor.[63] Federal courts in New York have interpreted that rule as prohibiting an adverse inference based on an invocation of Fifth Amendment rights against the non-movant on summary judgment. In a series of three opinions since 2005, the Second Circuit has articulated a view that no adverse inferences are available on summary judgment against the non-movant.

In *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*,[64] a group of former shareholders of Dutch company Saybolt sued the company's former outside counsel Philippe Schreiber, alleging that he was negligent in advising the company that payment of a bribe would not violate U.S. law. Saybolt paid the bribe and shortly thereafter it and two of its principals, Frerik Pluimers and David Mead, were indicted.

Schreiber moved for summary judgment, arguing that no genuine issue of fact had been raised as to Saybolt's reliance on Schreiber's advice. Among other things, Schreiber argued that the court should draw an adverse inference in his favor from the fact that Pluimers had invoked his Fifth Amendment rights in response to deposition questions about his reliance on Schreiber's advice. The Second Circuit affirmed the district court's denial of Schreiber's summary judgment motion. Addressing Schreiber's contention that Pluimers' invocation of his Fifth Amendment privilege supported an adverse inference on summary judgment, the Second Circuit held:

> [T]o the extent that [Pluimers'] deposition is offered into evidence at trial, the defendants may be entitled to an instruction that the jury may draw adverse inferences against Pluimers on each question as to which he asserted his Fifth Amendment privilege during the deposition. *Cf. LiButti v. United States,* 107 F.3d 110, 123–24 (2d Cir.1997) (setting forth factors relevant to a determination of whether an adverse inference may be drawn on the basis of a non-party's invocation of his or her Fifth Amendment privilege). Even assuming that a *jury* might draw such inferences, however, *we* are required at summary judgment to draw all reasonable inferences in favor of the non-moving party [].

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[58] *S.E.C. v. Durante*, No. 01 Civ. 9056 (DAB) (AJP), 2013 WL 6800226, at *10 (S.D.N.Y. Dec. 19, 2013), *report and recommendation adopted,* No. 01 Civ. 9056 (DAB), 2014 WL 5041843 (S.D.N.Y. Sept. 25, 2014), *aff'd,* 641 F. App'x 73 (2d Cir. 2016).

[59] *In re Bernard L. Madoff Inv. Sec. LLC*, 560 B.R. 208, 227 (Bankr. S.D.N.Y. 2016).

[60] *In re Bernard L. Madoff Inv. Sec. LLC*, 560 B.R. at 227; *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 12 Civ. 115 (JSR), 2013 WL 1609154, *6 & n.4 (S.D.N.Y. Apr. 15, 2013); *In re Alstom SA*, 454 F. Supp. 2d 187, 208 & n.17 (S.D.N.Y. 2006).

[61] *LiButti*, 107 F.3d at 124.

[62] *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).

[63] *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 378 (2007).

[64] 407 F.3d 34 (2d Cir. 2005).

> Doing so, we cannot conclude that Pluimers's silence resolves all genuine issues of fact on the question of Saybolt's reliance on Schreiber's advice.[65]

The extent of *Stichting*'s holding is not entirely clear. While the quoted language suggests a broad rule against drawing any adverse inferences against a non-movant on summary judgment, the court did not explicitly state such a rule. Nor did it explain which "reasonable inferences" it drew in the plaintiff's favor or state that *no* evidentiary weight should be given to Pluimers' refusal to testify. To the contrary, the language above suggests that the court at least considered Pluimers' silence but could not "conclude that [it] resolve[d] all genuine issues of fact."

In any event, despite the questions left unanswered by *Stichting*, the Second Circuit subsequently referenced in *dicta* a broad rule prohibiting adverse inferences on summary judgment against a non-movant based on an invocation of the Fifth Amendment privilege by the non-movant or another witness. In a footnote to its opinion in *In re 650 Fifth Ave. & Related Properties*, the Second Circuit "t[ook] exception to [the district court's] suggestion that it could draw adverse inferences at summary judgment based on individuals' invocation of their Fifth Amendment privilege" and characterized *Stichting* as holding that "a court may not draw negative inferences against a nonmoving party on a summary judgment motion" based on individuals' invocation of their Fifth Amendment rights.[66] The court did not rule on the issue, however, "because, ultimately, the lack of testimony from those witnesses meant that there was no record evidence to dispute the overwhelming evidence" in the movant's favor.[67]

Similarly, in its summary opinion in *Amusement Industry, Inc. v. Stern*,[68] the Second Circuit, citing *In re 650 Fifth Avenue and Related Properties*, stated in *dicta* that "adverse inferences cannot be drawn against a non-moving party at summary judgment based on an invocation of the Fifth Amendment privilege."[69]

In light of *In re 650 Fifth Avenue and Related Properties* and *Amusement Industry*, it would seem fairly clear that adverse inferences against non-movants based on Fifth Amendment invocations may not be drawn by federal courts in the Second Circuit. Several decisions by lower federal courts in New York have adopted this view.[70] Nevertheless, some New York

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[65] *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 55 (2d Cir. 2005) (emphasis in original).

[66] 830 F.3d 66, 93 n.25 (2d Cir. 2016).

[67] *Id*.

[68] 721 F. App'x. 9 (2d Cir. 2018)

[69] *Id.* at 11. The quoted language can fairly be characterized as *dicta* because, as in *In re 650 Fifth Avenue and Related Properties*, the court affirmed summary judgment on the separate ground that the defendant's refusal to testify meant that he was not able to offer proof contradicting the evidence submitted by plaintiff on summary judgment.

[70] *See, e.g.*, *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, Apprenticeship, Journeyman, Retraining, Educ., & Indus. Fund v. James Dean Contracting Corp.*, No. 11 Civ. 5879 (JMF), 2013 WL 6569911, at *1 (S.D.N.Y. Dec. 13, 2013) ("Plaintiffs may well have a strong case at trial given Donnarumma's and Perretti's invocation, but it is not a basis to grant summary judgment here as the Court is required to draw all reasonable inferences in the nonmoving parties' favor."); *S.E.C. v. Aronson*, No. 11 Civ. 7033 (JSR), 2013 WL 4082900, at *12 (S.D.N.Y. Aug. 6, 2013) (quoting *Stichting* for proposition that "while 'a *jury* might draw such inferences ... [the Court is] required at summary judgment to draw all inferences in

federal judges have continued to permit such adverse inferences on summary judgment[71] at least where such adverse inferences are supported by other evidence.[72] With one exception,[73] these

favor of the non-moving party'" (alteration in original)), *on reconsideration in part on other grounds,* No. 11 Civ. 7033 (JSR), 2013 WL 6501324 (S.D.N.Y. Dec. 11, 2013); *Franco v. Ideal Mortg. Bankers, Ltd.*, No. 07-CV-3956 (JS) (AKT), 2011 WL 317971, at *4 (E.D.N.Y. Jan. 28, 2011) ("[O]n summary judgment, the Court cannot draw reasonable inferences against a non-moving party, even when those inferences stem from that party invoking the Fifth Amendment."); *Fendi Adele S.R.L. v. Ashley Reed Trading, Inc.*, No. 06 Civ. 243 (RMB) (MHD), 2010 WL 571804, at *11 (S.D.N.Y. Feb. 16, 2010) ("While it is settled law that a trier of fact may draw an adverse inference in a civil action against a party who invokes the Fifth Amendment privilege, the court in deciding this summary judgment motion has not drawn any inference from James Ressler's invocation of his right against self-incrimination."); *Parsons & Whittemore Enters. v. Schwartz*, 387 F. Supp. 2d 368, 372 (S.D.N.Y. 2005) ("Plaintiffs may ultimately be entitled to an instruction that the jury may draw adverse inferences against the Defendant on each issue as to which he has asserted his Fifth Amendment privilege. . . . But even assuming that a jury might draw such inferences, the court is still required at *summary judgment* to draw all reasonable inferences in favor of the non-moving party."); *In re Allou Distributors Inc.*, Adv. No. 04-08369-ess, 2012 WL 6012149, at *15 (Bankr. E.D.N.Y. Dec. 3, 2012) (declining to draw adverse inference against non-movant on summary judgment); *In re Jacobs*, 394 B.R. 646, 664 (Bankr. E.D.N.Y. 2008) (declining to draw adverse inference against non-movant on summary judgment); *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007) ("[I]t must be remembered that at summary judgment, the Court is required to draw all reasonable inferences in favor of the non-moving party, despite potential for the ultimate trier of fact to draw an adverse inference from the assertion of Fifth Amendment privileges.").

[71] *See, e.g.*, *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 26 (E.D.N.Y. 2013) (drawing adverse inference against non-movant on summary judgment, but noting that "a motion for summary judgment cannot be granted on an adverse inference alone"); *Ball v. Cook*, No. 11 Civ. 5926 (RJS), 2012 WL 4841735, at *5 (S.D.N.Y. Oct. 9, 2012) (applying adverse inference against non-movant defendant where defendant's "repeated invocations of his Fifth Amendment privilege" caused "Plaintiff's inability to obtain information to which he is otherwise entitled"); *Armstrong v. Collins*, Nos. 01 Civ. 2437 (PAC), 02 Civ. 2796 (PAC), 02 Civ. 3620 (PAC), 2010 WL 1141158, *33 (S.D.N.Y. Mar. 24, 2010) (acknowledging split among district courts but holding that "[o]n the facts and circumstances here, the Court finds that it is appropriate to draw an adverse inference against [defendant]"); *U.S. S.E.C. v. Suman*, 684 F. Supp. 2d 378, 387 (S.D.N.Y. 2010) (drawing adverse inference against non-movant on summary judgment, but holding that "summary judgment cannot be granted on an adverse inference alone; rather, the inference must be weighed with other evidence in the matter in determining whether genuine issues of fact exist"), *aff'd,* 421 F. App'x 86 (2d Cir. 2011); *New York Dist. Council of Carpenters Pension Fund*, 2009 WL 362640, at *4 (drawing adverse inference against non-movant on summary judgment, though stating that, under *Stichting*, "even assuming that a jury might draw [adverse] inferences, [the court is] required at summary judgment to draw all reasonable inferences in favor of the non-moving party" (second alteration in original)); *S.E.C. v. Pittsford Capital Income Partners, L.L.C.*, No. 06 Civ. 6353T (P), 2007 WL 2455124, at *15 (W.D.N.Y. Aug. 23, 2007) (drawing negative inference against non-movant defendants), *aff'd in part, appeal dismissed in part sub nom. S.E.C. v. Pittsford Capital Income Partners, LLC*, 305 F. App'x 694 (2d Cir. 2008); *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 452 (N.D.N.Y. 2006) (applying adverse inference against defendant on plaintiff's summary judgment motion, but denying the motion); *JSC Foreign Econ. Ass'n Technostroyexport v. International Dev. & Trade Servs., Inc.*, 386 F. Supp. 2d 461, 464 (S.D.N.Y. 2005) (drawing adverse inferences against non-movants and holding that, "[w]hile the court is required to draw all reasonable inferences in favor of the non-moving party on a motion for summary judgment, a negative inference may be drawn against the non-moving party if the non-moving party asserts the Fifth Amendment privilege against self-incrimination in response to probative evidence provided by the moving party"). Even those courts that have permitted adverse inferences on summary judgment hold that a summary judgment motion cannot be granted on the basis of an adverse inference alone. *See, e.g.*, *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 26 (E.D.N.Y. 2013); *Ball v. Cook*, No. 11 Civ. 5926 (RJS), 2012 WL 4841735, at *5 (S.D.N.Y. Oct. 9, 2012); *Armstrong v. Collins*, 2010 WL 1141158, at *34 (S.D.N.Y. Mar. 24, 2010); *U.S. S.E.C. v. Suman*, 684 F. Supp. 2d 378, 386–87 (S.D.N.Y. 2010); *In re Inflight Newspapers, Inc.*, 423 B.R. 6, 18 (Bankr. E.D.N.Y. 2010); *see also Fidelity Funding of California, Inc. v. Reinhold*, 79 F. Supp. 2d 110, 116 (E.D.N.Y. 1997); *Centennial Life Ins. Co. v. Nappi*, 956 F. Supp. 222, 228 (N.D.N.Y. 1997).

[72] *See In re Inflight Newspapers, Inc.*, 423 B.R. 6, 17-18 (describing split among lower courts).

[73] *See New York Dist. Council of Carpenters Pension Fund*, 2009 WL 362640 at *4.

decisions which preceded the decisions in *650 Fifth Avenue and Related Properties* and *Amusement Industries*, did not cite *Stichting*.

4. Drawing An Adverse Inference On Summary Judgment Requires Corroboration

While the application of an adverse inference to a non-moving party on summary judgment is not entirely clear, what seems clear is that an adverse inference, in and of itself, is insufficient to support a finding of liability. Instead, there must be independent and corroborating evidence of wrongdoing.[74] Specifically, the Seventh Circuit has stated "defendant's silence [should] be weighed *in light of other evidence* rather than leading directly and without more to the conclusion of guilt or liability."[75]

The Second Circuit also suggested this result in *LiButti*, where the defendant argued on appeal that the district court during its bench trial weighted the adverse inference against her too heavily. In rejecting the defendant's argument, the Second Circuit noted that "the district court did not rely solely upon the adverse inference" in rendering judgment against the defendant but instead "tested the persuasiveness of the adverse inference against other evidence, and having done so, accorded considerable weight to the adverse inference" because it was consistent with other evidence.[76]

Nevertheless, dismissal has resulted from the mere invocation of the privilege when the invocation is regarding facts that are crucial to a defendant's ability to mount a defense and are uniquely in plaintiff's control. In *Serafino v. Hasbro, Inc.*,[77] the court dismissed the plaintiff's action stating that although plaintiff had an absolute constitutional right not to reveal any potentially incriminating material, his invocation of his Fifth Amendment privilege placed defendants at a significant disadvantage and hindered their ability to mount a defense, because the facts were uniquely in control of plaintiff himself.

IV. FACTORS TO CONSIDER WHEN DETERMINING WHETHER A CIVIL CASE SHOULD BE STAYED PENDING THE OUTCOME OF A CRIMINAL TRIAL

What happens when a civil and criminal case are pending at the same time? In order to ensure that testimony in the civil case does not affect the criminal trial, courts will, in certain instances, impose a stay of the civil case pending a determination of the criminal trial. District courts have set forth six or seven factors (depending on the jurisdiction) that a court will consider in deciding

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[74] *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *5 (E.D. Ill. May 11, 2000) ("an adverse inference drawn against a party invoking the Fifth Amendment privilege is ordinarily insufficient to support summary judgment in the absence of other independent, material and probative evidence…Nor is an adverse inference based on a Fifth Amendment invocation alone sufficient evidence to defeat summary judgment."); *Sebastian v. City of Chicago,* No. 05 C 2077, 2008 WL 2875255, at *34 (N.D. Ill. July 24, 2008) ("Before an adverse inference may be drawn from a party's refusal to testify in a civil case, there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege.") (internal citations omitted).

[75] *See, LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995) [emphasis in original].

[76] *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999).

[77] 82 F.3d 515, 519 (1st Cir. 1996). The district court found that there were "no company records or other Hasbro employees whose information could effectively substitute for responses from George Serafino himself." The Court of Appeals agreed.

whether a stay is warranted. Although the factors may vary, courts will consider the same general concepts as follows:

> (i) [T]he interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire; (ii) the hardship to the defendant, including the burden placed upon him should the cases go forward in tandem; (iii) the convenience of both the civil and criminal courts; (iv) the interests of third parties; and (v) the public interest … (vi) the good faith of the litigants (or the absence of it) and (vii) the status of the cases.[78]

The Second Circuit uses a six-factor test: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *Louis Vuitton Malletier S.A. v. LY USA, Inc.,* 676 F.3d 83, 99 (2d Cir. 2012).

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[78] *Green v. Cosby*, 177 F. Supp. 3d 673, 678 (D. Mass. 2016) (*citing Microfinancial, Inc. v. Premier Holidays Int'l, Inc.,* 385 F.3d 72, 77 (1st Cir. 2004)); *Sokol v. Brent Clark, M.D., P.C.*, No. 16-1477, 2018 WL 1089620, at *1 (W.D. Pa. Feb. 23, 2018) (same); *Duncan v. Banks*, No. SA-15-CV-148-XR, 2017 WL 4805111, at *2 (W.D. Tex. Oct. 24, 2017) (same); *Blanda v. Martin & Seibert, L.C.,* No. 2:16-0957, 2017 WL 63027, at *3 (S.D. W.Va. Jan. 5, 2017) (setting forth the following six factors (1) the interest of the plaintiff's in proceeding expeditiously with the litigation or any particular aspect of it, and the potential prejudice to plaintiffs of delay, (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; (5) the interest of the public in the pending civil and criminal investigation; (6) the relatedness of the criminal and civil proceedings (whether they involve substantially similar issues)); *Superior Home Mortg., LLC v. Marbury,* No. 1:19-cv-01056-STA-jay, 2020 WL 1878861, at *1 (W.D. Tenn. April 15, 2020) (*citing FTC v. E.M.A. Nationwide, Inc*., 767 F.3d 611, 627 (6th Cir. 2014) (setting forth the following seven factors (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; (6) the public interest (7) the extent to which the defendant's fifth amendment rights are implicated.)); *United States v. Brown,* No. 1:12-cv-00394-SEB-DKL, 2013 WL 1221982, at *3-4 (S.D. Ind. March 25, 2013) (setting forth the following six factors (1) the posture of the criminal proceedings; (2) the overlap of the criminal and civil proceedings; (3) whether the government entity initiating the criminal action is also a party in the civil matter; (4) the burden on the defendants if the civil case is not stayed; (5) the prejudice to the civil plaintiff if the civil case is stayed; and (6) the effect of a stay on the public interest.); *Ruszczyk v. Noor*, 349 F. Supp. 3d 754, 759-760 (D. Minn. 2018) (setting forth the following six factors - (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation; (6) the extent to which the defendant's fifth amendment rights are implicated.); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-325 (9th Cir. 1995)(same); *Fine v. Tumpkin,* No. 17-cv-02140, 2018 WL 317466, at *3-4 (D. Colo. Jan. 8, 2018) (same); *S.W. v. Clayton Cnty., Pub. Sch.,* 185 F. Supp. 3d 1366, 1372-1372 (D. Georgia, 2016) (same).

At least one district court in the Eleventh Circuit has stated that "[t]he similarity of the issues in the underlying civil and criminal actions is considered the most important threshold issue in determining whether to grant a stay."[79]

As set forth by a district court in the Seventh Circuit, the "Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings … The ultimate question, therefore, is whether the court should exercise its discretion in order to avoid placing the defendants in a position of having to choose between risking a loss in their civil cases by invoking their Fifth Amendment rights, or risking conviction in their criminal cases by waiving their Fifth Amendment rights and testifying in the civil proceedings."[80]

Where one of the parties to the civil litigation is the government, a court is more likely to grant a stay pending the determination of the criminal proceeding. This is because "[i]f the governmental entity that initiated the parallel criminal prosecution or investigation is a party in the civil case, there is a concern that it may use the civil discovery process to circumvent limitations on discovery in criminal proceedings"[81] and "might seek to misuse the civil discovery process in order to further its interests in [a] criminal prosecution."[82] Conversely, the potential for prejudice is diminished where a private party, not the government, is the plaintiff, because it is less likely that civil discovery will be "used as a cloak to conduct criminal discovery."[83]

At least one court has held that where the Government brings a civil lawsuit simultaneously with a criminal proceeding and *the Government* is seeking a stay, a stay is improper absent a specific showing of prejudice that cannot be remedied by anything other than a complete stay of the civil proceeding.[84]

V. USE OF ALTERNATIVE REMEDIES, SUCH AS A RULE 26(C) PROTECTIVE ORDER

There has been some suggestion that courts should use the power presented in Rule 26(c) and simply issue a protective order as a way to limit prosecutorial access to testimony. Proponents argue that issuing a protective order will foreclose the possibility of future use of civil testimony in a criminal proceeding, thereby removing the need for the invocation of a Fifth Amendment privilege. The Second Circuit and at least one district court in the Fifth Circuit have held that the protections of a Rule 26(c) protective order are insufficient to protect civil testimony from future

[79] *S.W. v. Clayton Cnty., Pub. Sch.,* 185 F. Supp. 3d 1366, 1372-1372 (D. Georgia, 2016).
[80] *United States v. Brown*, 2013 WL 1221982, at *3 *(internal citations omitted)*.
[81] *See Chagolla v. City of Chicago*, 529 F. Supp. 2d 941, 946 (N.D. Ill. 2008).
[82] *See In re Scrap Metal Antitrust Litig.*, No. 1:02-CV-0844, 2002 WL 31988168, at *4 (N.D. Ohio, Nov. 7, 2002).
[83] *Citibank, N.A. v. Hakim*, No. 92 Civ. 6233, 1993 WL 481335, at *2 (S.D.N.Y. Nov. 17, 1993); *see also State Farm Mut. Auto. Ins. Co. v. Mittal*, No. 16-CV-4989(FB)(SMG), 2018 WL 3127155, at *3 (E.D.N.Y. June 25, 2018); *JHW Greentree Capital, L.P., Whittier Trust Co.*, No. 05 Civ. 2985 (HB), 2005 WL 1705244, at *2 (S.D.N.Y. July 22, 2005); *Bernard v. Lombardo*, No.16 Cv. 863 (RMB), 2017 WL 2984022, at *4 (S.D.N.Y. June 9, 2017); *Citibank, N.A. v. Super Sayin' Publ'g, LLC*, 86 F. Supp. 3d 244, 248 (S.D.N.Y. 2015); *Karimona Invs. LLC v. Weinreb*, No. 02 CV 1792 (WHP) (THK), 2003 WL 941404, at *4 (S.D.N.Y. Mar. 7, 2003).
[84] *S.E.C. v. Fraser*, No. CV-09-00443-PHX-GMS, 2009 WL 1531854, at *3 (D. Ariz. June 1, 2009); *see also S.E.C. v. Sandifur*, No. C05-1631C, 2006 WL 3692611, at *3 (W.D. Wash. Dec. 11, 2006); *FTC v. Johnson*, No. 2:10-cv-02203-MMD-GWF, 2013 WL 3155311, at *3 (D. Nev. June 19, 2013).

use in a criminal prosecution, and therefore a witness cannot be forced to testify based upon the presence of a Rule 26(c) protective order.

In *Andover Data Services, Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*,[85] the Second Circuit stated that "the protections of a Rule 26(c) order simply are not as certain as the protections of either the fifth amendment or a statutory grant of use immunity… [N]o matter how broad its reach, [it] provides no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution." Further, in *Odeh v. City of Baton Rouge/E. Baton Rouge,*[86] the court denied Defendant's motion to compel "[b]ecause district courts are precluded from compelling testimony in a civil [action] over a valid assertion of the Fifth Amendment privilege, absent a specific assurance of immunity for such testimony…" and "a protective order cannot adequately protect Plaintiff's interests…".[87]

VI. ADVERSE INFERENCES IN DIFFERENT FACTUAL SCENARIOS

A. Invocation Of The Fifth Amendment Privilege By A Non-Party

Under certain circumstances, an adverse inference will be applied to a party in a civil litigation where a non-party witness invokes his or her Fifth Amendment privilege.[88] In *LiButti v. United States*,[89] the daughter ("Edith") of a delinquent taxpayer ("Robert") brought an action for wrongful levy against the U.S. government. Among other things, Edith sought to enjoin the IRS from enforcing a tax levy on a certain race horse as part of its effort to collect unpaid taxes from Robert. After a bench trial at which Robert invoked his Fifth Amendment privilege when questioned about whether his funds were used to purchase the horse, the district court found that Edith was the sole owner of the horse and that the IRS had failed to establish a sufficient nexus between the horse and Robert to enforce the levy.

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[85] 876 F.2d 1080, 1082-1085 (2d Cir. 1989)

[86] No. 14-793-JJB-RLB, 2016 WL 1069663, at *3 (M.D. La. March 17, 2016).

[87] "The term 'use immunity' refers to a limited grant of immunity where, in exchange for a witness' self-incriminating testimony, the government is barred from using that testimony against the witness in a future prosecution. *See* L. TAYLOR, WITNESS IMMUNITY 79 (1983)." Murphy, *Use Immunity and the Fifth Amendment: Maybe the Second Circuit Should Have Stayed Silent,* 63 St. John's L. Rev. 585, 586, n.4 (No. 3 Spring 1989) "Transactional immunity provides broader protection to the witness than use immunity because it bars forever a prosecution for anything incriminating which the witness mentions. *See* L. TAYLOR, *supra ,* note 4, at 75." *Id*, n. 5.

[88] *Gil Ramirez Grp., L.L.C. v. Hous. Indep. Sch. Dist.*, No. 4:10-CV-04872, 2017 WL 3236110, at *15 (S.D. Tex. July 31, 2017) (holding that a non-party's silence in a civil proceeding implicates Fifth Amendment concerns to a lesser degree than a party's silence.); *Rad Servs., Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 274-277 (3d Cir. 1986) (drawing an adverse inference against plaintiff, a corporation, since "the mere fact that the witness no longer works for the corporate party should not preclude as evidence his invocation of the *Fifth Amendment*."); *F.D.I.C. v. Fidelity & Deposit Co.*, 45 F.3d 969, 978 (5th Cir. 1995) (drawing an adverse inference from invocation of the Fifth Amendment privilege by "non-part[ies] who [were] neither [] agent[s] nor [] employee[s], officer[s], director[s] or voting member[s] of the party,…"); *Cerro Gordo Charity v. Fireman's Fund Amer. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987) (imposing adverse inference against party due to the invocation of the Fifth Amendment privilege by non-party witness, since it was unlikely that the non-party witness would invoke the privilege solely for the purpose of harming the party, the invocation of the privilege was not the sole evidence implicating liability, and the non-party witness was a key figure in the lawsuit.).

[89] 107 F.3d 110, 123-124 (2d Cir. 1997).

On appeal, the government argued that the district court erred in refusing to draw any adverse inference from Robert's invocation of the Fifth Amendment privilege. Under the circumstances presented, the court held Robert's invocation of his Fifth Amendment privilege "struck directly at the only issue before the court," i.e., whether he or his daughter was the effective owner of the horse, and therefore should have been admitted in evidence and an adverse inference permitted. The court then remanded for the district court to consider the weight to be accorded Robert's invocations and whether any issues of unfair prejudice existed under Rule 403.

The court stated that "the circumstances of a given case, rather than the status of a particular non-party witness," determines the admissibility of any given witness's refusal to answer questions on Fifth Amendment grounds. Noting the "undeveloped posture of the law pertaining to adverse inferences when non-party witnesses invoke the Fifth Amendment in civil litigation," the court then surveyed the state of the law in other circuits on this issue and found that "the evolving case law and its underlying rationale . . . suggest a number of non-exclusive factors which should guide the trial court in making these determinations."

The Second Circuit set forth the following four-factor test to determine the admissibility of a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of a civil litigation and the concomitant imposition of an adverse inference:

> 1. *The Nature of the Relevant Relationships:* While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.[90]
>
> 2. *The Degree of Control of the Party Over the Non-Party Witness:* The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed, [] as a vicarious admission.
>
> 3. *The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.

[90] At least two courts in the Seventh Circuit have held that in order to apply an adverse inference to a party based upon a non-party's invocation of the Fifth Amendment privilege; the party seeking to use the invocation must establish a "relationship of loyalty." *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205, 2015 WL 2371597, at *25-26 (S.D. Ind. May 18, 2015); *Sebastian v. City of Chicago,* No. 05 C 2077, 2008 WL 2875255, at *33-34 (N.D. Ill. July 24, 2008). These cases have defined a relationship of loyalty as a close family or business relationship between the person who exercised the Fifth Amendment right and the individual against whom an adverse inference is drawn or where the interests of the parties in question are closely aligned. *Id*.

4. *The Role of the Non-Party Witness in the Litigation:* Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.[91]

Although the Supreme Court has not directly ruled on this issue, the four-factor test enumerated in *LiButti* has become well recognized and applied in each of the 11 Circuits.[92] In analyzing these four factors, the overarching concern remains whether applying the adverse inference is trustworthy and will advance the search for truth.[93] Courts apply this same analysis when determining whether an adverse inference should be applied against a litigant based on a Fifth Amendment invocation by another party to the same litigation.[94]

In applying *LiButti*, federal courts in New York have consistently followed the Second Circuit's admonition to evaluate the permissibility of adverse inferences by scrutinizing the particular facts. It is therefore difficult to draw generalizations about how particular types of third parties are treated.[95] Since *LiButti*, courts have permitted adverse inferences in the following types of cases:

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[91] *LiButti*, 107 F.3d at 123-124.

[92] *See e.g. Coquina Invs. v. TD Bank*, N.A., 760 F.3d 1300, 1310-1313 (11th Cir. 2014); *Rad Services, Inc.*, 808 F.2d at 274-277; *Cargill, Inc. v. WDS, Inc.*, No. 3:16-cv-00848, 2018 WL 1525352, at *12 (W.D. N.C. Mar. 28, 2018); *Securities and Exchange Comm'n v. Avent*, No. 1:16-CV-2459-SCJ, 2017 WL 6460243, at *4 (D. Ga. Dec. 15, 2017); *Schoenmann v. Salevouris*, No. 15-cv-05193-JSC, 2016 U.S. Dist. LEXIS 147089, at *7-10 (N.D. Cal. Oct. 24, 2016); *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205, 2015 WL 2371597, at *25-26 (S.D. Ind. May 18, 2015); *United States v. 62,552.00 in United States Currency*, No. 03-10153-RBC, 2015 WL 251242, at *7 (D. Mass. Jan. 20, 2015); *Lighthouse List Co., LLC v. Cross Hatch Ventures Corp.*, No. 13-60524, 2014 WL 11531800, at *11 (S.D. Fla. June 12, 2014); *Cotton v. City of Eureka*, No. C-08-04386 SBA, 22010 WL 2889498, at *4 (N.D. Cal. July 22, 2010); *United States v. Zerjav*, No. 4:08CV00207 ERW, 2009 WL 912821, at *33 (E.D. Mo. Mar. 31, 2009); *Miller v. Pilgrim's Pride Corp.*, No. 5:05CV00064, 2008 WL 178473, at *8 (W.D. Va. Jan. 16, 2008); *Emerson v. Wembley United States, Inc.*, 433 F. Supp. 2d 1200, 1211-1214 (D. Colo. 2006); *Parker v. Olympus Health Care, Inc.*, 264 F. Supp. 2d 998, 1001 (D. Utah, 2003); *Garrish v. UAW*, 284 F. Supp. 2d 782, 797-798 (E.D. Mich. 2003); *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *5 (E.D. Ill. May 11, 2000).

[93] *LiButti*, 107 F.3d at 124; *see also Coquina Invs.*, 760 F.3d at *1311; *Cargill, Inc.*, 2018 WL 1525352, at *12; *Zertuche v. United States*, No. 2:15-cv-02284-JPM-dkv, 2017 WL 6811994, at *13 (W.D. Tenn. Sept. 13, 2017); *Rigby v. Corliss (In re Mastro)*, No. 09-16841-MLB, 2017 WL 2889659, at *12 (Bankr. W.D. Wash. July 6, 2017); *United States v. 62,552.00 in United States Currency*, 2015 WL 251242, at *7; *Malibu Media LLC*, 2015 WL 2371597, at *10; *United States v. Zerjav*, 2009 WL 912821, at *33; *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 100250, at *2-3 (D. Kan. Jan. 8, 2013).

[94] *See, e.g.*, *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000) (relying on *LiButti* factors to draw adverse inference against invoker's co-defendants); *Willingham v. Cty. of Albany*, 593 F. Supp. 2d 446, 452–53 (N.D.N.Y. 2006) ("*LiButti* concerned the invocation of the privilege by a non-party witness where the court found that such invocation merited an adverse inference against a party. However, the rationale and analysis of *LiButti* have equal application to a case, as here, where a party invokes the privilege and the question presented is whether the party's invocation merits application of an adverse inference against other parties.").

[95] *Banks v. Yokemick*, 144 F. Supp. 2d 272, 289 (S.D.N.Y. 2001) ("The courts in these cases have declined to enunciate a blanket rule governing the drawing of adverse inferences from a non-party witness' invocation of the privilege against self-incrimination, preferring instead a case-by-case approach." (citing *LiButti*)); *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007) ("There are no bright line rules governing the drawing of an adverse inference from a non-party's invocation of the privilege against self-incrimination.").

- On plaintiff's summary judgment motion, adverse inference was drawn against defendant CEO of real estate investment firm as a result of invocation by the firm's outside counsel, a non-party to the litigation, where counsel represented defendant on an allegedly fraudulent transaction and served as point of contact between plaintiff and defendant with respect to the transaction.[96]

- On plaintiff SEC's motion for civil contempt for failure to pay previously ordered disgorgement, an adverse inference was permitted against defendant husband as a result of non-party wife's invocation.[97]

- On cross-motions for summary judgment, an invocation by a defendant employee of the Albany Housing Authority ("AHA") was used as the basis for an adverse inference against a co-defendant employee of AHA.[98]

- On a motion for a preliminary injunction in an action by the manufacturer of hair-care products against distributors, the court permitted an adverse inference against the downstream American distributor based on Fifth Amendment invocations by co-defendant upstream Chinese distributors, where all defendants were alleged to have participated in joint fraudulent scheme against manufacturer and therefore all defendants' interests in avoiding a fraud finding were aligned.[99]

- On motion *in limine*, the bankruptcy court permitted an adverse inference in a trustee's favor based on Fifth Amendment invocations by non-party former individual brokers of debtor's introducing broker.[100]

On the other hand, federal courts in New York have declined to permit adverse inferences in the following cases:

- In a bench trial, the court declined to draw adverse inference based on Fifth Amendment invocations by defendant's employee and friend, where there was no evidence that defendant personally participated in the alleged wrongful activity.[101]

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[96] *Amusement Indus., Inc. v. Stern*, 01 Civ. 11586 (LAK) (GWG), 2016 WL 4249965, at *7–*8 (S.D.N.Y. Aug. 11, 2016), *report and recommendation adopted,* 2016 WL 6820744 (S.D.N.Y. Nov. 10, 2016), *aff'd,* 721 F. App'x. 9 (2d Cir., 2018). On appeal, the Second Circuit noted that the District Court found there was other evidence that itself supported summary judgment, and that the adverse inferences drawn were corroborative of such other evidence. 721 F. App'x at *11.

[97] *S.E.C. v. Durante*, No. 01 Civ. 9056 (DAB) (AJP), 2013 WL 6800226, at *10 (S.D.N.Y. Dec. 19, 2013), *report and recommendation adopted,* No. 01 CIV. 9056 DAB, 2014 WL 5041843 (S.D.N.Y. Sept. 25, 2014), *aff'd,* 641 F. App'x 73 (2d Cir. 2016).

[98] *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 452–53 (N.D.N.Y. 2006).

[99] *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000).

[100] *In re Adler, Coleman Clearing Corp.*, No. 95-08203 (JLG), 1998 WL 182808, at *7-*9 (Bankr. S.D.N.Y. Apr. 17, 1998).

[101] *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 555 (S.D.N.Y. 2011).

- An adverse inference was rejected against a subordinate employee from the invocation of the Fifth Amendment by a former supervising employee.[102]

- In a civil rights case, an adverse inference was rejected against the police officer defendant based on the Fifth Amendment invocations by defendant's patrol partner and the ranking officer at the scene of the alleged misconduct.[103]

- The Second Circuit affirmed a district court's refusal to charge the jury that it could draw an adverse inference against the U.S. Customs and Border Patrol ("CBP") based on Fifth Amendment invocation by a non-party witness who was a "very low level employee" of CBP, where the witness "had no control over the key facts and issues in the litigation," there was "no showing that the witness was 'pragmatically a noncaptioned party in interest,'" and there was "insufficient information to determine that an adverse inference against CBP would have been 'trustworthy under all of the circumstances.'"[104]

- On defendant's motion *in limine*, the court rejected an application for a jury instruction permitting an adverse inference against the plaintiff administrative trustee overseeing a company's assets from invocation of the Fifth Amendment by the company's former senior vice present and general counsel.[105]

- On cross-motions for summary judgment, a bankruptcy court denied an adverse inference against the debtor based on invocations by the debtor's former officers.[106]

B. Invocation Of The Fifth Amendment Privilege By An Employee

Although an employee's invocation of the Fifth Amendment privilege is an inherently personal decision and right, the refusal to testify may nonetheless result in the imposition of an adverse inference against that employee's employer. Indeed, the majority of Circuits have recognized that adverse inferences can be imputed to a corporate party if the witness asserting the privilege is either a current or former employee, officer, or agent of that corporation, and the question that they refuse to answer concerns activities carried out by the corporation.[107]

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[102] *Securities & Exch. Comm'n v. Adelphia Commc'ns Corp.*, No. 02 Civ. 776 (PKC), 2006 WL 8406833, *12 (S.D.N.Y. Nov. 16, 2006).

[103] *Banks v. Yokemick*, 144 F. Supp. 2d 272, 289 (S.D.N.Y. 2001).

[104] *Akinyemi v. Napolitano*, 347 F. App'x 604, 607 (2d Cir. 2009) (quoting *LiButti*, 107 F.3d at 123–24).

[105] *Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294 (PKL), 2003 WL 21998980, *2–*3 (S.D.N.Y. Aug. 22, 2003).

[106] *In re WorldCom, Inc.*, 377 B.R. 77, 110 (Bankr. S.D.N.Y. 2007)

[107] *See*, *e.g.*, *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983) (holding that refusal by former and current employees of corporation to answer on Fifth Amendment grounds questions about their knowledge and participation in alleged thefts carried out in the course of their employment was competent and admissible evidence in negligence action against employer corporation); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271 (3d Cir. 1986) (holding that district court properly admitted the Fifth Amendment assertions of directors allegedly involved in planning of unlawful dumping by employer corporation); *Curtis v. M&S Petroleum, Inc*., 174 F.3d 661 (5th Cir. 1999) (holding that district court abused its discretion in excluding evidence of the assertion, by the employer corporation's president, of his Fifth Amendment privilege during his deposition as corporate representative); *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 385 (6th Cir. 1993) ("…where the witness invoking the privilege is a former employee of the civil defendant, and where the questions that the witness refuses

The Second Circuit emphasizes a case-by-case consideration of factors pursuant to Federal Rules of Evidence 403 and 501, although issues of loyalty to the corporation predominate. As discussed above, the court in *LiButti v. United States*[108] identified the following "non- exclusive" factors:

(1) The nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and; (4) the role of the non-party witness in the litigation.

The *LiButti* court noted that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth."[109]

The First Circuit has pointed out, however, that an adverse inference cannot be derived automatically from the mere existence of an employment relationship. Thus, in *Veranda Beach Club Ltd. Partnership v. Western. Sur. Co.*, the First Circuit recognized that "…an individual's invocation of a personal privilege against self-incrimination cannot, without more, be held against his corporate employer."[110] *Veranda Beach* concerned an action brought against a surety company's agent and his corporate employer based on the agent's alleged forgery of bond documentation. The plaintiff sought an adverse inference against the agent's employer based on the agent's assertion of the Fifth Amendment privilege when responding, as corporate representative, to requests for admissions served on the employer. The First Circuit upheld the district court's decision to exclude from evidence the requests for admission which prompted the agent's assertion of the Fifth Amendment privilege and rejected plaintiff's request for an adverse inference, since there was little evidence to show that the employer was closely involved in the disputed transaction or that it was even aware of or benefited from the agent's wrongdoing.[111]

The First Circuit subsequently issued a decision in *Iantosca v. Benistar,* which clarified its prior decision in *Veranda Beach*, holding that there is no *per se* rule insulating a corporate employer from adverse inferences based on an employee's assertion of the Fifth Amendment.[112] Thus, it found that the district court had properly instructed the jury that a negative inference was permissible against two corporations based on their common employee's invocation of the Fifth

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to answer concern the witness's activities undertaken on behalf of the employer and during the period of employment, it is proper to allow the jury to impute the witness's guilt to the defendant."); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481-82 (8th Cir. 1987) (holding that non-party former director of charity could be called to the stand to assert his Fifth Amendment privilege in an action involving the charity where his actions as a director were directly relevant to the case); and *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1312 (11th Cir. 2014) (permitting jury to draw adverse inference against defendant bank based on former employee's assertion of the Fifth Amendment privilege, where there was evidence of the former employee's knowledge of and involvement in the alleged fraudulent acts asserted against the defendant bank).

[108] *LiButti v. United States*, 107 F.2d 110, 123-24 (2d Cir. 1997)

[109] *Id. See also Progressive Cas. Ins. Co. v. Monaco*, No. 16-cv-823 (VAB), 2017 WL 2873051, at *10 (D. Conn. July 5, 2017).

[110] *Veranda Beach Club Ltd. Partnership v. Western. Sur. Co*, 936 F.2d 1364, 1374 (1st Cir. 1991)

[111] *Id.*, at 1373-75

[112] *Iantosca v. Benistar Admin. Servs., Inc.*, 567 F. App'x 1, 6 (1st Cir. 2014) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 352 (D. Mass. 1993))

Amendment.[113] The First Circuit noted that "…there was more than a simple employment relationship" since the corporate parties to which the employee's silence was imputed were, in fact, his alter egos, and that another officer, the employee's brother-in-law, had also invoked the Fifth Amendment.[114]

As these decisions illustrate, the effect of an employee's silence on his or her employer are addressed on a case-by-case basis. The case law reflects that the trustworthiness of an adverse inference based on a non-party assertion of the Fifth Amendment must generally be determined by taking into account the factors set forth in *LiButti*.[115]

C. Invocation Of The Fifth Amendment Privilege In A Separate Proceeding

With the exception of one narrow set of circumstances, it appears that no federal court in the Second Circuit has permitted an adverse inference to be taken from an invocation of the Fifth Amendment privilege in a separate proceeding. This is consistent with the rule that testimonial waiver of an individual's Fifth Amendment rights may only be inferred where the individual gave prior voluntary testimony "in the context of the same judicial proceeding."[116]

The narrow circumstance in which courts in the Second Circuit have permitted invocations of the Fifth Amendment to result in adverse inferences in separate proceedings is in the context of civil enforcement proceedings by the Securities & Exchange Commission. In several cases, courts in the Southern District of New York and the District of Connecticut have permitted adverse inferences to be drawn where a defendant in an enforcement action in federal court invoked his or her Fifth Amendment privilege in a prior SEC administrative investigation.

In *S.E.C. v. Dibella*, the court considered a motion by the SEC to admit evidence of defendant's Fifth Amendment invocations.[117] Defendant had asserted his Fifth Amendment rights when questioned at two SEC depositions in the summer of 2000, when the U.S. Attorney's Office was investigating the same conduct.[118] In 2004, the SEC initiated a federal action against defendant.[119] In 2006, after the threat of criminal prosecution passed, defendant waived his Fifth Amendment rights and submitted to a deposition but acknowledged that his recollection of relevant events had faded.[120] The court granted the SEC's motion *in limine* seeking to admit defendant's prior invocation of his Fifth Amendment privilege, holding that the SEC had been hamstrung in proving its case by defendant's invocations and that defendant had been properly apprised by the SEC at every stage of the investigation that the SEC would seek adverse inferences based on his refusal to testify.[121]

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[113] *Id.*, at 6-7
[114] *Id.*
[115] *See* Section 3(D)(i) of this Report.
[116] *See, e.g.*, *Klein v. Harris*, 667 F.2d 274, 288 (2d Cir. 1981).
[117] *S.E.C. v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 1395105 (D. Conn. May 8, 2007).
[118] *Id.* at *1.
[119] *Id.* at *2.
[120] *Id.*
[121] *Id.*; *see also S.E.C. v. PacketPort.com Inc.*, No. 3:05-cv-1747 (JCH), 2006 WL 2349452 (D. Conn. July 28, 2006); *S.E.C. v. Herman*, No. 00 Civ. 5575 (PKC) (MHD), 2004 WL 964104 (S.D.N.Y. May 5, 2004); *S.E.C. v. Cassano*, No. 99 Civ. 3822 (LAK), 2000 WL 1512617 (S.D.N.Y. Oct. 11, 2000).

VII. REVOCATION OF THE FIFTH AMENDMENT PRIVILEGE

While a party can revoke their previously asserted Fifth Amendment privilege and then testify at trial,[122] this is not an absolute right. Whether the invocation may be subsequently withdrawn is a fact-sensitive matter. It generally depends on the stage of the proceedings at which the withdrawal of the privilege is attempted and whether the adversary would be prejudiced.[123]

In *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Avenue, Brooklyn, NY*,[124] the leading Second Circuit authority on this subject, the Court discussed the circumstances under which a court could permit a litigant to withdraw a prior invocation of the privilege against self-incrimination, noting that care must be given to ensure that such a litigant does not thereby gain a tactical advantage over his or her adversary:

> In some instances, however, a litigant in a civil proceeding who has invoked the Fifth Amendment may not seek any accommodation from the district court, and may instead simply ask to withdraw the privilege and testify. In other cases, a litigant may ask to give up the privilege rather than accept the accommodation that the court has offered. The district court should, in general, take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur. The court should be especially inclined to permit withdrawal of the privilege if there are no grounds for believing that opposing parties suffered undue prejudice from a litigant's later-regretted decision to invoke the Fifth Amendment. *See [Sec. Exch. Comm'n v.] Graystone Nash, Inc.*, 25 F.3d [187,] 190-94 [3d Cir. 1994]; *see also FTC v. Sharp*, 782 F.Supp. 1445, 1452-53 (D. Nev. 1991) (refusing to bar a litigant's later testimony, since "it does not appear that the [opposing party] has been unfairly prejudiced" by prior assertion of Fifth Amendment); *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1291 (D. Minn. 1985) (admitting a litigant's testimony, since opposing party "has not been unfairly surprised or prejudiced by the [litigant's] assertion of the privilege and subsequent decision to testify at trial").
>
> This does not mean that withdrawal of the claim of privilege should be permitted carelessly. Courts need to pay particular attention to how and when the privilege was originally invoked.

[122] *City of New York v. Golden Feather Smoke Shop*, No. 08-CV-3966 (CBA), 2010 WL 2653369, *3-4 (E.D.N.Y. June 10, 2010).

[123] In determining whether a party will be entitled to revoke the prior assertion of privilege, a court will consider "the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to the opposing parties." *Bourgal v. Robco Contracting Enterprises, Ltd.*, 969 F. Supp. 854, 861 (E.D.N.Y. 1997); *In re Adler, Coleman Clearing Corp.*, No. 95-08203 (JLG), 1998 WL 182808, *5 (Bankr. S.D.N.Y. April 17, 1998).

[124] 55 F.3d 78 (2d Cir. 1995).

> Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategy advantage over opposing parties. *See Graystone Nash*, 25 F.3d at 190 (discussing "the potential for exploration" through abusive assertions of the Fifth Amendment in civil actions). If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions. *See id*, at 190-94; *see also Wehling [v. Columbia Broad. Sys.*] 608 F.2d [1084,] 1089 [(5th Cir. 1979)] (stressing that courts must be "free to fashion whatever remedy is required to prevent unfairness"). In such circumstances, particularly if the litigant's request to waive comes only at the "eleventh hour" and appears to be part of a manipulative, "cat-and-mouse approach" to the litigation, a trial court may be fully entitled, for example, to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege. *See In re Edmond*, 934 F.2d 1304, 1308-09 (4th Cir. 1991); *United States v. Parcels of Land*, 903 F.2d 36, 42-46 (1st Cir. 1990); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 576-77 (1st Cir. 1989); *United States v. Talco Contractors Inc.*, 153 F.R.D. 501, 505-12 (W.D.N.Y. 1994); *United States v. Sixty Thousand Dollars*, 763 F.Supp. 909, 913-14 (E.D.Mich. 1991).
>
> In the end, exactly how a trial court should respond to a request to withdraw the privilege—or indeed, more generally, how it should react to any motion precipitated by a litigant's assertion of the Fifth Amendment in a civil proceeding—necessarily depends on the precise facts and circumstances of each case. And it is not the province of appellate courts to try "to set down a hard and fast rule … when, typically, the District court is in a better position to know what means will accomplish the end of accommodating [all] interests." [*United States v.*] *United States Currency*, 626 F.2d [11,] 16 [(6th Cir.], *cert. denied*, 449 U.S. 993 (1980)], *see also Graystone Nash*, 25 F.3d at 192-94 (stressing "the circumstances of the particular litigation" and that devising an "appropriate remedy is within the discretion of the trial court"). [125]

District courts in the Second Circuit and outside the Second Circuit are in accord with the view set forth in *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Avenue, Brooklyn, NY*, and have held that it is important for a Court evaluating whether an invocation of

[125] *Certain Real Prop. & Premises*, 55 F.3d at 84-85 (2d Cir. 1995) (footnote omitted).

the Fifth Amendment privilege can subsequently be revoked to balance the competing interests of an attempted withdrawal with the resultant prejudice to be incurred by the other party.[126]

Conclusion

The Fifth Amendment provides a constitutional protection whereby an individual cannot be compelled to be a witness against himself. As set forth above, this constitutional privilege is not absolute and even when a party properly invokes the privilege, particularly in a civil case, that invocation is not without consequences. Being aware of the basic principles of invocation, the effects of same, and the parameters for revocation are essential to understanding the implications concerning invocation of the Fifth Amendment Privilege.

[126] *See e.g. United States v. The Incorporated Village of Island Park,* 888 F. Supp. 419 (E.D.N.Y. 1995) (refusing to permit the submission of affidavits opposing summary judgment when the defendants had previously blocked testimony during their depositions by invoking the Fifth Amendment); *Bourgal,* 969 F. Supp. 854, 861 (considering "the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to the opposing parties."); *City of New York v. Golden Feather Smoke Shop*, No. 08-CV-3966 (CBA), 2010 WL 2653369 (E.D.N.Y. June 25, 2010) (refusing to permit a witness to submit a declaration opposing a motion to find him in civil contempt because he had previously stymied attempts to depose him by repeatedly invoking the Fifth Amendment and holding that the witness' gamesmanship created significant prejudice to the opposing party and was an abuse of the discovery process); *Church & Dwight Co. v. Kaloti Enters. of Michigan, LLC*, 697 F. Supp. 2d 287 (E.D.N.Y. 2009) (analyzing each defendant differently and holding that some defendants could submit affidavits in opposition to a summary judgment motion but requiring those defendants to submit to a new deposition and testify freely about the issue in order to reduce prejudice to the plaintiff) *vacated in part on other grounds by* 2011 WL 4529605 (E.D.N.Y. Sept. 28, 2011); *see United States v. Sixty Thousand Dollars in United States Currency*, 763 F.Supp. 909, 913-914 (E.D. Mich. 1991) (passenger whose currency was seized and who refused to answer questions during discovery based on the Fifth Amendment could not factually oppose motions for summary judgment or testify at trial); *Dunkin Donuts Inc. v. Taseski*, 47 F. Supp. 2d 867, 872-873 (E.D. Mich. 1999) (striking affidavit in opposition to motion for summary judgment that concerned facts shielded from discovery by privilege); *In re National Audit Defense Network*, 367 B.R. 207, 216-218 (Bankr. D. Nev. 2007) (court empowered to draw negative inference from assertion of privilege and to strike counterclaim and affirmative defenses – privilege must be asserted on a question-by-question basis to ensure any corrective measures are narrowly tailored); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991) (Fifth Amendment cannot be sword and a shield – affidavit disregarded for summary judgment purposes when issues discussed were blocked during discovery).

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