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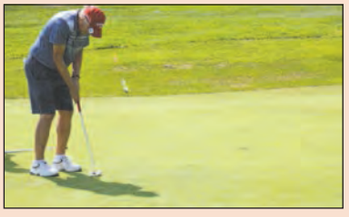

The Day the Rains Came Down

By Sarah Jane LaCova

Despite threatening skies and more than a light drizzle on the morning of August 13, fishing stalwarts aboard the Osprey left Port Jefferson Harbor with Captain Amanda Cash for a day of fishing. Barry Smolowitz, our boat photographer, captured the spirit of the jolly good time the fishing devotees had on film. While they had a little time for fishing before the storm really took on its full force and the boat had to return to shore, Mike Elliott won first prize, a fishing rod, for the biggest fish and Will Puvogel took second prize, earning a tackle box, for the second biggest fish.

The boat returned to shore where the Road King Band entertained the members and guests and they finished off a lunch and Sushi prepared by Jennifer Chan. A special thank you goes out to the members of the Road King Band, Jennifer Chan, her sushi chef and Joe LaCova, who picked up the breakfast, ice and lunch for all.

Rescheduled Golf Outing

The morning dawned on our rescheduled golf outing and brought us full sun-

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PRESIDENT'S MESSAGE

O.K... You're President, So What are You and the Bar Association Doing for Me?

Justin Block

By Justin Block

I have been president of the Suffolk County Bar Association for over a month now and have faced a few challenges already. These have been acute, short-term problems which have, or will be, resolved, and hopefully put in our collective rearview mirror.

One issue which will never go away is the issue of membership, and specifically the question we all face when our dues bill arrives: Is this worth it to me? What has the bar done for me, what are they doing for me, and what will they do for me in the future?

Allow me to try to address these questions so that you can be assured that your dues payment is worth every penny.

First, let's talk about the dues themselves. As you probably have figured out, the vast majority of our operating income is derived from our dues. There are other sources of revenue, but without our dues-paying members, we would be out of business in a heartbeat. The point is, we rely on our dues revenue to provide the programs and services our members use in their practices and their lives.

How do we compare? Using the category of lawyers in practice for anywhere from 6 to 10 years, our dues are

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BAR EVENTS

Judiciary Night
Wednesday, September 26, at 6 p.m.
Watermill Caterers, Smithtown

Enjoy an evening with the members of our judiciary, free from the constraints of the courtroom. Special guests of honor: Town Justices Hon. Andrea H. Schiavoni and Hon. Allen M. Smith.

Pro Bono Attorney Volunteer Luncheon
Wednesday, Oct. 17, at 12 noon
Bar Center, Hauppauge

A luncheon to honor our many pro bono volunteers who serve the Suffolk County community with distinction. Guest speaker District Administrative Judge, Hon. C. Randall Hinrichs

Membership dinner meeting with bowling
Wednesday, Oct. 17, at 6 p.m.
Polish Hall, Riverhead

"Telling Stories and Keeping Secrets," a member event not to be missed, 6 p.m.

FOCUS ON
FAMILY LAW
SPECIAL EDITION

CYBER

New Discovery Rules Have Changed Federal Litigation Forever

By Victor Yannacone, Jr.

The 2015 Amendments to the *Federal Rules of Civil Procedure* (Fed.R.Civ.P.) have resurfaced the federal litigation playing field.

Data preservation and record retention

The committee notes to Fed.R.Civ.P. Rule 37(e) recognize that "reasonable steps" to preserve electronically stored information suffice. Perfect preservation is not required, but there are certain practices which must be adopted to protect you as an attorney and your clients.

Your client must have a well-established record retention policy with compliance measures in place for their entire business operation.

Documentation of all record retention efforts is important. There should be some descriptive information associated with every backup effort starting with a log that is maintained by the individual who will eventually be named the "document custodian" when discovery demands are made.

Attorneys and law firms who have established relationships with business entities and their management should regularly discuss data preservation and record retention policies from the perspective that eventually e-discovery demands will be made upon the company.

Victor Yannacone

Rule 26 and Proportionality

Rule 26 does not require a business to keep everything even after litigation begins. The governing principle of the Rule is "Proportionality" and the basic criteria for evaluating proportionality is "reasonableness."

In the context of litigation, there are a series of questions which counsel should ask their clients before the court does.

• Did you circulate a legal hold notice throughout the company in a timely fashion?

• Did you immediately suspend any document retention policies which might apply to relevant data?

• Were the legal hold notices distributed to everyone who might hold potentially responsive data?

• Did you send out reminders or if necessary, reissue further litigation hold notices?

• Did you make sure that legal help notices went to every new hire?

• Did you make sure to preserve the data associated with every employee who left the company?

• Have you segregated and backed up the data from key custodians?

• Did you remember to check and where necessary preserve data from databases maintained by third parties which you or your client can access, particularly when they involve cross-border data processing and financial transfers?

• Have you considered local, state, regional, federal, and international privacy laws which may apply to some or all of the data your client is required to preserve?

Time is of the essence

The 2015 amendments have moved discovery issues to the very beginning of the litigation process rather than well into it, which has been accepted practice over the decades since the *Civil Practice Law & Rules* were adopted in New York.

Relying on the mandate of Fed.R.Civ.P. Rule 1 calling for a "just, speedy, and inexpensive" resolution of litigation, the 2015 amendments to Rule 4(m) and Rule 16 provide that defendants must be served, and scheduling orders issued within 90 days after the complaint is filed.

Courts throughout the country see the scheduling order under Rule 16(b) as a way to clear their dockets quickly and discourage litigation by parties who are unwilling to accept the expenses associated with the new discovery rules.

Attorneys who fail to adequately prepare for the Rule 26(f) conference *and* engage in a substantive and meaningful "meet and confer" session prior to the Rule 16 hearing now run the risk of censure or Draconian sanctions.

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COMMERCIAL LITIGATION

Partial Enforcement Language in a Non-Compete Agreement Does Not Guarantee Partial Enforcement

By Jeffrey Basso

A standard provision typically included in non-compete agreements is a "partial enforceability" provision that gives the court the power to modify or "blue pencil" the terms of the agreement if the court finds the restrictive covenant to be overly broad. For example, if a court finds that a non-compete provision restricting an employee from working for a competitor anywhere within 100 miles of its former employer is too broad and not necessary to protect the former employer's business interests, the partial enforceability provision would permit the court to limit the geographic restriction to say, 10 miles, if the court deems that narrowed limitation suitable. However, just because a partial enforceability provision is included in a non-compete agreement does not mean a court will modify the terms to "fix" an otherwise unenforceable agreement and, many times, the court will simply decline to enforce the agreement in its entirety.

One recent example of this came out of the Appellate Division, Second Department in *Long Island Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hospital*, 2018 NY Slip Op 05674 (2d Dep't 2018), which affirmed the earlier decision of Justice Driscoll in Nassau County Supreme Court. Plaintiff was a medical practice that performed weight loss and other general surgeries. It had seven different offices throughout the New York metropolitan area. Defendant Javier Andrade was a surgeon hired by plaintiff. Upon being hired, Andrade signed an employment agreement with a restrictive covenant prohibiting him, for two years upon the expiration of his employment, from performing *any* type of surgery within 10 miles of *any* of plaintiff's seven offices and affiliated hospitals. During his employment with plaintiff, Andrade worked at only two of plaintiff's Nassau County offices and a hospital in Nassau County. When Andrade left plaintiff, he went to work for the defendant, St. John's Episcopal Hospital. Although Andrade worked for St. John's in an area that was outside of the restricted area, St. John's itself fell within the restricted area. As a result, plaintiff commenced the action for breach of the restrictive covenant.

Jeffrey Basso

Prior to any discovery, both Andrade and St. John's moved for summary judgment to dismiss the Complaint and their motion was granted. Plaintiff appealed. On appeal, the Appellate Division held that the lower court correctly determined that the geographical restriction was overly broad and geographically unreasonable "because it effectively barred [Andrade] for performing surgery, his chosen field of medicine, in the New York metropolitan area" and plaintiff had failed to show why such a restriction was necessary to protect its interests especially because the restriction included areas where Andrade never even worked when he was employed by plaintiff.

Importantly, the Appellate Division also agreed with the lower court's refusal to modify the restrictive covenant to make it enforceable. Citing prior decisions in *Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805 (3d Dep't 2004) and *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999), the court noted, "The determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves 'a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement.' Partial enforcement may be justified if an employer demonstrates, in addition to having a legitimate business interest, 'an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct.' 'Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment — as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust — the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad.'"

In this case, the Appellate Division agreed that partial enforcement was not warranted because plaintiff failed to show that there was good faith on its part, that there was no overreaching in having Andrade agree to the restrictive covenant which was a prerequisite to being hired, and there was also evidence from the record that plaintiff refused to negotiate the non-compete language.

What is becoming clear from recent court decisions on restrictive covenants, including this one, is that how and under what circumstances employers implement restrictive covenants on their employees is as important as the language contained within the restrictive covenants themselves.

Note: Jeffrey Basso, an attorney at Campolo, Middleton & McCormick, LLP, represents business owners, corporations, corporate officers, shareholders, and investors in a variety of litigation matters in state and federal court involving business and contractual disputes. Contact Jeff at jbasso@cmmllp.com.

The New Association Health Plans — Caveat Emptor (Continued from page 16)

members, especially healthier ones, means lower premiums, maybe a *lot* lower. However, without the federal standards the ACA imposes on most insurers and self-funded ERISA plan benefit designs the AHPs invite a number of identifiable risks. Less oversight means a greater possibility of mismanagement, which often leads to insolvency. This was bad enough when the AHPs were small; now that they have the potential of attracting thousands, if not tens of thousands of individual insureds, an insolvency may result in the inability to cover thousands of claims pending adjudication and payment at any one time. Next, lower standards (such as no requirement for a proven "track record") and the absence of effective reserve requirements mean that it is much easier to form an AHP than other types of health plan systems, particularly highly regulated "traditional" insurance. This invites fraud. Next, and this is a big one, under the old rules an AHP was required to cover "essential health benefits" and pay at least 60 percent of a member's average medical costs. Under the new rules, however, AHPs can be tailored to the anticipated population covered and do not have as many coverage requirements and/or some important benefits (mental health services and maternity care are two that come to mind).

Coverage discrimination is another area of concern. It is questionable at this time to what extent the AHPs will be required to comply with the ACA's requirements that plans not charge different premiums or offer different coverage based on gender, age, or trade. The ACA rule that plans may not charge "older" enrollees more than three times the premium rates charged to "younger" members also will not apply.

Finally, the extent and ability of state insurance regulators to supervise AHPs operating in their states is still an unknown. New Yorkers covered by an AHP would not have the benefit of many consumer protection laws, including increased access to coverage for opioid treatments, reduced cost sharing for breast cancer, essential health benefits, and protection from surprise bills from out of network doctors. (How AHPs will access or develop provider networks is uncertain.) Providers of medical care would not benefit from "prompt payment" laws, requirements that preauthorized claims be paid and an assortment of network contract language protections. Solvency issues obviously affect providers as much as they affect AHP members.

On July 27 the Superintendent of the New York State Department of Financial Services ("DFS") issued a press release that assures state residents that federal AHP rules do not preempt state laws and that "DFS Will Take Action Against Issuers That Fail to Comply with or Attempt to Circumvent New York Statutory or Regulatory Requirements:"

> "This includes New York's stringent requirements regarding the establishment of such groups, the requirement of essential health benefits and other consumer protections, regardless of the federal AHP Rule. The AHP Rule expressly does not impair DFS's regulatory authority to prevent brokers or insurers from seeking to offer plans impacting New York that have reduced benefit packages or otherwise do not comply with New York law. DFS will continue to enforce New York's Insurance Law and regulatory protections on Insurance policies offered to New Yorkers."
>
> https://www.dfs.ny.gov/about/press/pr1807271.htm

We'll see just how wide and deep this state supervision and oversight will go, especially in light of the federal judiciary's tendency to continue to expand the scope of ERISA preemption and eviscerate the ability of individual states to undertake any action that refers explicitly to ERISA plans or that has a substantial financial or administrative impact on them. The federal courts have held that ERISA prohibits both state laws that directly regulate employer-sponsored health plans and some laws that only indirectly affect plans. In particular, ERISA preempts state laws that prescribe benefit structures, enforcement mechanisms, duties of care, or plan funding responsibilities. In brief, the test applied to make the determination whether ERISA preempts a particular state law, regulation or cause of action is as follows: does the statute, rule or state law-based claim 1) have "reference to" an ERISA plan; 2) create more than an *incidental* economic impact on the plan as, for example, would a state requirement that the AHP establish defined coverage benefits if it wishes to offer its product in that state; 3) impact on what would be a "central matter of plan administration"; and 4) interfere with the administration of the plan on a national level? (As to this last point, for example, see *Gobielle v. Liberty Mutual Insurance Co,* 577 US ____ (2016), holding that because ERISA expressly preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan," a Vermont law requiring a self-funded ERISA plan to comply with state insurance reporting, disclosure and prescribed recordkeeping, a seemingly incidental, straightforward and innocuous obligation that all state licensed insurers had to meet, nevertheless unlawfully impacts upon an essential part of the uniform system of ERISA plan administration and thus is completely preempted by federal law.

Also, we cannot overlook the possibility if not the likelihood that any significant exercise of state supervision will be limited to AHPs that are organized in New York. The problem (some say it's the intention of the new law and regulations) is that AHPs organized in states that are more lax in consumer protections, anti-fraud initiatives, management oversight, reserve requirements, benefit designs and provider payment obligations (the latter potentially resulting in more exclusions and larger member out-of-pocket responsibilities) may not be subject to New York state regulation and oversight. If court rulings on current ERISA preemption controversies are an indicator, any conclusions regarding state law oversight may have to await the flood of litigation that certainly will follow any attempt by state regulators to exercise such supervision.

The political and financial implications of AHP availability are significant. AHPs will be attractive to healthy individuals who are unlikely to need a lot of medical care. If, however, the bulk of covered individuals consists of the healthier portion of the population then less healthy people, who generate much higher healthcare usage and costs, will remain on ACA plans. This is likely to increase ACA "exchange plan" premiums and very well may destabilize the "Obamacare" marketplace.

The applicability date for fully-insured AHPs is set for Sept. 1, 2018. For any employee benefit welfare plan that is not insured, the applicability date is Jan. 1, 2019.

I am indebted to the Foley & Lardner LLP blog, "Association Health Plans – The Final Rule Is Issued" by Jay Mark Waxman, Esq and Morgan J. Tilleman, Esq, posted on July 10, 2018, and the *ehealth.com* blog of July 16, 2018, "Concerns of Association Health Plans for Small Businesses", for some of the information used in this article.

Note: James Fouassier, Esq. is the associate administrator of the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York and Co-Chair of the Association's Health and Hospital Law Committee. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu.

New Discovery Rules Have Changed Federal Litigation Forever (Continued from page 17)

Discovery guidelines

Regardless of whether you represent a plaintiff or defendant, always suggest tiered or phased discovery whenever practical at the meet and confer session.

Any attorney who makes a discovery request has a nondelegable duty to test that request against the mandate of Rule 26 which clearly states the elements which must be considered in determining the scope of discovery and the timetable for completing discovery.

If you do not know where relevant data is stored and what it will take to collect and produce it, make sure you bring a knowledgeable IT representative from your client prepared to discuss those issues to the "meet and confer" session.

Proportionality

The limiting criteria imposed by Rule 26(b)(1) upon any discovery demand is whether it is "proportional to the needs of the case." Relevancy of each discovery demand must be demonstrated. "Fishing expeditions" are no longer permitted. The "reasonably calculated to lead to the discovery of admissible evidence" language was purposefully deleted from the revised rule.

If you have a question about a discovery demand, send your adversary an email and follow it with a telephone call. Then carefully document your inquiry. It may become critical in establishing compliance with the spirit of the rules.

Objections to discovery

If you must object to a discovery demand, make sure you provide a factual detailed response explaining your objection in detail. Avoid boilerplate objections such as, "overly broad and unduly burdensome" unless you provide specific facts with respect to each objection. Many courts are now adopting the position that any discovery response that does not comply with the Rule 34 requirement to state objections with specificity will be deemed a waiver of all objections except privilege.

The amended Rule 26(g)(3) establishes that when an attorney signs a discovery request or response the attorney is certifying to the court that they made a "reasonable inquiry" to ensure that the discovery request or sponsor is "complete and correct as of the time it is made." Sanctions are required and mandatory if the discovery request or response is not "complete and correct." The judge has no discretion and no evidence of improper intent or bad faith is required. The court must impose sanctions if no substantial justification is provided for the violation of this rule.

The message in these amended rules is clear and unequivocal. Just because you are a law school graduate with a license to practice law in the state of New York and have been admitted to one or more federal courts does not mean you are qualified or prepared to file a lawsuit or defend an action in the federal courts today.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.