

PRESIDENT’S MESSAGE
BY JOANNE VOS, ESQ.

“The achievements of an organization are the results of the combined effort of each individual.”

Vince Lombardi



I know I will catch some flack for this, but, aside from Tony Romo, I hate football. I pretty much hate everything about it: buffalo wings and “cheese” spray out of a can, the swill that gets passed off as beer, the shouting at inanimate objects (such as TVs), the clandestine meetings where so-called “fantasy” leagues are selected, and most importantly, the fact that 30 minutes or less of actual “ball-in-motion” time somehow takes an entire afternoon to suffer through. I guess I just don’t understand the absolute dedication and sacrifice that is seemingly required to be a true fan of the pigskin. Regardless, there is something football gets right every time: the concept of teamwork.

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- * March 12, 2010 — NJDA Products Liability Committee Seminar
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- * April 29, 2010 — NJDA Diversity and Philanthropy Committee Women’s Round Table

**STEALING COMPANY DOCUMENTS:
 IMMEDIATELY TERMINABLE OFFENSE OR
 PROTECTED ACTIVITY?
 BY MARK SALOMAN, ESQ.**

As the highest-ranking human resources executive at Curtiss-Wright Corporation, Joyce Quinlan made it a point to get to work early. In the summer of 2003, however, Quinlan was not interested in getting a jump on her day.

Instead, she spent her early morning hours photocopying and carting away nearly 2,000 pages of company files, many of which included highly confidential and personal information relating to employees throughout the company. She then

delivered the copies to her attorneys so they could assess the viability of a gender discrimination lawsuit against her employer, which she filed in November 2003. Quinlan nonetheless remained employed with Curtiss-Wright

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In preparation for this Message, I Googled™ “teamwork quotes” and the above quote by Vince Lombardi popped up numerous times. It really resonated with me. The bottom line? NJDA is nothing without you and every single one of this organization’s achievements can be traced back to the efforts of an individual. I would like to take this opportunity to extend a heartfelt thanks to the following “varsity players” (as Brian O’Toole would undoubtedly dub them):

Steve Foley, Chad Moore, and Frank Caruso, who presented an excellent and very well-received seminar on Auto Law and Subrogation Liens in November 2009;

Scott Glennon and Jessie Basner, who coordinated NJDA’s Annual Holiday Party in December 2009, which resulted in a generous donation to The Ethan Foundation for Autism;

Marie Carey, who every year, coordinates and organizes NJDA’s Trial College and, to add to the success of this year’s event, secured the invaluable participation of (Ret.) Judge Walter R. Barisonok and Edward Decter, M.D. of CFO;

Mark Saloman and Steve Karg, who regularly bring unique and important amicus opportunities to NJDA’s forefront;

Michael Leegan and Chuck Hopkins, whose joint efforts and hard work we endeavor to result in an updated Medical Directory which may be accessible to members only on the NJDA website; and Kevin DeCoursey, who, as Chairman of the Board, still comes to every Board Meeting on the first Wednesday evening of each month, serves as a guiding force behind all of NJDA’s initiatives, and supports the goals of each one of the Committee Chairs, Directors, and Executive Officers.

Here is what we have coming up! All of these worthy events will offer now-required, and

much sought-after, CLE credits. Some of them will also offer the ever-elusive Ethics CLE credit. Be on the lookout for more details regarding each of these events on our website at www.njdefenseassoc.com.

March 12, 2010: Seminar hosted by NJDA’s Products Liability Committee, including a topic on strategies for defending Consumer Fraud Act cases;

April 15-16, 2010: DRI Business Litigation and IP Seminar, featuring our very own Mark Saloman who will be presenting, “Blowing the Whistle or Just Blowing Smoke? Defending State Court-Initiated Whistleblower Claims” (for more information, visit www.dri.org);

April 29, 2010: Women’s Round Table co-hosted by NJDA’s Diversity and Philanthropy Committees; and

June 24-27, 2010: Annual Convention located in family fun-filled, Mystic, CT; NJDA is both proud and excited to partner with the Connecticut Defense Lawyer’s Association and the Atlantic Region of DRI for the first joint, annual meeting of its kind!

Now, back to the football/teamwork issue...

NJDA provides continuous opportunities for publishing, speaking, and leading an organization to victory. NJDA needs you, your talent, and your commitment to teamwork. I hope each one of you will consider running with the ball. Please contact me to discuss how you can be our next MVP.

Joanne Vos



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STEALING COMPANY DOCUMENTS: IMMEDIATELY TERMINABLE OFFENSE OR PROTECTED ACTIVITY? BY MARK SALOMAN, ESQ.

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until March 2004, when she first revealed (in the discovery process for her lawsuit) that she had made off with the set of Curtiss-Wright documents. Not surprisingly, Quinlan was summarily fired. What is striking is that she amended her lawsuit to add a claim for retaliatory discharge, alleging that her termination—for violating established company policy concerning the confidentiality of company records—was unlawful because her removal of company documents in furtherance of her lawsuit was “protected activity.”¹



Joyce Quinlan is hardly the only employee to have absconded with company documents in an effort to secure evidence of an alleged unlawful employment practice. In 2005, Kathleen Niswander copied and delivered customer insurance claim files to the lawyers who represented a class of plaintiffs in a gender discrimination case against Niswander’s employer.² In 2003, Preston Watkins entered his company’s personnel office and copied eight employee profiles containing salary grade and performance evaluations.³ In 1998, Dennis O’Day rummaged through his supervisor’s office, copied notes and memoranda about a pending lay-off prominently marked “personal/sensitive,” and then showed them to one of his co-workers on the lay-off list.⁴ All of these employees were promptly fired after the company discovered that they had copied and disseminated confidential company documents. They then claimed that their respective terminations constituted unlawful retaliation in response to their “protected activity.”

The employees’ arguments are based upon the anti-retaliation provisions contained in federal statutes—including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Occupational Safety and Health Act—and their various state counterparts. These statutes generally prohibit an employer from taking adverse employment action (termination; failure to promote; undesirable transfer or reassignment) against an employee who opposes an unlawful practice or participated in an investigation, hearing, or proceeding under the statute.⁵ The exact test varies by statute, but generally, in order to state a claim of retaliation, the employee has the burden of proving that he or she engaged in a “protected activity,” that an adverse action was taken against him or her, and that there was a causal connection between the “protected activity” and the retaliation.⁶

But can an employee legitimately contend that reproducing, removing, and revealing confidential company documents is “protected activity” under the law? The short answer is “no” because, as one court noted, if this were permitted

anytime an employee is caught with his or her hand in the till so to speak (copying confidential records), all the employee has to do is voice some [] suspicion of discrimination and the assertion that he or she plans to take the papers to some unnamed lawyer to assure immunity. The purveyors of corporate espionage will have a field day in providing ready made

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excuses for employees caught in the most compromising of positions and business will respond by limiting access to their files far beyond what is true today.⁷

Nonetheless, courts often will consider the reasonableness of the employee's use of confidential company files in determining whether the employee's conduct is an offense worthy of discipline, including termination, or if it rises to the level of "protected activity" under the relevant statute and thereby insulates the employee from anything adverse.

IS THE EMPLOYEE'S CONDUCT OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES?

Employees may have a legitimate interest in bringing an employer's unlawful conduct to light, but courts are unwilling to provide sweeping protection to employees in a manner that would allow "plaintiffs everywhere [to] be entitled, under the umbrella of protected activity, to steal company information, and . . . not only be able to avoid disciplinary action by their employer, but to successfully maintain a claim against their employer if adverse action is taken for the misconduct."⁸ To the contrary, employers must ensure that their confidential files are not needlessly disseminated to unauthorized parties. Before condoning the employee's conduct by declaring it "protected activity," courts consider whether the employee's conduct was "reasonable under the circumstances."⁹

What is "protected activity"?

Though dependent upon the statute at issue, "protected activity" generally falls into two

categories: participation activity and opposition activity. An employer may not retaliate against an employee for participating in an ongoing investigation or proceeding nor for opposing unlawful practices in the workplace. Opposition activity includes utilizing informal grievance procedures, staging informal protests, and voicing one's opinion. However, illegal actions—such as theft of original company documents—is not protected at all.¹⁰

Participation vs. Opposition—How much protection is provided?

Participation activity is commonly protected because the applicable laws ensure that employees have access to complaint and enforcement mechanisms. Opposition activity, however, is protected only if the employee's conduct is reasonable.¹¹ When an employee is disciplined for copying company documents, courts generally look at whether the employee was engaged in opposition or participation activity and consider the context of the employee's action in determining whether the employee's actions are reasonable. In its comprehensive analysis, the Ninth Circuit Court of Appeals held that a finding of reasonableness is appropriate in cases involving confidential corporate information. In such instances, the employer has a legitimate interest in maintaining the confidentiality of its documents and the "tools of civil discovery" remain available to a plaintiff to obtain relevant and necessary documents.¹² When a plaintiff chooses self-help to obtain documents outside of the discovery process, her actions are subject to scrutiny.

A SIX-FACTOR BALANCING TEST

The determination of whether the employee's conduct is "reasonable" involves a balancing test between "the employer's recognized, legitimate need to maintain an

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orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions.”¹³ The Ninth Circuit’s decision in *Niswander v. Cincinnati Insurance Company* surveys the analysis applied by federal courts across the country and lists six factors it held to be relevant in determining whether the copying, removal, and dissemination of confidential material is reasonable. These are: (1) how the documents were obtained; (2) to whom the documents were given; (3) the content of the documents; (4) whether the documents were produced in direct response to a discovery request; (5) the scope of the employer’s privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer’s privacy policy.¹⁴ The court believed that these factors adequately address the employer’s legitimate desire to keep its documents confidential while still protecting the employee’s alleged need to retain a copy of incriminating documents, lest the company destroy them before litigation commences.¹⁵ Though not universally applied, this six-factor test is nonetheless instructive for employers considering taking action upon discovery that an employee has removed copies of confidential company documents.

1. How are the documents obtained?

Federal courts are reluctant to protect employees who actively seek out confidential documents, as opposed to employees who inadvertently or “innocently” acquire them. For example, in *Watkins v. Ford Motor Company*, an employee found a book of employee profiles lying open in “plain view” in the personnel office with no markings on them to designate them as confidential. While the employee may have inadvertently come upon the profile binder, he

did not limit his examination—and copying—to what was in plain view. Therefore, copying the documents contained in the binder was neither innocent nor “protected activity.”¹⁶

Similarly, courts look with disfavor upon employees who covertly acquire company documents. Entering rooms or accessing files to which an employee usually does not have access, searching for documents in the early morning hours or late at night or disregarding notices that the documents are private or confidential are considered serious breaches of trust and not afforded protected status.¹⁷ The courts are unwilling to “provide employees an incentive to rifle through confidential files,” even when the employee is searching for evidence of an employer’s unlawful conduct.¹⁸

New Jersey’s appellate court recently confirmed in *Quinlan v. Curtiss-Wright Corp.*, that a company could fire a current employee-plaintiff if she took documents she received as a normal part of her job duties and then used them only in her lawsuit. Quinlan’s claim of retaliatory discharge was rejected because there was nothing to suggest that her employer delivered the purported “smoking gun” document to her with the expectation that she would copy and deliver it to her lawyer in her ongoing lawsuit. Indeed, “if Curtiss had altered that routine [of providing personnel documents to Quinlan] after she filed suit, it could have opened itself to the possibility of another claim of retaliation.”¹⁹ Importantly, the court recognized that Quinlan did not stumble across the document in question; “[r]ather, she was entrusted with it as part of her regular duties in the human resources department.”²⁰

2. To whom were the documents given?

Providing copies of furtively acquired documents to any unauthorized individual may be considered unreasonable. Courts are

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mindful of employers' interest in keeping sensitive information from not only external parties but other employees as well. In *O'Day v. McDonnell Douglas Helicopter Company*, the court found it particularly unreasonable that an employee — who found a handwritten list ranking employees for a slated lay-off — showed the document to a co-worker whose name was on the list. The *O'Day* court held that this conduct impinged upon the company's "strong interest" in preserving employee morale.²¹ Even transmitting copies of confidential documents to a co-worker to call attention to a perceived unlawful employment practice in an effort to gain assistance may not be protected.²²

Providing copies of documents only to one's attorney by no means ensures an employee's conduct will be considered "protected." In *Baker v. Georgia Power Company*, the employee disclosed the names, salaries, and employment dates of employees hired at a particular company office only to her own attorney and an attorney with the Justice Department. The court held that the employee's conduct was not protected because the employee had failed to show that the confidential information was inaccessible to her attorney through normal discovery methods.²³ Indeed, to permit an employee to rifle through their employers' files and copy confidential material "secure in the knowledge that employers could do nothing so long as that material was later used in litigation," would impermissibly "transform an unprotected action, copying confidential items, into a protected action on the basis of the subsequent use of the confidential material."²⁴

3. What information is contained within the documents?

The documents' contents directly implicate the interests of both the employer and

the employee, so a comparison of the sensitivity of the information to its importance to the employee's claim is helpful. When, for example, an employee innocently discovered documents on a company-issued computer describing a company policy to favor young employees in hiring and promotion decisions, the employee's refusal to return those documents was protected.²⁵ In a different scenario, in which the employee copied and transmitted customer insurance claims in order to help her remember the details of incidents which she believed were retaliatory, the court found this conduct was not protected activity because "[p]roducing confidential documents for the sole purpose of jogging one's memory, when there are readily available alternatives to accomplish the same goal, does not constitute the kind of reasonable opposition activity that justifies violating a company's privacy policy."²⁶ Even personnel files which directly evidence an unlawful employment practice may not justify an employee's circumvention of the discovery process because employers have such a strong interest in keeping personal employee information confidential.

4. Under what circumstances are the documents produced?

The circumstances under which the employer becomes aware that the employee has copies of company files may be relevant in determining whether the employee acted reasonably. In many cases, the employer is unaware that the employee has company documents in his or her possession until the employee produces them as part of discovery. If the employer learns that the employee possesses company files from a third party or through misuse of the files, the employee will have a more difficult time proving that her actions were reasonable.

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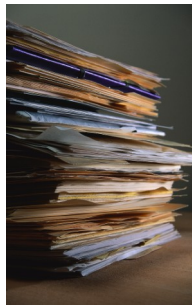
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5. What is the scope of the employer’s privacy policy?

Courts will look at whether the employer had an established policy prohibiting the dissemination of confidential material and to what extent the employee should have been on notice that he or she was not permitted to copy or transmit company material. Where the employer has a clear policy explaining that an employee who copies confidential documents without authorization may be terminated, the employee will not be protected for copying documents, even if the documents were removed from an area accessible to all employees.²⁷

6. Can the employee preserve the evidence in another manner?

Courts will consider the likelihood of the documents being destroyed by the company prior to litigation to determine whether it was reasonable for the employee to copy and preserve them, although even a strong possibility of destruction will not necessarily override the employer’s interest in preserving confidentiality. In *O’Day*, the employee knew that the company periodically destroyed documents, including papers containing the reasons for personnel decisions. Indeed, the confidential list that the employee copied was, in fact, destroyed prior to the litigation. Nevertheless, the employee’s serious breach of trust—rummaging through his supervisor’s office at night and sharing the confidential document with a co-worker—could not justify his acts as “protected activity.”²⁸ Where the employee has no legitimate basis to fear that the employer will destroy the relevant documents, courts are even less willing to give employees protection for covertly copying documents because the employee can easily secure counsel and obtain the information



through the “proper legal channels.”²⁹

MINIMIZING LIABILITY—LOCK UP YOUR FILES AND SEND A STRONG MESSAGE

Though employees are rarely successful in arguing that copying confidential company documents should be considered “protected activity” for purposes of a retaliation claim, lessons can be learned from these cases. In order to minimize the possibility that an employee will “steal” company files and get away with it, employers should consider the following:

- Minimize the number of employees who have access to company files.
- Establish a uniform written company policy explaining which company files are considered confidential, who may access such files, and the repercussions for removing them in any manner without permission.
- Maintain records of employment decisions because a company practice of destroying such documents makes it more likely that an employee will preemptively seek to make copies.

Clearly mark files as confidential. Assessing the validity of an employee’s retaliation claim will involve an analysis of several factors, including the proximity in time between the alleged “protected activity” (the removal of documents) and the adverse employment action. By maintaining a clear confidentiality policy and limiting employee access to confidential files, an employer can minimize the risk of being sued by employees caught with their hand in the till.

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ENDNOTES

¹ Quinlan v. Curtiss-Wright Corp., No. ESX-L-8976-03, 7 N.J. Super. (Law Div. 2006), *aff'd*, 409 N.J. Super. 193 (App. Div. 2009).

² Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 718 (6th Cir. 2008).

³ Watkins v. Ford Motor Co., 2005 WL 3448036, *19-20 (S.D. Ohio 2005).

⁴ O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).

⁵ 42 U.S.C. § 2000e-3(a) (Title VII forbids an employer from “discriminat[ing] against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under [Title VII]”).

⁶ Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745, 754 (4th Cir. 1996).

⁷ Quinlan v. Curtiss-Wright Corp., No. ESX-L-8976-03, 7 N.J. Super. (Law Div. 2006), *aff'd*, 409 N.J. Super. 193 (App. Div. 2009).

⁸ Watkins v. Ford Motor Co., 2005 WL 3448036, *19-20 (S.D. Ohio 2005).

⁹ Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 725 (6th Cir. 2008).

¹⁰ Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 259 (4th Cir. 1998).

¹¹ Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 720 (6th Cir. 2008) (*quoting Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)).

¹² Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 726 (6th Cir. 2008).

¹³ *Id.* at 722.

¹⁴ *Id.* at 726.

¹⁵ *Id.* (*quoting Jeffries v. Harris County Community Action Association*, 615 F.2d 1025, 1036 (5th Cir. 1980)).

¹⁶ Watkins v. Ford Motor Co., 2005 WL 3448036, *20 (S.D. Ohio 2005).

¹⁷ O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).

¹⁸ *Id.* at 756; *Contrast Kempcke v. Monsanto Co.*, 132 F.3d 442, 445-47 (8th Cir. 1998) (The employee had discovered the documents on a computer assigned to him by his employer and refused to return them. The court likened the situation to an employee being inadvertently copied on an internal memorandum or discovering a document mistakenly left in an office photocopier).

¹⁹ Quinlan v. Curtiss-Wright Corp., 409 N.J. Super. 193, 209 (App. Div. 2009).

²⁰ *Id.* at 210.

²¹ O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 764 (9th Cir. 1996).

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ENDNOTES

- ²² Jeffries v. Harris County Community Action Association, 615 F.2d 1025, 1036 (5th Cir. 1980).
- ²³ Baker v. Georgia Power Co., 1981 WL 375 (N.D. Ga. 1981).
- ²⁴ Quinlan v. Curtiss-Wright Corp., 409 N.J. Super. 193, 208-209 (App. Div. 2009).
- ²⁵ Kempcke v. Monsanto Co., 132 F.3d 442, 444 (8th Cir. 1998).
- ²⁶ Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 726-27 (6th Cir. 2008).
- ²⁷ Carlson v. American Meter Co., 896 F. Supp. 952, 954 (D. Neb. 1995).
- ²⁸ O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 764 (9th Cir. 1996).
- ²⁹ Watkins v. Ford Motor Co., 2005 WL 3448036, *23 (S.D. Ohio 2005).

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Holiday Party

Left to Right: Greg McGroarty, Michele Haas, Jennifer Passanante, Joanne Vos, Scott Glennon, Jessie Basner, Michael Leegan, Mark Debrowski, Founder of the Ethan Foundation for Autism, Joseph Garvey, Brian Chabarek, Robert Helwig, Joseph Petrillo, Chad Moore, Jacob Grouser, Kevin DeCoursey

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THE MAGIC OF TRIAL LAW

BY BRIAN O'TOOLE, ESQ.

Less than ten percent of practicing lawyers are engaged in trial work. With a few exceptions, the trial bar is notoriously underpaid. It is common for lawyers working in the areas of bankruptcy, bond work, tax, matrimonial and transactional law to make \$500.00 per hour or more. While the upper crust of the plaintiff's bar certainly exceeds this, probably ninety percent of the trial bar isn't even close to these type of numbers. So why do the overwhelming majority of us labor in the vineyards of trial work when more lucrative opportunities so clearly exist. I suspect the reason lies in our collective desire to stand up in Court and argue a case in front of a Judge and Jury. I believe ultimately that this is why we chose law in the first place. All these other areas of endeavor lack the majesty we associate with being a lawyer. We all grew up with Atticus Finch imploring his jury to "For God's sake, do your duty!" in the famous summation scene in To Kill a Mockingbird. We were all thrilled by Barney Greenwald's masterful cross-examination of Captain Queeg in The Caine Mutiny, and who hasn't stolen something from Frank Galvin's brilliant summation in The Verdict. In short, this is what lawyers do. It's not about business deals or tax forms or bond issues, it's about pitting yourself against the witness with your case hanging in the balance. It's about taking less than an hour to present a summation which probably takes you ten hours to prepare.

There's also a tremendous amount of folklore surrounding trial law. We've all attended Irving Younger's lectures on cross-examination, which probably gave us more ammunition to use at a cocktail party, rather than in a courtroom. We've all also heard the famous story about how Clarence Darrow would put a wire in his cigar and then light it when the State's attorney started his summation. He would then puff away and the ash would get longer and longer. You guessed it, the jury focused their concentration on watching the ash and when it would fall,

rather than on the Prosecutor's summation. Of course, this was back in the days when trials were conducted in saloons closed for the occasion and smoking was permitted. It's doubtful you could convince our current Assignment Judges to let you light up, but it's great cocktail party stuff.

There is also a tremendous volume of books written about trial law. Works such as F. Lee Bailey's The Defense Never Rests, Louis Nizer's My Life In Court, and the biography of Edward Bennett Williams, The Man to See, are standard reading material for trial lawyers.

Television has also had a significant impact on how the public perceives the trial bar. I'm sure almost everyone believes that an investigator in a trench coat storms into Court at a crucial moment, handing the attorney a dossier containing case breaking information, a la Paul Drake and Perry Mason. We also have the stern E.G. Marshall in his role on The Defenders and Andy Griffin in the Seersucker wearing Matlock. Most recently we see Shark, an unscrupulous prosecutor and Boston Legal, a spoof where their lawyers try an Anti-Trust litigation one week and a capital murder case the next. Conspicuously absent are television series featuring tax lawyers or bankruptcy mavens dynamically filing exhaustive motions. While extremely lucrative, these specialties don't really get the blood coursing through your veins. In a word, the public and the trial bar describe these specialties as "boring." So we persist in preferring the dramatic setting of trial, either criminal or civil.

Statistics seem to suggest that the lawyer's impact on the trial are minimal with the key ingredients being the witnesses themselves. Personally, I do not agree with this assumption because I feel the lawyer is the most significant factor in the outcome of a trial. Whether that's true or not, I'm sure almost all of you agree with me on this. To think that our Herculean efforts

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THE MAGIC OF TRIAL LAW BY BRIAN O'TOOLE, ESQ.

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aren't vital to the pursuit of justice would be too much to bear.

In any event, we'll all continue to try our cases, regardless of riches potentially available elsewhere. I will also occasionally look over my

shoulder to see if Paul Drake might actually be rushing into the Courtroom.



4 CLE credits pending NJ, NY & PA

Product Liability Defense Strategies Seminar

Friday, March 12, 2010
Hilton, Woodbridge, NJ
8:30 am—12:30 pm

Presented by the NJDA
Products Liability Committee

NJDA Insurance Law Committee

The New Jersey Defense Association, Insurance Law Committee, facilitates the development of dispute resolution expertise, promotes improvements in civil justice, and represents the interests of insurers, insurance claim professionals, self-insurers and defense attorneys.

Currently, we are interviewing key claims professionals to ascertain how to strengthen the carrier and defense counsel partnership. We recently completed a survey on prominent defense attorneys. Together, these surveys are providing important insight on how you can advance the value of your services.

We recognize that value is an elusive and malleable concept. We are not operating under the illusion that we possess the expertise to define it all for you. Still, we can tell you what legal services insurance companies value most. We can also offer a forum for refining the value proposition. The pace of change gets faster every year. Join us, as we try to stay ahead of the curve.

Gerald F. Strachan, Esq.

BEYOND E-MAIL: SAVVY INTERNET PRACTICES IN THE TWITTER AGE

BY ERIC L. PROBST, ESQ. AND RAQUEL S. LESNEVER, ESQ.

Though social networking is relatively new and innovative, the good news for HR professionals is that existing employment policies can readily be applied to this new form of communication.

Electronic communications. Over the past ten years or so, e-mail has transformed how lawyers and their clients conduct business. Consequently, attorneys and their clients have grappled with the challenges that electronic communications present during litigation. To overcome these obstacles, businesses have had to revamp Internet policies, create document retention and destruction policies, establish e-discovery litigation response teams and evaluate the systems by which e-mail is saved and stored, with the looming fear that someday they may need to dig up e-mail, produce back-up tapes or copy hard drives during the discovery phase of a lawsuit at the cost of hundreds of thousands of dollars. Due mainly to the ease of creating and sending e-mail, IT personnel, management and in-house legal departments have had to work together to devise protocols to handle (and, eventually, locate, retrieve and produce) millions of pages of e-mail. But that's old news.

The advent and explosion of social networking sites has changed the discovery landscape again. Facebook, MySpace and Twitter, instant messaging and blogging present corporations with new business and litigation challenges. Businesses can no longer focus only on e-mail when drafting document retention and destruction policies, litigation hold letters, Internet usage policies and producing electronically stored information ("ESI"). And, unfortunately for companies, the sheer volume of posts, notes, Tweets, blogs and IMs that are generated on a daily basis increases

the likelihood that an employee will post, blog or Tweet employment-related information that may require production during discovery. Just as e-mail forced companies to change their business and litigation response practices, these social networking sites are now forcing businesses to adopt practices to control and/or prevent their employees' use of these sites.

1. Social Networking Sites

Millions of individuals access Facebook, MySpace, Twitter and other similar sites each day. In July 2009, Facebook founder Mark Zuckerberg confirmed that Facebook had 250 million members, making it by far the largest social networking site around. Current estimates have MySpace membership hovering around 150 million, while Twitter had a monthly growth of 1,382 percent earlier this year. In recent years these networking outlets have become widely accessed by both individuals and businesses. Many companies have Facebook pages and Twitter accounts. Even if a business does not officially utilize social networking sites, it is beyond question that its employees use these sites for either work-related or personal purposes. Indeed, some of these millions of individuals are *your* employees, and they are probably tweeting on *your* company computers. Given how engrained usage of these networking sites is becoming, it would be naïve to believe that employees are limiting their work computer usage to solely work related tasks. If employees

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are accessing Facebook, MySpace, Twitter and the like on their work computers and using them to discuss work-related issues, it is conceivable that some of these posts, notes, and tweets may be relevant to a future lawsuit and may need to be produced.

It is not difficult to imagine a scenario where an employee's use of Facebook or a personal blog might become implicated in an employer's litigation. A product developer posts a message on a personal blog while at work. The employee writes about what's going on at work and mentions concerns about the safety of a particular product. Months later when the product hits the market, a consumer is injured, a lawsuit is filed, and plaintiff's attorney serves extensive discovery. All of a sudden, the employee's personal blog is not personal; it is business. The question is – what are the implications of this inevitable commingling of business and pleasure on employer computers when litigation arises?

2. How to Prepare for E-Discovery Requests of Social Networking Information.

Few would doubt that the information contained on social networking sites falls within the expansive definition of ESI under the 2006 amendments to the Federal Rules of Civil Procedure. The multi-media nature of social networking sites, which commonly involves the posting of pictures and videos, means that it is no longer just written documents that may need to be produced during discovery. Further, these networks are "interactive," meaning information

and data is constantly being added and, sometimes, deleted. As many companies are discovering and others will find out, the ever-increasing amount of data generated by and stored on company computers due to participation in social networking adds still more complexity to the already overwhelming task that is e-discovery.

It is now imperative that e-discovery litigation response teams include the discussion of social networking sites with records custodians when investigating the sources of potentially relevant ESI for production. Litigation hold letters should advise employees that if information relevant to the lawsuit can be found on their social networking sites that management should be advised immediately and the information preserved. Corporate defendants should find out whether employees have potentially relevant (and damaging) information on these sites during the pre-discovery investigation phase, rather than at a deposition.

The use of these sites also should be addressed in corporate Internet usage policies. The policy should state whether employees can use these sites at work for work-purposes. If use is permitted, the policy should outline how, when and for what purposes these sites can be used. Employee training programs might be considered if a company's business relies heavily on these sites (e.g. communicating with clients regarding sales). Importantly, employees should be instructed in the appropriate use of these sites because of the potential privacy issues involved with the personal information contained on the sites.

Though social networking is relatively new and innovative, the good news for HR professionals is that existing employment

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policies can readily be applied to this new form of communication. A comprehensive social networking policy should reiterate that all other workplace policies are still in effect, including anti-harassment policies, codes of ethics, codes of business conduct, confidentiality policies, etc., and state that these policies govern communications through social media as well. The policy should require all employees to include a disclaimer on any communication they post on a blog or other social networking site, stating that the views expressed are those of the employee only and not of the company, and making clear that the employee has no authority to speak on behalf of the company. The policy should also include a directive that employees not utilize the company logo or trademark without express consent. Employees should also be prohibited from sharing confidential or proprietary information on blogs or social networking sites and from referencing clients, customers or partners of the company. And, as with any policy, employees must be made aware of the consequences of violating the policy.

3. Conclusion.

Time will tell where the social networking revolution will take us. Suffice to say that with hundreds of millions of users, these networks are here to stay, and their usage will likely only grow in coming years. Just as e-mail did ten years ago and sometimes still does today, the Facebooks, MySpaces and Twitters of the

Internet world will continue to present business professionals and attorneys with new litigation challenges. Though, the necessity of an effective and efficient storage and retention system for e-mail and other business-generated documents has always been critical, it is even more so now, given the constantly evolving nature of information being posted and exchanged on social networking sites. However, by addressing Internet usage policies and exploring the ways in which employees are utilizing social networking on company computers, employers can put themselves in the best possible position to efficiently respond to e-discovery requests when litigation arises and hopefully avoid having to produce inappropriate or damaging information.



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REMOVAL TO FEDERAL COURT ON THE GROUNDS OF FEDERAL QUESTION JURISDICTION AND PRE-ANSWER MOTIONS TO DISMISS MAY BE THE KEY TO A K.O. FOR DEFENSE COUNSEL AFTER IQBAL AND TWOMBLE.

BY DONALD F. BURKE, ESQ. AND DONALD F. BURKE, JR.

With a one-two punch delivered by the United States Supreme Court in Iqbal and Twombly, dismissal of federal court actions at the pleading stage of federal court actions have become more likely for defendants facing otherwise expensive and time consuming litigation on questionable claims. As a result, defense counsel should consider filing pre-answer motions to dismiss in federal court and removing appropriate state court actions to federal court in order to take advantage of the heightened pleading standard.



On May 18, 2009, the Supreme Court decided Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) providing its first interpretation of the higher and more defendant friendly “plausibility” pleading standard created in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Twombly overturned the long-standing “no set of facts” standard enunciated in Conley v. Gibson, 355 U.S. 41, 45-46 (1957) where the Court stated: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Iqbal confirms the plausibility standard requires factual allegations in a Complaint that are more than “merely consistent” with wrongful conduct. Further,

this heightened plausibility standard applies to all federal litigation, not just the antitrust context involved in Twombly. Indeed, it is particularly important in cases with policy reasons for limiting discovery, such as matters brought pursuant to 42 U.S.C. § 1983. Although a court must still accept well-pled facts as true, the court is not required to accept a plaintiff’s legal conclusions. Iqbal, 129 S. Ct. at 1949, (noting “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”).

In order to understand the change in pleading standards, it is helpful to review the facts. In Iqbal the defendants included former Attorney General John Ashcroft and FBI Director Robert Mueller who were sued individually for allegedly condoning the unconstitutional detention of Javid Iqbal, a Pakistani detained on identity fraud charges as part of a sweeping investigation in the wake of the September 11, 2001 terrorist attacks. Iqbal alleged that during his detention, he was subject to abuses such as beatings, unnecessary body-cavity searches and denial of opportunities to pray. Id. at 1944. Iqbal ultimately pled guilty to criminal charges, served a term of imprisonment and was removed to Pakistan. Id. at 1943. Iqbal filed an action against a number of federal officials and corrections officers alleging constitutional violations.

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With respect to Ashcroft and Mueller, Iqbal challenged the allegedly discriminatory policy of classifying certain post-September-11th detainees as “of high interest,” and subjecting them to abusive conditions of detention. Id. at 1944. The Complaint turned on five key allegations:

“[T]he [FBI], under the direction of defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”

“Ashcroft and Mueller “each knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”

“The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.”

Ashcroft was the “principal architect” of the policy and

Mueller was “instrumental in [the policy’s] adoption, promulgation, and implementation.”

Id. at 1944.

The Complaint did not include any factual allegations connecting Ashcroft and Mueller to the specific abuse Iqbal suffered or supporting the allegation that Ashcroft’s and Mueller’s actual purpose was to discriminate. Ashcroft and Mueller moved to dismiss on grounds of qualified immunity. Iqbal v. Hasty, 490 F.3d 143, 152 (2d Cir. 2007), rev’d, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). (“A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law.”)

Relying primarily on Twombly, the defendants argued that top-level government executives are not ordinarily involved in the day-to-day interpretation and implementation of their broad policies, and without factual allegations that they personally and purposefully made discriminatory policies, they could not plausibly have violated Iqbal’s “clearly established” rights. Iqbal, 129 S. Ct. at 1943. The district court denied the motion to dismiss and the Second Circuit upheld the denial, specifically permitting Iqbal to “probe” his allegations against Ashcroft and Mueller through limited discovery from other, lower level defendants. Iqbal, 490 F.3d at 178. The Second Circuit stated: “We are mindful too that, for high-level officials, this discovery might be

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either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations.” *Id.* at 178.

The Supreme Court reversed, holding that *Iqbal*’s Complaint did not contain any “factual allegation” to “plausibly suggest” that Ashcroft and Mueller adopted detention policies for the purpose of discrimination, and that discovery could not be used to cure a defective Complaint. *Iqbal*, 129 S. Ct. at 1952. In so holding, the Court confirmed that F.R.C.P. 8 is an independent and important barrier to commencing litigation; it unambiguously rejected the “careful-case-management approach” as an alternative to weeding out meritless litigation at the pleading stage; and it provided an analytical framework for courts and litigants considering Federal Rule 12(b)(6) motions to dismiss. *Id.* at 1953. This analytical framework has its roots in *Twombly* and because *Iqbal* is an elaboration of precedent established by *Twombly*, an appreciation of the rationale of *Twombly*’s reinterpreted Rule 8(a) (2) is helpful.

In *Twombly*, a putative class of subscribers brought an action under Section 1 of the Sherman Act, 15 U.S.C. § 1 (2004) against local telephone and internet line operators claiming they had conspired to restrain competition in each other’s local markets. The Complaint in *Twombly* alleged facts suggesting the operators engaged in

“parallel conduct” (i.e., acted in a coordinated fashion), but it did not allege facts suggesting an actual agreement or conspiracy had taken place. Only agreements and conspiracies – not parallel conduct – are illegal under Section 1 of the Sherman Act. The Supreme Court held that an allegation of parallel conduct, “without more,” fails to state a claim because it is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554. The Supreme Court emphasized the Complaint had to include “enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* at 556. The Court succinctly stated “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a) (2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” *Id.* at 557.

Two stated justifications for *Twombly*’s plausibility standard motivated the Court, both of which were reemphasized in *Iqbal*. First, the Court was concerned about “sprawling, costly, and hugely time-consuming” discovery. *Id.* at 560. The Court stated:

[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no

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‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.

Id. at 559.

Second, the Court expressed doubt about the ability of district courts to identify and manage “false positives” (i.e., meritless litigation) after the motion to dismiss stage. Id. at 554; see also id. at 559:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side (internal citation omitted).

This is a clear departure of earlier precedent. In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168-69 (1993), the Court stated: “In the absence of such an amendment [to Rules 8 and 9], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” In departing from the unworkable “control of discovery to weed out unmeritorious claims” theory, the Court in

Twombly found it “self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries’; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.” Twombly, 550 U.S. at 559 (internal citation omitted). The Court described its plausibility standard as requiring Complaints to contain “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” Id. at 556.

The Supreme Court’s decision in Iqbal amplifies and clarifies the scope and meaning of Twombly’s “plausibility” pleading standard and provides a clear three-step analysis for defense counsel to follow in urging a court to dismiss for failure to state a claim.

First, each element of the cause of action must be precisely identified. This provides a framework for the rest of the inquiry. In the context of the action against Ashcroft and Mueller, the Court determined Iqbal was required to sufficiently plead that the defendants (a) violated the Constitution through their own individual actions, and (b) adopted and implemented a policy of classifying post-September-11 detainees as “of high interest” for the purpose of discriminating on account of race, religion, or national origin.

Second, the allegations in the Complaint which are not entitled to an “assumption of

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truth” must be identified. Iqbal, 129 S. Ct. at 1950. Such allegations include mere “legal conclusion couched as a factual allegation” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” Id. at 1949-1950. Although conclusory allegations may help provide a “framework of a complaint,” they are to be disregarded when assessing the sufficiency of the pleadings under Rules 8(a) (2) and 12(b) (6). Id. at 1950. Applying these considerations to Iqbal, the Court found the allegation that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to abuse “as a matter of policy” was no more than a “formulaic recitation of the elements” of a Constitutional discrimination claim. Id. at 1949. Similarly, the Court disregarded Iqbal’s factually unsupported and conclusory allegations that Ashcroft was the “principal architect” of the policy, and that Mueller was “instrumental” in adopting it. Id. at 1951.

Third, the remaining factual allegations must be considered to determine whether they “plausibly” suggest an entitlement to relief. Id. The Supreme Court acknowledged that determining whether allegations are

plausible might be context specific and will draw on “judicial experience and common sense.” Id. at 1950. The Court observed, as in Twombly, “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. at 1949.

In establishing this plausibility standard, the Court relied upon the text of Federal Rule 8(a)(2) stating that “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-that the pleader is entitled to relief.” Id. at 1950 (citing F. R. C. P. 8(a) (2)).

Applying these considerations to the Complaint in Iqbal, the Court evaluated the two remaining factual allegations: (a) that “the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11”; and (b) that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.” Id.

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The Supreme Court may not have the final word, however.

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at 1951. (quoting the Complaint). The Court held that, although these allegations were consistent with unlawful discrimination, they were equally consistent with the legitimate policy of detaining illegal aliens who had potential connections to those responsible for the September 11 attacks. Id. Applying the plausibility standard to the allegations in the Complaint, the Court stated:

On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that ‘obvious alternative explanation’ for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” (internal citation omitted).

Id. at 1951-1952.

Because unlawful discrimination was not a “plausible conclusion” from the allegations of the Complaint, the Court held dismissal was required. Id. at 1952.

In light of the heightened pleading requirements established by Iqbal and Twombly, defense counsel handling federal court matters now have a potent weapon to use at the pleading stage to “knock out” questionable claims. Moreover, Iqbal and Twombly have made removal to federal court of state court cases alleging violations of federal law much more attractive. Further, while the “no set of facts” rule remains the pleading standard in New Jersey state courts under Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (“for purposes of analysis plaintiffs are entitled to every reasonable inference of fact”), defense counsel should consider arguing in appropriate cases that similarities between F.R.C.P. 8(a)(2) requiring “a short and plain statement of the claim showing that the pleader is entitled to relief” and R. 4:5-2 requiring “a statement of facts on which the claim is based, showing that the pleader is entitled to relief” should yield a plausibility standard under New Jersey Court Rules similar to that established by Twombly and Iqbal. New Jersey defense counsel are all too familiar with the “sprawling, costly, and hugely time-consuming” discovery that meritless litigation requires that motivated the Supreme Court to establish the plausibility standard pursuant to federal court pleading rules. Strong arguments can be fashioned to urge a similar result under state court pleading rules.

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BY DONALD F. BURKE, ESQ. AND DONALD F. BURKE, JR.

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The Supreme Court may not have the final word, however. On October 27th, the House Judiciary Committee held the first congressional hearing on the far-reaching May ruling, which raised the pleading standard for most civil complaints, making it more difficult to keep cases from being thrown out. Many courts are now requiring more specific facts that, plaintiffs lawyers say, aren't often available until discovery. Senator Arlen Specter has proposed a bill directing federal courts to interpret the

rules as the Supreme Court did in a much earlier decision, Conley v. Gibson (1957). The bill falls within the jurisdiction of the Senate Judiciary Committee and, if considered, would likely be a lightning rod for debate among plaintiffs' lawyers, consumer groups and businesses. Will the Senate deliver a fatal blow to Iqbal and Twombly? Only time will tell.

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