STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

MICHAEL P. REGAN
CHAIR
1301 AVENUE OF THE AMERICAS
FLOOR 21
NEW YORK, NY 10019
PHONE: (212) 907-9700
FAX: (212) 907-9800
MREGAN@SGRLAW.COM

COUNCIL ON JUDICIAL ADMINISTRATION

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

LITIGATION COMMITTEE

BARBARA SENIAWSKI
CHAIR
1460 BROADWAY
FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

January 29, 2018

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: New York City Bar Comments on Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure

Dear Mr. McConnell:

The New York City Bar Association has reviewed the proposal of the Commercial Division Advisory Council to amend Commercial Division Rule 11-g (22 NYCRR § 202.70[g], Rule 11-g[d] and [d]) to include sample "privilege claw-back" language for use in the standard form of stipulation and order for the production of confidential information in matters before the Commercial Division. The City Bar supports the objective of adding sample privilege claw-back language to the Commercial Division Rules and offers these comments concerning the Proposed Amendment.[1]

We agree with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution that amending the CPLR would be the most effective means of mitigating the risk of inadvertent privilege waiver. An amendment to the CPLR would provide the greatest predictability not only in the Commercial Division but also across the state courts. In the meantime, amending the Commercial Division Rules to include sample claw-back language is a step in the right direction.

[1] These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

We do not agree that the proposed claw-back language "eliminates" the possibility of litigation regarding the question of waiver, and we suggest refining the language to address ambiguities that may lead to disputes. For example, the proposed language includes stipulations that each party will implement "reasonable procedures" to avoid inadvertent disclosure and take "reasonable steps" to correct inadvertent disclosures but does not define those terms. Although judicial opinions provide guidance regarding such concepts, parties may find themselves in conflict over the application of such precedents to a question of waiver. The proposal also includes a stipulation that neither party, when presented with a request for the return of protected information inadvertently produced, will challenge the other's document review procedures or efforts to rectify the inadvertent disclosure, or claim prejudice. It is unclear, however, whether the waiver of any right to challenge the producing party's actions or claim prejudice depends upon the producing party's actual implementation of "reasonable procedures" for document review and taken "reasonable steps" to correct the error.[2]

To promote fairness and minimize disputes, the sample claw-back provisions should also require a party who, upon review, identifies a document appearing to contain privileged material [or other protected information] to promptly notify the producing party in writing of having received the document, allowing the producing party to request a claw-back.

We recommend that sample claw-back provisions be added to the Commercial Division Rules as part of a new, separate rule, rather than as a subsection of Rule 11-g (Proposed Form of Confidentiality Order). Many parties will want to include claw-back provisions in a confidentiality stipulation and order, but other parties may prefer a stand-alone claw-back stipulation and order, and judges (including judges who do not elect to use the form stipulation that appears in Appendix B to the Commercial Division Rules) may prefer to include such provisions in a preliminary conference or other order. Setting forth sample claw-back provisions in a separate rule would underscore the flexibility with which the stipulations can be written. It would also comport with the Subcommittee's stated goal of providing language that may be incorporated "into the Standard Form [Confidentiality Stipulation and Order], *or into another form of order utilized by the Justice presiding over the matter*" (emphasis added).

Finally, while any sample claw-back language must provide clear and useful provisions that parties can adopt wholesale, we believe that the language of the Proposed Amendment that specifically allows for deviation from the form provisions is also essential. In major commercial actions with voluminous document production (which this rule is designed to address), important protections beyond attorney-client privilege, materials prepared in anticipation of litigation, and attorney work-product are likely to apply. Parties may be harmed through the inadvertent production of material that is subject to other privileges and protections recognized at common law, protected from disclosure pursuant to a state or federal statute (such as HIPAA), or broadly recognized as highly sensitive and confidential (such as Social Security Numbers and financial

[2] Further ambiguity arises in the language preceding subsection (a) of the proposed claw-back provisions. Among other things, it includes a definition of "Documents" that conflicts with the definition set forth in numbered paragraph 1 of the Appendix B form stipulation and order. We recommend that the language be revised to state simply, "The Parties agree as follows," and that the phrase "documents or information" replace the capitalized term "Documents" in subsection (a) of the proposed claw-back provisions.

account numbers). The proposed claw-back provisions properly allow litigants and judges to mitigate the risk of inadvertent disclosure of such documents and information by varying the language as they deem appropriate (e.g., by listing specific additional bases for protection or more broadly refer to other applicable privileges or protections),[3] and this aspect of the proposal would make the Commercial Division a more attractive forum in which to resolve disputes.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Michael P. Regan
Chair, Committee on State Courts of
Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation

[3] One recent example that highlights the need for such protection is Wells Fargo's inadvertent production in July 2017 of "a vast trove of confidential information about tens of thousands of the bank's wealthiest clients." https://www.nytimes.com/2017/07/21/business/dealbook/wells-fargo-confidential-data-release.html