

Antitrust & Complex Business Dispute News

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The Chair's Comments



Bradley Evans

It is my distinct honor and privilege to serve as the Chair of the Antitrust and Complex Business Disputes Law Section of the NCBA for 2015-2016. I am humbled to serve in the role that many distinguished lawyers throughout the State have held in prior years. It is an exciting time to be a part of our Section. The Section has seen dramatic growth

in recent years following the expansion of our area of focus to cover "complex business disputes." Our Section Council has identified several laudable goals for the year, including expanding the diversity of our membership and providing additional networking opportunities as a benefit of membership. We hope that you will stay tuned for these opportunities and participate when you can.

On the topic of benefits of membership, our first newsletter for the year contains excellent articles that we hope will benefit your practice. Our editors, Nathan Standley and Tom Segars, have put together four excellent articles. In "DOJ Investigation of Airline Capacity Launches a Fleet of Civil Lawsuits," our Section Vice-Chair, Mitch Armbruster, explores the Department of Justice investigation and multidistrict litigation affecting airline carriers across the country. This article may be of particular interest to you given the busy holiday travel season! In "Supreme Court Gives Teeth to Active Supervision Requirement," one of our coeditors, Nathan Standley, examines the antitrust issues impacting professional licensing, including the lessons learned from two cases that originated in North Carolina: *North Carolina State Board of Dental Examiners v. Federal Trade Commission* and *LegalZoom v. North Carolina State Bar*. Next, in "Encryption is not a four letter word," Pegeen Turner delves into the nuts and bolts of encryption, offering some steps that we can all implement in our practices as our use of and reliance on technology increases. Finally, in "Summary of the Latest Amendments to the Federal Rules of Civil Procedure," Paul Cox provides insights into the most recently-ad-

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Supreme Court Gives Teeth to Active Supervision Requirement

By Nathan Standley

The Supreme Court's February 2015 decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* ("N.C. Dental Board") has found its way into federal district courts around the country. Many North Carolinians and antitrust and regulatory law practitioners are well-aware of the case and its teeth-whitening roots. In its ruling, the Supreme Court clarified that state agencies controlled by active market participants in the regulated industry must demonstrate active state supervision in order to invoke state action immunity under *Parker v. Brown*.

In the wake of the N.C. **Dental Board** decision, numerous private actions have been brought against state licensing boards and other regulatory agencies, seeking injunctive and declaratory relief as well as treble damages and attorneys' fees. Two of the more notable cases that rely extensively on the N.C. **Dental Board** case are *Teladoc, Inc. v. Texas Medical Board* and *LegalZoom v. North Carolina State Bar*. This article examines these two cases and some of the issues that are yet to be resolved. Notably, the *LegalZoom* case was recently settled but the issues it teed up help to illustrate the uncertainty and the complexity stemming from the Supreme Court's decision.

N.C. Dental Board Case Highlights

Although most readers will recall the general tenets of the N.C. **Dental Board** case, it is useful to highlight the major points. The N.C. Dental Practice Act requires a dental license to provide or advertise "stain removal" services. The Act also grants the board the power to en-

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The Chair's Comments, continued from the front page

opted Supreme Court amendments, including changes affecting discovery proportionality and preservation of electronic information. These articles are of substantial interest not only to antitrust practitioners and business litigators, but to virtually all attorneys in the State of North Carolina.

In other news, please mark your calendars for our annual meeting and CLE on February 11, 2016 at the Bar Center in Cary. Mitch Armbruster, who is also chairing our CLE Committee this year, has organized another excellent CLE featuring topics and speakers that you will not want to miss. The agenda features two judicial panels, one featuring several sitting Federal Court judges and one featuring three sitting Business Court Judges. We hope that you will take advantage of this excellent CLE and networking opportunity.

In addition, this year we will be hosting a social at the Bar Center following the CLE. Beverages and appetizers will be provided, so plan on sticking around for a while after the CLE to avoid traffic and to spend some time with our distinguished speakers and other Section members.

We look forward to seeing you in February. In the meantime, if you are interested in participating more actively in our Section or if our Section can be of any assistance to you, please do not hesitate to contact me.

The Latest in Complex Business and Chapter 75 Litigation: State and Federal Courts 2016 (2016 Antitrust and Complex Business Disputes Law Section Annual Meeting)

February 11, 2016, NC Bar Center, Cary

Register online at tinyurl.com/450ATM

Description: Complex business litigation in North Carolina continually develops and evolves. Your practice will be affected by judicial decisions in contract law and Chapter 75/antitrust litigation, modifications of procedural rules in both state and federal courts—including the implementation of statutory changes to the Business Court and the court's rules—and changes to the rules of civil discovery in federal court. This program is a must-attend CLE for North Carolina litigators who handle complex business disputes. Experienced and distinguished attorneys, along with state and federal judges, bring you up to date on the law and best practices in various aspects of complex business litigation in North Carolina.

force against nonlicensees, though it did not expressly grant the board the power to issue cease and desist orders (or letters) against nonlicensees. Prior to 2010, after receiving numerous complaints, the Dental Board sent over 40 cease and desist letters to unlicensed teeth whitening service providers informing them that their conduct could be in violation of state law. The Dental Board also sent letters to property management companies informing them that the teeth whitening businesses with which they dealt could be violating the state's Dental Practice Act. The Fourth Circuit and the Supreme Court found that these actions achieved the intended result—nondentists ceased offering teeth whitening services in North Carolina.

On appeal to the U.S. Supreme Court, the Dental Board challenged the conclusion by the Fourth Circuit, the FTC, and the FTC's administrative law judge that state agencies controlled by active market participants must show "active supervision" by the state in order to invoke state action immunity. The board also contended that it was actively supervised by the state; though that issue was not before the Supreme Court.

The Court ultimately rejected the Dental Board's argument, holding that "Midcal's active supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity — public or private — controlled by active market participants." **N.C. State Bd. of Dental Examiners v. FTC**, 135 S. Ct. 1101, 1113 (2015). As a result, state boards controlled by active market participants must now demonstrate active supervision by the state in order to invoke immunity over conduct that may otherwise be anticompetitive and restrain trade in the regulated market. Unfortunately for antitrust observers and state licensing boards, the parameters of a "controlling interest" and the definition of an "active market participant" may have to be set by future litigation given that the majority opted not to delve into either element.

In its opinion, the Supreme Court laid out some general guidelines with regards to active supervision: it "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" **N.C. State Bd. of Dental Examiners v. FTC**, 135 S. Ct. 1101, 1116 (2015) (quoting **Patrick v. Burget**, 486 U.S. 94, 100-101 (1988)). The Court also provided a few "constants" with regards to active supervision:

- The state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.
- The state supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.
- The mere potential for state supervision is not an adequate substitute for a decision by the State.
- The state supervisor may not itself be an active market participant.
- In general, however, the adequacy of supervision will

otherwise depend on all the circumstances of a case.

N.C. State Bd. of Dental Examiners, 135 S. Ct. at 1116-17.

Future litigation will help to answer some of the questions surrounding the **N.C. Dental Board** opinion. Some of these questions were teed up by the dissent, authored by Justice Alito. He raised some important issues for states and state licensing boards to consider as they respond to the opinion:

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? . . . Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service? What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services?

Id. at 1123 (Alito, J., dissenting).

There is little doubt that the issues raised by the dissent will play a role in the development of state policy in response to the opinion. More importantly for state licensing boards and their members, however, are the issues of liability and damages. These issues are already coming to the forefront in North Carolina.

LegalZoom Goes From Business Court to Federal Antitrust Court to Armistice

The unauthorized practice of law dispute between LegalZoom and the North Carolina State Bar took a new turn in June 2015 when LegalZoom brought federal antitrust claims against the Bar in the Middle District of North Carolina. Complaint, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439 (M.D.N.C. June 3, 2015). As most readers are aware, there has been a long-running dispute in state court between LegalZoom and the State Bar over the issue of unauthorized practice of law. The state court and federal court battles came to a close with the October 2015 announcement that the two sides had settled their disputes. As a result, LegalZoom agreed to withdraw its antitrust action (which it did on November 5, 2015) and, with it, the opportunity for a federal district court to weigh in on the complex issues therein. However, the LegalZoom-State Bar dispute is an important one when examining some of the primary issues that will continue to arise when a state occupational licensing agency seeks to enjoy state action immunity.

For purposes of this article, the primary facts are focused on LegalZoom's prepaid legal services plans and the State Bar's regulation of such plans. The State Bar regulates and approves prepaid legal services plans pursuant to N.C. Gen. Stat. § 84-23.1 and 27 N.C.A.C. 1E.0301 *et seq.* As described by the State Bar, LegalZoom had tried unsuccessfully to register its prepaid plans twice since 2010:

LegalZoom has tried to register prepaid plans on two occasions. After the [Authorized Practice Committee] expressed concerns about the 2010 application, LegalZoom filed the Business Court case. LegalZoom submitted substantially similar registrations in 2014. The State Bar did not register those plans and LegalZoom filed this action. Both times, the plans were not registered for the same reasons: (i) the plans did not meet the regulatory definition of a “prepaid legal services plan” and (ii) aspects of the plans violated the provisions for the unauthorized practice of law.

Brief in Support of Defendants’ Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 7 (M.D.N.C. Aug. 20, 2015).

In its most recent complaint, LegalZoom alleged violations of Sections 1 and 2 of the Sherman Act and seeks declaratory and monetary relief. The complaint was brought against the State Bar, the Bar’s President (in his official capacity), a member of the Bar’s Authorized Practice Committee (in his official and individual capacities), and two Bar staff attorneys (in their official and individual capacities). Also named in the complaint were twenty-three co-conspirators who, although not named as defendants, were members of the State Bar’s Authorized Practice Committee and allegedly voted to exclude LegalZoom from the relevant market.

The company had sought over \$10.5 million in damages (after trebling) resulting from the bar’s “unlawful monopolization” and restraint of trade in the legal services market. LegalZoom claimed that the State Bar had engaged in unauthorized and anticompetitive conduct for the benefit of its licensee leadership and members. Specifically, the lawsuit alleged that the State Bar prevented LegalZoom from selling its prepaid legal services plans to North Carolina individuals and small businesses by refusing to register the plaintiff company’s prepaid plans. The complaint also alleged that the State Bar adopted, without legislative authority or active state supervision, a restrictive definition of prepaid legal services plans and refused to accept for registration plans that did not conform to that definition.

On August 20, 2015, the State Bar moved to dismiss the case on a variety of Rule 12 grounds. These grounds for dismissal proposed by the State Bar are potentially significant for those looking to bring antitrust claims against market-participant-controlled state boards and for state boards looking to defend against such claims. The first three of five grounds for dismissal are focused on the merits of an antitrust violation, whereas the last two are focused on state action immunity. The State Bar also advanced Eleventh Amendment and qualified immunity grounds for dismissal, but those will not be addressed here.

First, the State Bar contended that the named defendants were not in competition with the plaintiff because they were not engaged in the business of providing prepaid legal plans:

There is no allegation that the State Bar members are seeking to provide *prepaid legal services plans*, which LegalZoom seeks to provide, or to exclude such plans

from the North Carolina market. Instead, the State Bar members provide legal services directly to their employers (e.g., the State of North Carolina in the case of public employees and court officials, nonprofit entities, or private companies) or to clients (e.g., in the case of a private practice attorney). And, as acknowledged in LegalZoom’s complaint, there are numerous prepaid plan providers in North Carolina, all registered by the State Bar.

Brief in Support of Defendants’ Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 16 (M.D.N.C. Aug. 20, 2015) (emphasis in original).

This seemingly straightforward issue of who is in competition within the relevant market is deceptively complex and has the potential to negate many suits going forward. While none of the named defendants in this case were in the business of selling prepaid legal services plans akin to those offered by LegalZoom, there is an argument to be made that, assuming the individual defendants are active market participants, each could stand to derive economic benefit from prepaid legal services plans being prevented from entering the legal services market in North Carolina.

That brings us to a second issue raised by LegalZoom: an injury to an individual or entity is not an injury to competition. It is generally understood that federal antitrust laws exist to protect competition, not competitors. See generally, **Atl. Richfield Co. v. USA Petroleum Co.**, 495 U.S. 328, 334 (1990). Unfortunately for LegalZoom, according to the State Bar, “there is a robust market for prepaid plans in North Carolina, with dozens registered by the State Bar. Instead of allegations that show harm to competition, LegalZoom alleges injury only to itself because its plans were not registered.” Brief in Support of Defendants’ Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 12 (M.D.N.C. Aug. 20, 2015). The State Bar noted that LegalZoom had relied extensively on the **NC Dental Board** case but the Bar distinguished that case by arguing that “the Dental Board totally excluded the non-dentist teeth whiteners and their suppliers from doing business in North Carolina. In contrast, LegalZoom’s allegations show that the State Bar has not excluded prepaid plan providers from providing such services in North Carolina.” Brief in Support of Defendants’ Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 15 (M.D.N.C. Aug. 20, 2015).

Third, the State Bar claimed that LegalZoom failed to adequately plead a conspiracy among competitors to exclude other competitors or potential competitors from the relevant market. In order to overcome the contract, combination, or conspiracy requirement of Section 1 of the Sherman Act, a plaintiff must allege sufficient facts that “tend to rule out the possibility that the defendants were acting independently.” **Bell Atl. Corp. v. Twombly**, 550 U.S. 544, 554 (2007); see also **Am. Needle, Inc. v. NFL**, 560 U.S. 183, 196 (2010) (“The question is whether the agreement joins together ‘independent centers of decisionmaking’”). This issue was one of great contention during the **NC Dental Board** case, with both the FTC and the Fourth Circuit holding that the Dental Board’s members were capable of conspiring and that sufficient facts had been alleged on the subject to find an agreement

to restrain trade. However, the issue was not directly taken up by the Supreme Court.

Fourth, the State Bar relied upon state action immunity grounds in its motion to dismiss. In an interesting maneuver, the State Bar argued that an *ipso facto* immunity should apply to this case because the rules that are enforced by the State Bar relating to prepaid legal services plans are either adopted or rejected by the Chief Justice of the North Carolina Supreme Court. In essence, the State Bar advanced a theory that the real party in interest is the Chief Justice or the North Carolina Supreme Court, which are granted *ipso facto* immunity. See **Hoover v. Ronwin**, 466 U.S. 558 (1984). There is little doubt that state supreme courts are granted what is effectively automatic state action immunity when acting in a legislative capacity. However, the State Bar's reliance on such automatic immunity would likely have faced headwinds under the **NC Dental Board** decision and prior Supreme Court cases.

In a related argument for dismissal, the State Bar argued that it is a quintessential state agency that is not required to demonstrate active supervision. The Fourth Circuit had opined in a footnote that “[a]lthough we find the dicta in **Hallie** inapplicable in the instant case, where the ‘state agency’ is composed entirely of private market participants, our opinion should not be read as precluding more quintessential state agencies from arguing that they need not satisfy the active supervision requirement.” **N.C. State Bd. of Dental Examiners v. FTC**, 717 F.3d 359, 367 n.4 (4th Cir. 2013). This argument may have also faced an uphill battle given the private market participants who arguably “control” the State Bar's conduct at issue.

Fifth (and lastly for purposes of this article), the State Bar argued that “[a]t a minimum, the State Bar is Immune under the **Parker Doctrine**.” Brief in Support of Defendants' Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 28 (M.D.N.C. Aug. 20, 2015). Although the *ipso facto* immunity and quintessential state agency immunity arguments fell under a **Parker** analysis, this final argument is one that acknowledges and follows the **NC Dental Board** analysis imposing the active supervision requirement. As summed up by the State Bar: “[t]o any extent the Court were to conclude that the State Bar is not a state actor or a quintessential state agency, but rather is a nonsovereign actor controlled by active market participants, it is entitled to **Parker** immunity.” Brief in Support of Defendants' Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 29 (M.D.N.C. Aug. 20, 2015).

Significantly, the two sides differed on what conduct is required to be actively supervised under the **NC Dental Board** analysis. LegalZoom took issue with both the rulemaking and the subsequent prohibition conduct engaged in by the State Bar: “The State Bar was not acting in pursuit of a clearly articulated state policy, nor was it actively supervised, when it adopted these rules or when it acted to illegally exclude and unreasonably restrain competition in the Relevant Market.” Complaint, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 25 (M.D.N.C. June 3, 2015). In contrast, the State Bar portrayed the issue as being solely in regards to its rulemaking: “LegalZoom does not allege that the rules were misapplied. The appropriate place for legal scrutiny therefore should be on the adoption of the rules in question – whether the adoption of the rules was consistent with a clearly articulated state

policy and whether the adoption process was actively supervised.” Brief in Support of Defendants' Motion to Dismiss, **LegalZoom.com, Inc. v. N.C. State Bar**, No. 1:15-CV-439, at 30-31 (M.D.N.C. Aug. 20, 2015).

The State Bar, as part of its active supervision argument, advanced the theory that attorney general participation should weigh in favor of finding sufficient active state supervision. According to the State Bar, “[t]he North Carolina Attorney General has been involved from the beginning in the State Bar's defense against LegalZoom's antitrust claims This kind of active supervision was absent with respect to the Dental Board.” Id. at 34. Although it was neither relied upon nor discussed by the Supreme Court, the issue of representation by private counsel was noted by the Fourth Circuit. **N.C. State Bd. of Dental Examiners**, 717 F.3d at 375. **LegalZoom** had teed up a plethora of considerations for antitrust scholars and state legislators alike. Unfortunately, at least for many observers beyond the parties themselves, the case will not provide early insights into how federal district courts will analyze and apply the teachings of **NC Dental Board**.

Texas Medical Board Stares Down Antitrust Suit Over Telemedicine Restrictions

Another case that is drawing extensive national attention from antitrust practitioners and state licensing practitioners alike is **Teladoc, Inc. v. Texas Medical Board**. This case is similar to **LegalZoom** in that it involves a long-running battle between the parties in state court and has recently spilled over into the antitrust arena. Indeed, Teladoc and the Texas Medical Board have been at odds since at least 2011, when they became embroiled in a case over whether the Medical Board adhered to proper procedures when engaging in rulemaking. Fast forward to 2015 when Teladoc, like LegalZoom, opted to take its grievances outside of state court and sued the Texas Medical Board in the federal district court for the Western District of Texas.

In its complaint, Teladoc sued the Texas Medical Board and its members in their individual and official capacities, alleging a violation of the Sherman Act and the Dormant Commerce Clause. On April 10, 2015, the Medical Board (with 12 of its 19 members being practicing doctors) adopted two rule amendments that require doctors to have an in-person or face-to-face session with a patient prior to providing telemedicine services. If there is no established, face-to-face relationship, the rules require that a physician, nurse practitioner, or physician assistant be physically present with the patient for the telemedicine consultation. Teladoc alleges that the rules will “not only shut down Teladoc's operations in Texas, but it will threaten its ability to provide services in other states that welcome telehealth providers.” Complaint, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343-RP, at 32 (W.D. Tex. Apr. 29, 2015). The complaint did not specifically seek treble damages but, instead, requested injunctive relief and a declaration that the amendments are invalid and unenforceable.

On May 29, one month after Teladoc filed its complaint, the court granted its motion for a preliminary injunction and enjoined the Medical Board “from taking any action to implement, enact, and enforce” the rule amendments. **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-CV-343, 2015 U.S. Dist. LEXIS 90230, at *34 (W.D.

Tex. May 29, 2015). Notably, the court observed that because the Medical Board did not assert any immunity defenses, “[t]he normal deference afforded to a state under antitrust law is, therefore, not an issue in reviewing Plaintiff’s application for a preliminary injunction. The Court’s opinion is properly read through that narrow, and unusual, lens.” *Id.* at *10. On a procedural note, on July 23, the Medical Board and its fourteen members in their individual capacities were dismissed pursuant to a joint stipulation filed by the parties. Thus, the only remaining defendants are the board members in their official capacities.

On July 30, the Medical Board moved to dismiss Teladoc’s claims on multiple bases including state action immunity. According to the Medical Board,

The state action immunity doctrine should apply to the actions of the [Texas Medical Board] for two chief reasons. First, the plaintiffs’ portrayal of [NC Dental Board] serves to undermine federalism and state sovereignty principles and to disrupt the ability of the State of Texas to protect its citizens. . . . Second, in [N.C. Dental Board] the Supreme Court developed a “flexible and context-dependent” standard that looks to the structure and incentives of a regulatory agency to determine whether active supervision is required.

Defendants’ Amended Motion to Dismiss, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343, at 2-3 (July 30, 2015).

The Medical Board places much of its stock on distinguishing itself from the Dental Board in an effort to claim that sufficient active state supervision exists. One of its primary distinguishing arguments is that

[b]ecause the North Carolina board’s only authority with respect to the unauthorized practice of dentistry was to refer a case to other officials for prosecution, and because the board did not adopt a rule that could be challenged, the only way the non-dentist teeth-whitening providers could have obtained judicial review of the “cease and desist” orders was as a defense to criminal prosecution.

Defendants’ Amended Motion to Dismiss, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343, at 10 (July 30, 2015).

In essence, the Medical Board claims that “the judicial review available to scrutinize [Texas Medical Board] rules and actions constitutes active state supervision” in a manner that was not present in the Dental Board’s circumstances. This argument may require further clarification given that the Dental Board has express statutory authority to seek injunctive relief in state court for unlawful acts such as the unauthorized practice of dentistry and nearly all actions taken by the Dental Board can be subjected to judicial review. In addition, non-dentist teeth whitening providers could have conceivably requested a hearing before the Dental Board or sought a declaratory ruling from the Board. Nonetheless, the **N.C. Dental Board** case did arise out of enforcement, not rulemaking

conduct. Whether the Texas judiciary’s ability to invalidate board rules constitutes sufficient active state supervision is yet to be seen.

In a related line of argument, the Medical Board argues that the Texas sunset review process constitutes active state supervision. Many states have sunset review requirements whereby a commission, often made up of state legislators and legislative staffers, scrutinizes existing state agencies and state statutes to determine whether they should be readopted. As a result of the 2005 sunset review by the Texas legislature, the Medical Board argues that the legislature “endorsed the [Texas Medical Board’s] rules and actions, generally and of relevance to this suit, as promoting state policy rather than private interests.” Defendants’ Amended Motion to Dismiss, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343, at 18 (July 30, 2015). Significantly, Teladoc has argued that the “Sunset Review Commission does not have the power to veto or modify any rule adopted by the TMB.” Plaintiff’s Supplemental Opposition to Defendants’ Motion to Dismiss the Amended Complaint, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343, at 19 (August 25, 2015).

Finally, the Medical Board cites to the Texas legislature’s rules review process as active state supervision. In Texas, as in many other states, proposed agency rules are referred to standing legislative committees for consideration. However, in Texas, such standing committees may only send to the promulgating agency a statement of support or opposition. It is of note that the Medical Board also relies upon numerous “good government” statutes, similar to those relied upon by the Dental Board (i.e., public records, open meetings, ethical disclosures and removal, and ongoing reporting), in arguing that it is subject to active state supervision. Additionally, the Medical Board argues that it is distinguishable because its members are appointed by the governor and confirmed by the state senate whereas the Dental Board’s members were elected by North Carolina’s dentists. This point was relied upon by the Fourth Circuit concurrence in the Dental Board’s case, but the Supreme Court did not rely upon this factor as influencing its decision.

In addition to its active supervision arguments, the Medical Board, like the North Carolina State Bar in **LegalZoom**, argues that “[n]one of the physician members of the [Texas Medical Board], who are all specialists, are in direct competition with the Teladoc physicians, who provide only general and family medicine services when working for Teladoc.” Defendants’ Amended Motion to Dismiss, **Teladoc, Inc. v. Tex. Med. Bd.**, No. 1:15-cv-00343, at 24 (W.D. Tex. July 30, 2015). In other words, according to the Medical Board, its members are not active market participants in competition with Teladoc. This issue is a significant one that is present in **Teladoc** and **LegalZoom** along with several other state action cases that have arisen in the wake of the **N.C. Dental Board** case. With all of the active supervision factors advanced by the Medical Board, the **Teladoc** case is sure to become a bellwether for state board rulemaking and what constitutes sufficient state oversight.

Conclusion

Going forward, private litigants will continue to utilize the **N.C. Dental Board** case in an effort to challenge state licensing board enforcement and rulemaking actions. Many questions remain outstanding regarding the parameters of state action immunity, most notably what qualifies for active state supervision and whether indi-

vidual board members may be subject to liability by serving on such boards. **Teladoc** stands to be one of the most defining cases in this first wave of litigation, while the antitrust case formerly known as **LegalZoom** teed up some of the complex issues and the high stakes for states and their licensing agencies. In addition to private litigation, the FTC and advocacy organizations are sure to continue their efforts to narrow state action immunity. Finally, state legislatures undoubtedly will be keeping a close eye on all of these developments to determine whether statutory changes are necessary to help ensure that state boards have clearly-articulated state policy to justify displacing competition and that any proposed conduct that may

restrain trade is actively supervised by a disinterested state actor. Regardless of how federal courts opt to interpret and apply the **N.C. Dental Board** decision, all sides appear to agree that the intersection of antitrust law and state regulation of occupations has taken on a new level of uncertainty and interest.

Nathan Standley is an associate at Allen, Pinnix & Nichols in Raleigh. He concentrates his practice on antitrust, corporate counseling, and state licensing matters. His firm represented the N.C. State Board of Dental Examiners before the Federal Trade Commission and in its appeal of the FTC's order.

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DOJ Investigation of Airline Capacity Launches a Fleet of Civil Lawsuits

By Mitch Armbruster

In the years since the Great Recession, many air travelers have taken to complaining about traveling on full flights. On the one hand, these complaints can be seen as airlines simply doing a better job of correctly predicting capacity needs, as full flights are more profitable ones. On the other hand, for some, the disappearance of empty middle seats in a concentrated industry looks like a conspiracy. The existence of an ongoing Department of Justice investigation into airline industry discussions about seating capacity has certainly raised the specter of conspiracy allegations among the plaintiffs' bar. Since July 1, 2015, there have been at least 97 federal civil lawsuits alleging collusion under the Sherman Act in regards to airline capacity. Including one case from the Middle District of North Carolina, these cases are now being consolidated in the District of Columbia by the U.S. Judicial Panel on Multidistrict Litigation.

The Runway to Litigation

On July 1, 2015, the Associated Press reported that the Department of Justice had issued civil investigative demands (CIDs) to the country's four largest airlines (American, United, Delta, and Southwest – which comprise more than 80% of the domestic market), seeking information and documents regarding discussions of airline capacity controls, going back to 2010. *See* David Koenig, et al., "U.S. Probing possible airline collusion that kept fares high," Associated Press (July 1, 2015). This news came after public complaints that airline fares had not been dropping despite falling fuel prices, as well as suggestions that the airlines had been discussing "capacity discipline" at industry meetings. "Capacity discipline" means airlines exercising caution when expanding passenger capacity to avoid declines in profitability caused by less-full flights.

A June 11, 2015 column in the *New York Times* by James B. Stewart scrutinized the annual industry meeting of the International Air Transport Association (IATA), highlighting comments made by various airlines during the conference about capacity discipline. James B. Stewart, "'Discipline' for Airlines, Pain for Fliers," *The New York Times*, June 11, 2015, available at <http://www.nytimes.com/2015/06/12/business/airline-discipline-could-be-costly-for-passengers.html>. These comments were apparently not actually made in meetings with other airlines, but in response to questions to reporters and analysts, though they were all on the record. Stewart also cited recent comments by the CEO of Southwest Airlines about plans to increase capacity which caused negative reactions on Wall Street. This led to attempts by Southwest to calm industry watchers which were seen as a walkback of their plans.

Shortly after Stewart's column appeared, Senator Richard Blumenthal (D-CT) wrote a public letter to William J. Baer, Assistant Attorney General for the Antitrust Division, requesting an investigation into the IATA meetings and alleged potential misuse of

market power in the airline industry. *See* Letter from Richard Blumenthal to William J. Baer (July 17, 2015), available at <https://consumermediallc.files.wordpress.com/2015/06/20150617-blumenthal-to-doj-airline-coordination.pdf>. Two weeks later, the Associated Press confirmed the existence of the CIDs.

Though the initial AP report simply confirmed the existence of the DOJ investigation and did not contain any "smoking gun" evidence of collusion, the first civil suit and proposed class action was filed that same day in the Southern District of New York. *See Devivo v. Delta Airlines, Inc.*, (S.D.N.Y. Case No. 1:15-cv-05162). The thirteen-page complaint in *Devivo* liberally borrowed from press reports and the Blumenthal letter, and boldly alleges that the four major airlines have entered into a conspiracy to restrain trade and control capacity in violation of the Sherman Act. Within two weeks of the filing of *Devivo*, at least 34 federal lawsuits had been filed. By August 12, at least 75 suits had been filed, all making the same basic allegations that the four major airlines have engaged in collusion to keep passenger capacity down. *See* Terry Maxon, "Guess how many antitrust lawsuits have been filed against the Big 4 airlines," *Dallas Morning News*, August 12, 2015, available at <http://aviationblog.dallasnews.com/2015/08/guess-how-many-antitrust-lawsuits-have-been-filed-against-the-big-4-airlines-no-more-than-that-guess-again.html/>.

As of November 2015, only one airline capacity suit has been filed in North Carolina's federal courts. *Cone v. American Airlines Group, Inc.* (M.D.N.C. 1:15-cv-728) was commenced on September 3, 2015, among the last of the actions to be filed. The 28-page complaint in *Cone* contains additional background information, but the same essential claims for violation of Section 1. Interestingly, the *Cone* complaint also affirmatively alleges that the statute of limitations should be tolled, arguing that the existence of a conspiracy could not have been discovered prior to the start of the annual IATA meeting on June 7, 2015. However, there is ample evidence that industry reporters were simply covering a topic which has been reported on for a number of years, and had not tricked the airlines into divulging a master conspiracy. *See* Joe Sharkey, "Expect Fewer Seats, Even of Overseas Flights," *The New York Times*, August 27, 2012, available at <http://www.nytimes.com/2012/08/28/business/airlines-focus-on-capacity-discipline-on-the-road.html>.

MDL Proceedings

The airline defendants promptly made motions to transfer the rapidly growing list of suits to the U.S. Judicial Panel on Multidistrict Litigation ("Panel"). *See In re: Domestic Airline Travel Antitrust Litigation* (MDL No. 2656). On October 13, 2015, the Panel issued a transfer order ("Transfer Order") after considering four motions under 28 U.S.C. § 1407 for centralized pretrial proceedings. Four different districts had been proposed for the site of

consolidation by plaintiffs, including the Northern District of Illinois (which had the most support among tag-along plaintiffs), the Eastern District of New York, the District of District of Columbia, and the Southern District of New York. Other tag-along plaintiffs suggested a variety of other districts, often connected to their district of origin. The defendant airlines advocated for centralization in either the District of District of Columbia, or, alternatively, in the Northern District of Texas (where both American and Southwest are headquartered).

The Panel selected the District of District of Columbia as the transferee district for the litigation, as it is a “convenient and accessible forum for what will be a nationwide litigation.” Transfer Order at 2. Further, the Panel found the case presented an opportunity to assign the litigation to Judge Colleen Kollar-Kotelly, “an able and experience jurist who has not yet had the opportunity to preside over a multidistrict litigation.” *Id.* Judge Kollar-Kotelly does have significant antitrust experience, however. She presided over the Microsoft antitrust litigation, replacing Judge Thomas Penfield Jackson on remand from the D.C. Circuit, and approving the ultimate settlement of that litigation in 2002. Kollar-Kotelly also has experience with antitrust concerns in the airline industry, having previously approved the settlement between the U.S. Department of Justice and American and US Airways which paved the way for those two carriers to merge in 2013.

Upon receiving notice of the Transfer Order, the **Cone** matter was transferred to the District of District of Columbia on October 28. According to the MDL Statistics Report as of mid-November, the **Cone** case is one of approximately 97 pending airline capacity collusion cases.

Repeating The Past?

A number of mergers have happened in the airline industry since 2008. Delta merged with Northwest in 2008; Southwest bought AirTran in 2010; United and Continental merged in 2012; and American and U.S. Airways combined in 2013. However, the general allegations of these airline capacity lawsuits bear a fair resemblance to litigation in the Eastern District of North Carolina from 2001-2004 which centered on whether airlines had conspired to eliminate travel agent commissions. **Hall v. United Air Lines, Inc.**, 296 F. Supp. 2d 652 (E.D.N.C. 2003), *aff'd* **Hall v. Am. Airlines, Inc.**, 118 Fed. Appx. 680, 683 (4th Cir. 2004). There, the plaintiffs took issue with the erosion from the late 1990s through 2002 of the once-standard 10% commission on tickets to travel agents. After one airline made a decision to reduce its commission structure during that time period, its competition would soon follow. The decisions were not all identical but the commission structures were eventually reduced to zero, except for agents who entered into incentive agreements with individual airlines. The plaintiffs in **Hall** also alleged that IATA meetings provided a venue for collusion to occur. Nevertheless, there was no evidence found that collusion

had actually occurred or that the behavior was any different than the parallel or “interdependent” actions that can occur in competitive industries. Judge Britt ultimately granted summary judgment in favor of the defendant airlines, finding “overwhelmingly compelling evidence” that the airlines’ decisions “were just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by plaintiffs.” *See id.* at 671. The Fourth Circuit affirmed Judge Britt in a summary opinion issued in 2004.

One difference between the recent spate of cases and **Hall** is that **Hall** came after a prior lawsuit challenged a move the airline industry had made in 1995 to impose caps on travel agents’ commission. That suit resulted in a settlement in 1996 for only a small percentage of the agents’ alleged damages. The perceived lackluster outcome of that suit for travel agents meant there was little appetite for new suits among potential plaintiffs. In the passenger capacity cases, however, all that is needed to file suit is a person who buys airline tickets.

Shareholder Interests

Where these civil cases will go next is unclear. Motions to dismiss would seem likely to be filed given the lack of evidence of actual collusion. No doubt the DOJ investigation will be searching for a “smoking gun,” but the public reporting to date merely indicates that airlines have all publicly released information on their capacity planning, often in response to Wall Street analysts monitoring airline profitability. But, the involvement of investors and analysts in industry capacity discussions may be one of the specific subjects of the DOJ’s investigation. According to a recent University of Michigan study, airline ticket prices were found to be higher when airlines are commonly owned by similar sets of investors. David McLaughlin, “U.S. looks at Airline Investors for Evidence of Collusion,” BloombergBusiness, September 22, 2015, available at <http://www.bloomberg.com/news/articles/2015-09-22/do-airfares-rise-when-carriers-have-same-investors-u-s-asks>. One explanation for this result could be that airlines do not want to take steps to harm the interests of large shareholders who also own stakes in other airlines. Or, the study also suggests that large investors could act as a conduit for the coordination of pricing moves. If so, the investors are doing a very poor job of it, as domestic airfares dropped to the lowest levels seen since in 2010 in August 2015. *See id.* For now, along with the plaintiffs’ bar, we will need to wait and see what happens in the DOJ investigation.

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Summary of the Latest Amendments to the Federal Rules of Civil Procedure

By Paul M. Cox

The United States Supreme Court issued an order in April adopting new amendments to the Federal Rules of Civil Procedure. Under the Court's Order, the updated rules took effect on December 1, 2015, and "shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."

The following is a summary of the amendments, drawing from the text of the amended rules and from the Notes of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States ("Committee Notes"), which were submitted to the Court. A redline showing changes to the text of the rules, along with the Committee Notes, can be accessed [here](#).

1. Parties Are Now Responsible for Implementing the Purposes of the Rules (Rule 1)

Rule 1 is slightly amended to emphasize that the parties, not just the courts, are responsible for applying the Federal Rules to secure the "just, speedy, and inexpensive determination" of every case.

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Redline of Fed. R. Civ. P. 1. The change responds to pleas to discourage parties from abusing procedural tools to increase cost and delay.

2. Shorter Time Limit for Serving a Defendant with a Complaint (Rule 4(m))

The new rules reduce the time limit for serving a defendant with a complaint from 120 to 90 days. This change is designed to reduce delay at the beginning of litigation. In that regard, this amendment complements a change in Rule 16(b)(2), which shortens the time period for a court to issue a scheduling order.

Shortening the time to serve under Rule 4(m) means that the time period for notice to a party to be brought in by amending a pleading is also reduced. *See* Fed. R. Civ. P. 15(c)(1)(C).

3. Live Communication at Scheduling Conferences (Rule 16(b)(1))

The amended rules omit the provision in the outgoing rules permit-

ting a scheduling conference "by telephone, mail, or other means." Fed. R. Civ. P. 16(b)(1)(B). The rationale is that a scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The Committee Note accompanying the amendment explains that such a conference "may be held in person, by telephone, or by more sophisticated electronic means."

4. Earlier Scheduling Orders (Rule 16(b)(2))

A court must now issue a scheduling order within the earlier of 90 days after the defendant has been served or 60 days after the defendant has appeared. These time periods are 120 days and 90 days, respectively, in the outgoing rules. However, a court may delay issuing such an order for good cause. The Committee Note explains that cases involving multiple parties and complex issues, for example, may "need extra time to establish meaningful collaboration." As with the change to Rule 4(m), this change is designed to encourage early and active case management.

5. New Items in Scheduling Orders (Rule 16(b)(3)(B))

The amended rules include three new items which may be included in scheduling orders: (1) provisions for the preservation of electronically stored information, (2) consent orders under Evidence Rule 502 regarding the disclosure of information covered by attorney-client privilege or work product protection, and (3) a requirement that a party request a conference with the court before filing a discovery motion. The courts have discretion on whether to include these matters.

6. New Standard for Discoverable Information (Rule 26(b))

One of the most significant amendments pertains to the scope of discoverable information. Discoverable information now includes "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Redline of Fed. R. Civ. P. 26(b)(1). The focus on proportionality is the key addition to the Rule.

To explain what "proportional to the needs of the case" means, the Rule incorporates a multi-factor test. That test comes from the outgoing version of Rule 26(b)(2)(c)(iii), which governs limitations on discovery. In the amended rules, the language in Rule 26(b)(2)(c)(iii) has been relocated to the "scope" of discovery section, Rule 26(b)(1), along with one additional factor (emphasized below). Under this test, the parties and the court must consider:

- the importance of the issues at stake in the action,
- the amount in controversy,

- *the parties' relative access to relevant information,*
- *the parties' resources,*
- *the importance of the discovery in resolving the issues, and*
- *whether the burden or expense of the proposed discovery outweighs its likely benefit.*

The Committee Note explains that when these proportionality factors were originally added to the Federal Rules, they were intended to be part of the evaluation of the scope of discoverable information. But because these factors did not appear directly under the scope-of-discovery section of the rules, they lost their intended force in practice. The Committee Note thus explains that this amendment “restores the proportionality factors to their original place in defining the scope of discovery.” Although these factors no longer appear in Rule 26(b)(2)(c)(iii), the Committee Note states that “[t]he court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).”

The amended Rule 26(b) also excludes the litany of examples of discoverable items that are in the outgoing Rule: “the existence, description, nature, custody, condition, and location of any document or other tangible things and the identity and location of persons who know of any discoverable matter.” The Committee Note explains that discovery of such items “is so deeply entrenched in practice that it is no longer necessary to clutter” the Rule with them.

Finally, the new Rule 26(b) eliminates a phrase that, according to the Committee, has been used incorrectly to define the scope of discovery: “Relevant information . . . [that] appears reasonably calculated to lead to the discovery of admissible evidence.” This provision is replaced with a clarification that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1).

The Committee Note discussing the revised scope-of-discovery standard is extensive. In the interest of brevity, this summary will not outline that entire discussion. But the passage is worth reading to understand how this set of amendments is intended to work in practice.

7. A Court’s Authority to Shift Costs in Protective Orders (Rule 26(c))

Rule 26(c) is amended to explicitly recognize that a court may allocate costs associated with disclosure or discovery in a protective order. The Committee Note explains that this authority already exists under the rules and is regularly employed, but this addition should “forestall the temptation some parties may feel to contest this authority.” The Committee cautions, however, that this amendment does not change the background assumption that the responding party will ordinarily bear the cost of responding to discovery requests.

8. Early Requests for Production (Rule 26(d)(2))

Rule 26(d) is amended to permit a party to deliver requests for production before the discovery planning conference required under Rule 26(f). A party may make such a request if more than 21 days

have elapsed since the summons and complaint were served. This amendment is intended to facilitate more productive discussions at Rule 26(f) conferences. For the purposes of responding to early requests, a party is considered to be served with these requests at the time of the Rule 26(f) discovery conference, rather than the time of actual service.

9. Stipulated Sequencing of Discovery Methods (Rule 26(d)(3))

There is now an explicit recognition that parties may prescribe the sequence of discovery methods by stipulation (e.g., depositions after written discovery). The outgoing Rule suggests that only a court order may prescribe such sequencing. Absent such a stipulation or order, the background rule applies, which permits “any” sequencing of discovery methods. Fed. R. Civ. P. 26(d)(3).

10. New Items in Discovery Plans (Rule 26(f)(3))

In concert with the new items that may be included in a planning order under Rule 16(b)(3)(B), Rule 26(f) is amended to update the list of issues that must be addressed in the parties’ discovery plan. First, the parties must now address the “preservation” of electronically stored information. Fed. R. Civ. P. 26(f)(3)(C). The Rule already requires parties to address the “disclosure” and “discovery” of such information. *Id.* Second, although the parties already must discuss whether a court order is required to enforce an agreement regarding the protection of privileged material, the Rule is updated to cite the authority for such a court order: Evidence Rule 502. Fed. R. Civ. P. 26(f)(3)(D).

11. Updated Cross-References for Discovery Devices (Rule 30(a), (d); Rule 31(a); Rule 33(a))

This set of changes is a formality. These rules concern the standards for obtaining depositions when leave of the court is required, for extending the duration of depositions, and for propounding more than 25 interrogatories. They all cross-refer to the multi-factor proportionality test under Rule 26. These cross-references are now updated to reflect the movement of that test from Rule 26(b)(2)(c)(iii) to Rule 26(b)(1).

12. Regulating Objections to Document Requests (Rule 34(b)(2))

Rule 34 is amended to address the potential for objections to document requests to impose unreasonable burdens on the requesting party. The Rule now requires an objecting party to “state with specificity the grounds for objecting” to a request. An objection must also state whether any responsive materials are being withheld on the basis of the objection.

Rule 34 is further amended to explicitly permit copying, in addition to physically inspecting, documents. This is already common practice. A final amendment clarifies that under the new early document request procedure, *see* Fed. R. Civ. P. 26(d)(2), the time to respond starts ticking at the discovery planning conference, not when the request is served.

13. Updating the Grounds for a Motion to Compel Production (Rule 37(a))

This amendment clarifies that a party may file a motion to compel not only when another party fails to permit inspection, but also when the other party fails to produce documents. Permitting such a motion is already common practice.

14. Sanctions for Failing to Preserve Electronically Stored Information (Rule 37(e))

This amendment dramatically changes the standard for imposing sanctions for failure to preserve electronically stored information. The outgoing version of the Rule states that a court “may not” impose such sanctions “[a]bsent exceptional circumstances.” Now, the Rule affirmatively authorizes sanctions in certain circumstances. The Rule is motivated by the difficulties in dealing with the exponential growth of electronic information, and by a desire to establish uniform federal standards where the courts of appeals have developed divergent approaches to the problem.

As a threshold matter, for sanctions to be imposed, a party must have “failed to take reasonable steps to preserve” electronically stored information “that should have been preserved in the anticipation or conduct of litigation,” and there must be no way to replace the information through additional discovery. Fed. R. Civ. P. 37(e). The Committee Note explains that this standard is based on the common law duty to preserve relevant information when litigation is reasonably foreseeable.

If sanctions are warranted under the above standard, the Rule authorizes two sanctioning methods, depending on how serious the situation is. Under the first provision, if the court finds that the other party is prejudiced by the loss of information, the court “may order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). Under the second provision, if the court finds that the party “acted with the intent to deprive another party of the information’s use in the litigation,” the court may impose one of the following sanctions: (a) presume that the lost information is unfavorable to the party, (b) instruct the jury that it may or must presume the information was unfavorable to the party, or (c) dismiss the action or enter a default judgment. Fed. R. Civ. P. 37(e)(2). It is important to bear in mind that, even if a sanction is authorized in a particular case, the decision to impose sanctions is ultimately subject to the discretion of the court. The rule is not mandatory.

The Committee Note explaining this rule change includes a thorough discussion of how Rule 37(e) is intended to operate in

practice. In the interest of brevity, this summary will not go into that discussion. But the passage is worth reading for the purposes of advising clients on electronically stored information and preparing to litigate sanctions motions for lost information.

15. Standards for Setting Aside a Default Judgment (Rule 55(c))

This amendment clarifies that the demanding standards a party must meet to set aside a default judgment under Rule 60(b) apply only when the default judgment is final (i.e., not when the judgment disposes of only some of the claims).

16. Removing the Appendix of Forms (The Appendix of Forms; Rule 4(d); Rule 84)

Finally, the new Rules no longer include the Appendix of Forms. Because there are many alternative sources for such forms, including the websites of the Administrative Office of the United States Courts and the individual district courts, the Committee determined that it was no longer necessary to append forms to the Federal Rules.

This change results in two consequent changes to the rules. First, Rule 84 is now eliminated. That Rule merely explains the purpose of the Appendix. Second, the removal of the Appendix required an amendment to Rule 4(d), which governs requests for a waiver of service of a summons. The outgoing version of Rule 4(d) referred to Forms 5 and 6 in the Appendix, which are the waiver-request and waiver-acknowledgment forms. *See* Fed. R. Civ. P. 4(d) (1)(C), (D). The Committee decided to keep these two forms in the Federal Rules. Accordingly, these two forms are now appended to the end of Rule 4, and the text of the Rule has been updated to reflect this change.

Conclusion

As this summary demonstrates, the Supreme Court adopted some significant amendments to the Federal Rules of Civil Procedure this year. Chief among these are the focus on proportionality in defining the scope of discovery and the authorization of sanctions for failure to preserve electronically stored information. Starting this month, we should begin to see just how much these amendments will change the practice in federal court.

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Encryption Is Not a Four Letter Word

By Pegeen Turner

Encryption sounds very technical and scary, and while most attorneys don't like to talk about IT security, this is something attorneys need to know and apply to our daily lives. It is not a difficult concept and can save you and your malpractice insurance company from lots of headaches.

What is Encryption?

Encryption is a process to store your data so that only you can access it. There is an encryption "key" (essentially a password) that you keep to encrypt and decrypt the data. When the data is encrypted, it is converted to ones and zeros so that it can be stored securely, and if the encrypted data falls into the wrong hands (the bad guys or the NSA) it can NOT be read. You hold the only encryption key, and your data can only be decrypted (unlocked) and read by you.

There are different types of encryption. Let's take a closer look at a few of the main types.

Encryption Types

While there are many types of encryption out there, the following types would be most relevant for attorneys:

Document Encryption - When we talk about document encryption, I am referring to documents and sensitive client information that are stored on your laptop and in the cloud without any security other than a password. Dropbox, Box, Google Drive, and (put your favorite cloud-based storage here) users need to pay attention to this type of encryption. Document encryption would be used in collaboration with these cloud-based programs to convert the data into ones and zeros on your local computer. If your computer is lost or stolen, the data would not be able to be accessed without the encryption key.

Email Encryption - Email encryption is the converting of emails to an encrypted format so they can be securely transmitted from one person to another. In some encrypted email systems, the email recipient needs to set up an account with the sender's encryption service to read the encrypted email. Since sensitive information can be exchanged safely with encrypted email, attorneys that have worked with HIPPA or Sarbanes-Oxley documents have already seen email encryption first-hand, and many real estate attorneys will be required to implement encrypted email for compliance with upcoming CFPB regulations.

Disk Encryption - When we talk about disk encryption, we are referring to the encryption of all data on a piece of hardware - a laptop, desktop, external hard drive, etc. This encryption occurs before the operating system loads on a computer and many Windows computers are coming with disk encryption software installed (BitLocker), but not turned on by default. With disk encryption enabled, the documents and other data on that stolen laptop are worthless without the key.

Do I need encryption?

In short, yes! Storing data today is not about having data accessible wherever you go. It is about having your data **SECURELY** accessible everywhere you go. Programs like Dropbox, Box.com, Drive, etc. are great, but your data security is only as secure as your password. If your password is Password123, it is NOT secure. A great password (12+ characters including capitals and punctuation) is the first layer of security, encryption is the second and add on Two Factor Authentication (we can talk about that later), now we are talking!

What programs can I use for encryption?

Different products have been designed to address each type of encryption. For document encryption, programs like Viivo and Boxcryptor can encrypt cloud-based storage, like Dropbox, Box.com, Google Drive, etc. When you want to protect your data upfront at the hardware level, programs like VeraCrypt and BitLocker can encrypt your whole hard drive, a USB drive, or individual files or folders.

Email encryption is a bit of a different story because email encryption is dependent on where your email is stored. I am not talking about Outlook, but where is your email behind the scenes? Is it on an email server in your office? On GoDaddy with your website? Or on a cloud-based system like Office 365 or Google Apps? Each of these systems can offer email encryption, but there are different systems for each of them.

With some popular email systems, including up-to-date server-based email systems, Google Apps and Office 365, you can enable encryption on these systems for an additional fee. Other email systems can use third-party software like Zix Corp or add-ins to your browser like Virtru, my personal favorite. There are lots of options for email encryption, but it is dependent on your firm's needs (does every email need to be encrypted?) and the ease of use for your clients.

Is encryption hard to set up?

Typically, no. Programs today try to make it "easy" to install and maintain. Some of the programs, like VeraCrypt, are more technical but still are geared toward the average user. Ask your IT person (or a 14-year old gamer) and they should be able to help you if you get stuck and need some tech translation.

It should go with saying, make sure you have your data backed up before you start. As with any software installation, some do not go as planned so you want to take precautions.

Are they difficult to use?

Again, typically no. The most difficult part of using an encryption program is the setup. Once it is setup, it runs in the background and you shouldn't see it too much in your day to day work.

However, it may require some maintenance and updating. Depending on the program and how you choose to encrypt it, you may need to maintain a master password, a USB drive, a fingerprint (biometric encryption), so choose your secure “key” carefully and document it.

Just do it!

In the end, encryption should not be seen as a hindrance to your everyday work, but a benefit. Just like you backup your data in case of a hard drive failure or a virus (you do, right?), encryption

is another way of preparing for trouble. Knowing that your data is safe and secure will make you and your clients feel better about working together securely. Considering how user-friendly the software has become and with so much at stake, I suggest you just do it. Happy Encrypting!

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