

consultants' APO amendment application. The Commission issued a warning letter to the supervisory attorney but found that the supervisory attorney's legal support staff and the consultants had not breached the APO.

Before the first APO release at issue, the supervisory attorney, an APO signatory, directed his legal assistant to file an APO amendment application for the consultants. Due to technical issues, the legal assistant did not file the APO amendment application and did not inform anyone that she never completed the filing. The legal assistant stated that she was not aware of the time sensitivity of the APO amendment application. Without confirming whether the retained consultants had been added to the APO, the supervisory attorney instructed legal support staff to provide APO release materials from two releases to the retained consultants. Legal support staff at the firm did not confirm whether the consultants had been added to the APO before transferring the APO release materials. The day after the second release, the firm's staff discovered that the consultants' APO amendment application had not been filed with the Commission, and staff filed the APO amendment application on the same day as this discovery. The Commission ultimately granted the application and placed the consultants on the APO.

The Commission first became aware of this breach through opposing counsel. The supervisory attorney did not notify the Secretary of the potential breach until twelve days after his firm's discovery.

In determining whether to issue a sanction for the breach, the Commission considered mitigating factors, including that: (1) The breach was unintentional; (2) the supervisory attorney had not previously been found in breach of an APO; (3) he and his firm took immediate corrective action upon discovery of the breach; (4) his firm implemented new procedures to prevent similar breaches in the future; and (5) the retained consultants were eventually added to the APO, handled the BPI at all times as if they were subject to the APO, and did not disclose the BPI to unauthorized individuals. The Commission also considered the following aggravating factors: (1) The retained consultants were not authorized under the APO when they first received and viewed BPI; (2) opposing counsel, not the supervisory attorney or his firm, first notified the Commission of the breach; and (3) the supervisory attorney and his firm waited twelve days after discovering the breach to report it to the

Commission. Ultimately, the Commission determined that the mitigating factors outweighed the aggravating factors, and it issued a warning letter rather than a sanction. The consultants were the only non-signatories to view the BPI, and they were eventually added to the APO.

The Commission also considered whether to find the supervisory attorney's legal support staff and the consultants in breach of the APO, and it determined not to do so. The Commission found that the supervisory attorney's lack of oversight resulted in his staff's failure to comply with APO procedures. He had not relayed the urgency of the APO amendment application filing, and he did not instruct his staff to ensure that the consultants were on the APO before transferring APO release materials to them. The Commission similarly determined not to find the consultants in breach because they did not know that they were not authorized under the APO to view the BPI when they received it. Further, the consultants handled the BPI at all times as if they were under the APO, and they did not share the APO materials with unauthorized individuals.

B. Fiscal Year 2021

Case 1. The Commission determined that an attorney breached the APO in a section 337 investigation when he disclosed CBI in open court before the U.S. Court of Appeals for the Federal Circuit ("CAFC"). The Commission issued a private letter of reprimand.

The attorney's disclosure of CBI occurred during his rebuttal to opposing counsel's opening oral argument. Opposing counsel objected to the disclosure and moved that the CAFC not post a transcript or recording. In response to opposing counsel's objection, the attorney ended his rebuttal. A Commission attorney was present at the time of the disclosure and notified the Secretary of the breach. Following additional briefing from the parties on the disclosure, the CAFC ultimately granted opposing counsel's motion to withhold the transcript and recording of the oral argument from its website, and no transcript or recording was ever posted. However, individuals not authorized to receive CBI under the APO were present at the CAFC oral argument at the time of the disclosure.

In determining the appropriate sanction in response to the breach, the Commission considered mitigating factors, including: (1) The breach was inadvertent and unintentional; (2) the Commission was immediately aware of

the breach due to its staff's presence at the oral argument; and (3) the attorney took prompt corrective action to mitigate the effect of the breach. The Commission also considered the following aggravating factors: (1) Opposing counsel discovered the breach; and (2) the Commission presumed that non-signatories to the APO who were present at the CAFC oral argument heard the CBI, and the attorney did not present any evidence to the contrary. The Commission determined to issue a private letter of reprimand.

By order of the Commission.

Issued: December 14, 2021.

Lisa Barton,

Secretary to the Commission.

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JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Appellate Rules; Meeting of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Advisory Committee on Appellate Rules; Notice of cancellation of open hearing.

SUMMARY: The following virtual public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing on January 14, 2022. The announcement for this hearing was previously published in the **Federal Register** on August 11, 2021.

DATES: January 14, 2022.

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(Authority: 28 U.S.C. 2073.)

Dated: December 15, 2021.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

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