

The Commission advised in the preamble to the notice of proposed rulemaking in 1990 that it will permit authorized applicants a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the BPI. However, the Commission cautioned authorized applicants that they would be held responsible for safeguarding the confidentiality of all BPI to which they are granted access and warned applicants about the potential hazards of storage on hard disk. The caution in that preamble is restated here:

[T]he Commission suggests that certain safeguards would seem to be particularly useful. When storing business proprietary information on computer disks, for example, storage on floppy disks rather than hard disks is recommended, because deletion of information from a hard disk does not necessarily erase the information, which can often be retrieved using a utilities program. Further, use of business proprietary information on a computer with the capability to communicate with users outside the authorized applicant's office incurs the risk of unauthorized access to the information through such communication. If a computer malfunctions, all business proprietary information should be erased from the machine before it is removed from the authorized applicant's office for repair. While no safeguard program will insulate an authorized applicant from sanctions in the event of a breach of the administrative protective order, such a program may be a mitigating factor. Preamble to notice of proposed rulemaking, 55 FR 24100, 24103 (June 14, 1990).

In 2002, the Commission completed two investigations of instances in which members of a law firm or consultants working with a firm were granted access to APO materials by the firm although they were not APO signatories (Cases 1 and 5). In these cases and four others in 2001, the firm and the person using the BPI mistakenly believed an APO application had been filed for that person. The Commission determined in all these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. Action could be taken against these persons, however, under Commission rule 201.15 (19 CFR 201.15) for good cause shown. In all cases, the Commission decided that the non-signatory was a person who appeared regularly before the Commission and was aware of the requirements and limitations related to APO access and should have verified his or her APO status before obtaining access to and using the BPI. In all but one case, the Commission issued warning letters because it was the first time the persons

in question were subject to possible sanctions under section 201.15.

Also in 2002, the Commission found the lead attorney to be responsible for breaches in at least four cases where he or she failed to provide adequate supervision over the handling of BPI. (Cases 1, 3, 9, and 10). Lead attorneys should be aware that their responsibilities for overall supervision of an investigation, when a breach has been caused by the actions of someone else in the investigation, may lead to a finding that the lead attorney has also violated the APO. The Commission has found that a lead attorney did not violate the APO in cases where his delegation of authority was reasonable.

III. Specific Investigations in Which Breaches Were Found

The Commission presents the following case studies to educate users about the types of APO breaches found by the Commission. The studies provide the factual background, the actions taken by the Commission, and the factors considered by the Commission in determining the appropriate actions. The Commission has not included some of the specific facts in the descriptions of investigations where disclosure of such facts could reveal the identity of a particular breacher. Thus, in some cases, apparent inconsistencies in the facts set forth in this notice result from the Commission's inability to disclose particular facts more fully.

Case 1: Four attorneys were investigated for a breach involving the release of BPI to an attorney in the firm who was not a signatory to the APO. The attorneys who were involved in the Commission investigation assumed that they all had been included on the APO and shared the APO materials with each other. However, one of these attorneys, an associate, had not been included on the APO. The lead attorney was found to have breached the APO because he failed to provide adequate supervision over the handling of BPI and permitted the release of BPI to an associate in his firm who was not a signatory to the APO. The other attorneys were found to have breached because they provided the non-signatory with BPI to use in a Commission investigation. The fourth attorney did not breach the APO because he was a non-signatory, but the Commission determined that his actions were sufficient to demonstrate good cause for the imposition of sanctions under 19 CFR 201.15. He was not a signatory to the APO when he reviewed BPI contained in documents received under the APO and utilized the BPI in the preparation of a brief in the Commission investigation.

The three attorneys who breached the APO were issued warning letters. This was their first breach of an APO involving a section 201.15 violation. The attorney who was a non-signatory was issued a private letter of reprimand. Although this was his first violation under section 201.15, he had helped to cause a breach of the APO in a previous matter by failing to redact BPI from the public version of a brief filed in the Commission investigation. This breach had been previously investigated and reported. In that APOB investigation, the Commission found that there was sufficient information to suggest that a non-signatory outside the firm viewed the BPI.

Case 2: The Commission determined that an attorney, an APO coordinator, and a legal secretary breached the APO. The APO coordinator, who was a senior legal secretary, gave another legal secretary an attorney's edits to a draft brief and provided instructions regarding redaction of the CBI from brackets and the subsequent faxing of the draft brief to clients. The legal secretary did not remove all the CBI from the brackets because she believed it was the clients' information. She also did not have an attorney review the document, as required by the firm's procedures, after she made the edits and before she faxed the document to the clients. In the affidavits provided by the firm in this APOB investigation, there was a dispute between the legal secretary and the rest of the firm as to whether the legal secretary had received adequate instructions from the APO coordinator regarding the handling of the CBI. One of the attorneys working on the brief also recalled instructing the legal secretary to remove all the CBI from the brackets because the information had been generated by multiple clients.

In defending against the breach allegations, the firm raised issues about whether the information was CBI. The Commission considered each of the arguments and determined that CBI had been released.

In spite of the dispute over instructions given to the legal secretary, the Commission determined that she had breached the APO. In addition, the Commission determined that the APO coordinator and the attorney who made the edits to the brief, and who was also the lead attorney and managing partner in the firm, breached the APO for failure to provide adequate supervision over the legal secretary.

The Commission issued private letters of reprimand to all three persons, after considering that persons who were non-signatories to the APO actually read the