

redact BPI from the draft public brief which resulted in possession of the BPI by several non-signatories, including one who actually viewed the BPI. The Commission issued a warning letter to the secretary rather than a private letter of reprimand largely because she, as a clerical employee, was under the direct supervision of an attorney at the time of the breach. In addition, this was her first breach, the breach was unintentional, prompt action was taken to remedy the breach, and actions were taken by the firm to improve APO compliance procedures.

The Commission found that the lead attorney breached the APO because the associate attorney had e-mailed two versions of the public draft brief with masked but recoverable BPI. The Commission noted that the information provided in this APOB investigation indicated that it was the law firm's practice to e-mail public versions of documents containing masked but recoverable BPI to its clients. Further, although the first electronic brief had been retrieved or destroyed, there was no indication in the record that anyone had attempted to retrieve or destroy the electronic copies of the revised draft brief sent to the eight non-signatory clients. Consequently, the masked BPI in those electronic copies had evidently remained unprotected for at least nine months, and at risk of disclosure to APO non-signatories. The Commission determined that the lead attorney was not responsible for the breach involving BPI remaining visible in the one footnote as his delegation of the preparation of the public version of a brief to a mid-level associate was reasonable. However, the Commission issued the lead attorney a private letter of reprimand because of the serious problem raised by e-mailing electronic documents containing masked but retrievable BPI. The lead attorney had no prior breaches.

The associate attorney was also given a private letter of reprimand. The Commission reached its decision to sanction the associate after giving consideration to the existence of several mitigating factors with respect to the unredacted BPI, including the unintentional nature of the breach, the fact that corrective measures were immediately taken, the breach was reported to the Secretary's Office the following day, and certain procedures at the law firm were strengthened to prevent future breaches. The Commission noted that, with respect to the breach involving masked but recoverable BPI in both versions of the electronic brief, the breach was inadvertent. The Commission also

considered the fact this was the associate's first breach. A sanction was warranted, however, because a non-signatory viewed the unredacted BPI in the footnote in the first draft brief. Moreover, the Commission and not the law firm identified the breach involving the masked but recoverable BPI. Finally, there was no information on the record suggesting that anyone in the law firm had attempted to prevent disclosure to unauthorized persons of recoverable BPI contained in the revised draft brief.

Case 12: The Commission determined that three attorneys breached the APO. All three attorneys, who were from two different firms, had been responsible for preparing the public version of a joint brief in which not all BPI received under the APO had been redacted. After the public brief was completed, one of the firms sent copies to two of its clients where one office at each of the companies viewed the brief with the unredacted BPI. The Commission issued two of the attorneys private letters of reprimand and the third attorney received a private letter of reprimand with the additional requirement that he conduct an APO compliance seminar at his firm. This was the first breach for the first two attorneys, but the third attorney had breached another APO within two years of the occurrence of this breach. In issuing these sanctions, the Commission considered that BPI was viewed by non-signatories to the APO, and also considered the mitigating circumstances that the breach was unintentional; that corrective measures were taken immediately; that internal APO procedures existed before the breach and they had been followed; and that these procedures were strengthened.

A fourth attorney initially was found by the Commission to have breached the APO. His involvement with the preparation of the public brief had been solely to check the adequacy of the bracketing in the confidential version. He had delegated preparation of the public version to an attorney in his firm who was an experienced trade lawyer. The fourth attorney had sent the public brief to his clients not knowing that it contained unredacted BPI. During the sanctions phase of the APOB investigation, the fourth attorney cited a Commission summary of an APOB investigation completed in 2001 which had not been published during the breach phase of the current APOB investigation. The attorney argued that, since the facts contained in the summary were very similar to his circumstances and, in that case, the supervising attorney was found not to have breached, the Commission should

reconsider and reverse its decision that he had breached the APO. Based on these new arguments that had not been available to the attorney earlier, the Commission reconsidered and reversed its previous decision that he had breached.

Case 13: The Commission determined that a lead economic consultant breached the APO by failing to return or destroy confidential documents and certify that the documents were returned or destroyed within 60 days after the Commission's publication of its final remedy determination in the **Federal Register**. The Commission issued a warning letter to the lead consultant, while determining that other consultants in his firm were not responsible for the breach of the APO. The Commission, in reaching its determination, considered that this was the only breach in which the consultant had been involved within a two year period examined by the Commission for purposes of determining sanctions; that the consultant and other employees who were signatories to the APO executed and filed certificates of return or destruction of CBI materials less than one month after the deadline; that there was no indication in the record that any non-signatory had access to the CBI in question; and that the consultant's firm had implemented, pursuant to requirements imposed by litigation in which it was involved, a strict document retention policy which required various approvals before documents could be destroyed.

Case 14: The Commission determined that one attorney breached the APO when he filed a public version of a prehearing brief containing BPI. The BPI, the name of a business that was the source of a lost revenue allegation, had been contained in the confidential staff report at an earlier phase of the investigation. That report bracketed the name of a business in all but one place. The name of the business was deleted from the public version of the report in all locations. The attorney argued that he didn't breach the APO because the information was publicly available, since it was not consistently bracketed in the staff report. In response, the Commission noted that the confidential staff report was distributed only to parties who were signatories to the APO and was not distributed to the public. The public version of the staff report was distributed to the public, but it did not reveal the identify of the source of the lost revenue allegation. The attorney also argued that the information in question theoretically could have been obtained from public sources, *i.e.*, from information contained in public files for