

USCIT Judicial Conference

**Static Rules and Evolving
Business Information:
The Ethics of Confidentiality
in Trade Proceedings**

October 10, 2024



Moderator

Hon. Leo M. Gordon
U.S. Court of International Trade

Panelists

Evangeline Keenan
APO/Dockets Unit
U.S. Department of Commerce

Neal Reynolds
Senior Counsel
King & Spalding LLP

Tracy Kepler
Risk Control Director
CNA Insurance

Devin Sikes
Counsel
Akin Gump Strauss Hauer & Feld LLP

Disclaimer



This is not legal advice, nor should it be considered legal advice.



This presentation and the comments contained therein represent only the personal views of the participants, as spoken and do not reflect those of their employers or clients.



This presentation is offered for educational and informational uses only.



Soliciting speakers is strictly prohibited.

Outline

- I. Introduction
- II. Relevant Ethics Principles Regarding BPI
- III. Commerce Treatment on BPI
- IV. ITC Rules on BPI
- V. Other Considerations
- VI. Questions

Relevant Ethics Principles Regarding BPI

Model Rule 1.6 – Duty of Confidentiality

Ethics v. Evidence

Duty to Protect Confidences (MRPC 1.6)

- Ethics/Disciplinary Sanction
- Much more EXPANSIVE
 - ALL information relating to the representation except for “*generally known*” (ABA Op. 479)
 - Personal information relating the to the information that the client would not want disclosed
 - Information learned from client AND from interviews, documents, photos, observations, etc.
 - Information acquired BEFORE the representation begins and AFTER it ends
 - Notes/memos the lawyer creates relating to the matter

Model Rule 1.6 – Duty of Confidentiality

Ethics v. Evidence

Attorney-Client Privilege

- Common law - Evidence
- Cannot be compelled to testify

Differ in Four Principal Ways

Setting

- Asserted in judicial-like proceedings when asked to produce evidence v. extends to ALL matters re representation

Source

- ONLY communications between attorney and client v. ALL information from ANY source

Privacy

- Privacy of communication (3rd party generally destroys) v. NOT require privacy

Use

- Attorney/Client Privilege – only in litigation v. everywhere ALL the time

Model Rule 1.6 – Confidentiality

Rule 1.6(a)

A lawyer **shall not** reveal information relating to the representation of a client

Unless

- (1) the client gives **informed consent**
- (2) the disclosure is **impliedly authorized** in order to carry out the representation OR
- (3) the disclosure is permitted by paragraph (b).

Model Rule 1.6 – Confidentiality

- Rule 1.6(a) – Immaterial that the information was not disclosed or imparted by the client himself. Rule covers ALL information however obtained.
- Protection not limited to information concerning a particular litigation or transaction. It extends to ANY information “relating to the representation.

ABA Formal Opinion 480

- “information about a client’s representation contained in a court’s order, for example, although contained in a public document or record, is not exempt from the lawyer’s duty of confidentiality under Model Rule 1.6.”
- “duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.”
- “1st Amendment ...guarantees individuals’ right to free speech, this right is not without bounds. Lawyers’ professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer’s free speech rights are limited.”

Model Rule 1.6(a)(1) – Informed Consent

Look to definition MRPC 1.0(e):

- Agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct
- With Rule 1.6(a)(1): adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests,' including risk that information may then be disclosed to others, that lawyer-client privilege may be waived, and that information could be used to client's disadvantage

Model Rule 1.6(a)(1)

Informed Consent

- Informed consent requires an understanding of the risks and benefits attendant upon disclosure.
 - *See also* Rule 1.0, Comments [6] and [7] – Informed consent usually requires an affirmative response by the client; the lawyer may not assume consent from a client's

Informed Consent

ABA Formal Ethics Opinion 01-421 (2001)

- “disclosure to the client . . . in order to obtain informed consent within the meaning of Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client’s interests,” including risk that information may then be disclosed to others, that lawyer-client privilege may be waived, and that information could be used to client’s disadvantage
- Unlike a conflict waiver, informed consent to the disclosure of confidential information under Rule 1.6 need not be confirmed in writing

Model Rule 1.6(a)(2) – Impliedly Authorized

Examples

- ITC
- Data breach – law enforcement, IT professionals
- Insurance companies - lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests
- RE - Documents become public records, other parties to transaction receive information such as purchase price, amount of offer, amount accepted, and condition of property; disclosures to obtain title insurance are also impliedly authorized
- Consulting lawyer
- Independent contractors/outsourced workers

Impliedly Authorized

- Rule 1.6(a)(2): The permission is generally limited to disclosures that are clearly necessary to advance the representation of a client, such as facts “that cannot properly be disputed” or “a disclosure that facilitates a satisfactory conclusion to a matter.” Rule 1.6, Comment [5]
- “Impliedly authorized” depends upon the particular circumstances of the representation

Model Rule 1.6 – Confidentiality

Rule 1.6(b)

A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- Permits disclosure only to the extent necessary to accomplish one of the specified purposes in Rule 1.6(b) (1) - (7)
- Lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure – see Comment [16]
- Disclosure adverse to client's interest should be no greater than necessary to accomplish the purpose
- If disclosure is made to a tribunal, disclosure should be in a manner which limits access to only those who need to know it

Model Rule 1.6(b) – Confidentiality

Should I Disclose? Factors to Consider

- Nature of relationship with client
- Relationship with those who might be injured by client
- Lawyer's own relationship - involvement in the transaction
- Get client to disclose?

Model Rule 1.6(b) – Confidentiality

Permissive Exceptions

Rule 1.6(b) - A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) To prevent death/substantial injury
- (2) To prevent client crime/fraud result in financial injury
- (3) To prevent, mitigate, or rectify financial injury resulting from client crime/fraud where used lawyer's service
- (4) To secure legal advice regarding compliance with MRPC
- (5) To establish claim/defense in a controversy between lawyer & client
- (6) To comply to other law or court order
- (7) To detect & resolve conflicts of interest

Model Rule 1.6(b) – Confidentiality

Where Disclosures **MUST** be made regardless of Rule 1.6

- To the Tribunal – MRPC 3.3
 - Lawyer shall not knowingly:
 - Fail to correct a false statement of material fact or law previously made to tribunal by lawyer
 - Fail to take reasonable remedial measures to correct material evidence that lawyer, lawyer's client or witness called by lawyer has offered where lawyer comes to know of falsity
 - Fail to take reasonable remedial measures if necessary to prevent criminal or fraudulent conduct related to proceeding
- What triggers it:
 - Knowledge that evidence is false
 - Knowledge can be inferred from circumstances
 - Can resolve doubts in favor of client but cannot ignore obvious falsehood

Model Rule 1.6(a) – Scope of Representation

(a) Subject to paragraphs (c) and (d), a lawyer *shall* abide by a client's decisions concerning the objectives of representation

AND, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

A lawyer shall abide by a client's decision whether to settle a matter.

Division of Authority

Objectives v. Means

- Abide by client's instructions regarding the objectives of representation
- Consult with client about the means by which objectives are to be pursued

OBJECTIVES = decisions that directly affect

- Ultimate resolution of the case
- Substantive rights of the client **VERSUS**
- Client's decision

MEANS = decisions that are procedural/tactical

- Lawyer's decision

Implied Authorization

- Troubled Waters...
 - Comment 3 - At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf ***without further consultation***. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- Doesn't mean "I can do whatever I want."
- Or does it?

Model Rule 1.4 – Communication

(a) A lawyer SHALL:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished

(3) Keep the client reasonably informed about the status of the matter

Model Rule 1.4 – Communication, cont'd

(4) Promptly comply with reasonable requests for information from the client

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law

if client expects help that would be unethical or illegal – lawyer must inform client of limitations

Model Rule 1.4 – Communication, cont'd

Status of Matter

- Must Inform Client If:
 - Client's case was dismissed
 - Practitioner errors
 - Practitioner fails to follow client instructions on a material matter
- You blew it, ADMIT it
 - Hiding/Lying – tack on a charge of Rule 8.4(c)

Model Rule 1.4(b) – Communication, cont'd

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

What to Explain

- Legal effect of entering into an agreement
- Legal effect of executing a legal document
- Advising as to potential adverse consequences
- Client's objectives at risk – apprise client of facts and legal implications and alternative course of action

Model Rule 1.13 – Organization as Client

Governmental Entities

Comment [9]=Government Agency

- Difficulty in client ID
 - Agency, Branch, Government?

Conduct of Government Officials

- Authority under applicable law, policies, statutes, etc.

Model Rule 1.13 – Organization as Client

Governmental Entities – Comment [9]

...Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved....

When Your Client is in the Government

- **WAY HARDER** to determine who is your client
- Rules even say that it is a matter beyond the scope of these Rules
- Client may be a specific agency, but also a branch of government
- **EXAMPLE:** I work for the Office of the Solicitor, part of Office of General Counsel, part of USPTO, but is part of Department of Commerce. If the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.

When Your Client Is In The Government, cont'd

- Also, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.
- When the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

Commerce Treatment of BPI

Commerce AD/CVD Proceedings

- Trade Secrets Act - 18 USC 1905.
- In conducting its AD/CVD proceedings, the statute directs Commerce to make certain information generally available on a public record.
- The statute also provides a framework for Commerce to receive such information and maintain its proprietary status by exempting it from disclosure on the public record.
- Commerce must make available to interested parties, under an administrative protective order (APO), business proprietary information submitted to it during an AD/CVD proceeding. 19 USC 1677f(c)(1)(A).

Limits on Commerce's Sharing of BPI

With some exceptions, Commerce shall not disclose information designated as business proprietary by the submitter without the submitter's consent, other than to:

- a Commerce officer or employee directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise, or
- a U.S. Customs and Border officer or employee directly involved in conducting an investigation regarding negligence, gross negligence, or fraud under this subtitle.

19 USC 1677f(b)(1).

Commerce Sharing of BPI, cont'd

In addition to those named in the statute, Commerce's regulations also specify others with whom Commerce may share BPI:

- APO-authorized applicant
- U.S. Trade Representative as provided by 19 U.S.C. 3571(i)
- any person to whom the submitting person specifically authorizes disclosure in writing; and
- A party charged with committing an APO violation or its counsel under 19 CFR part 354.

19 CFR 351.306(a).

The Public Record

The statute also requires Commerce to disclose as public information:

- any proprietary information received in the course of a proceeding if it is disclosed in a form which cannot be associated with, or otherwise be used to identify, operations of a particular person, and
- any information submitted in connection with a proceeding which is not designated as proprietary by the person submitting it.

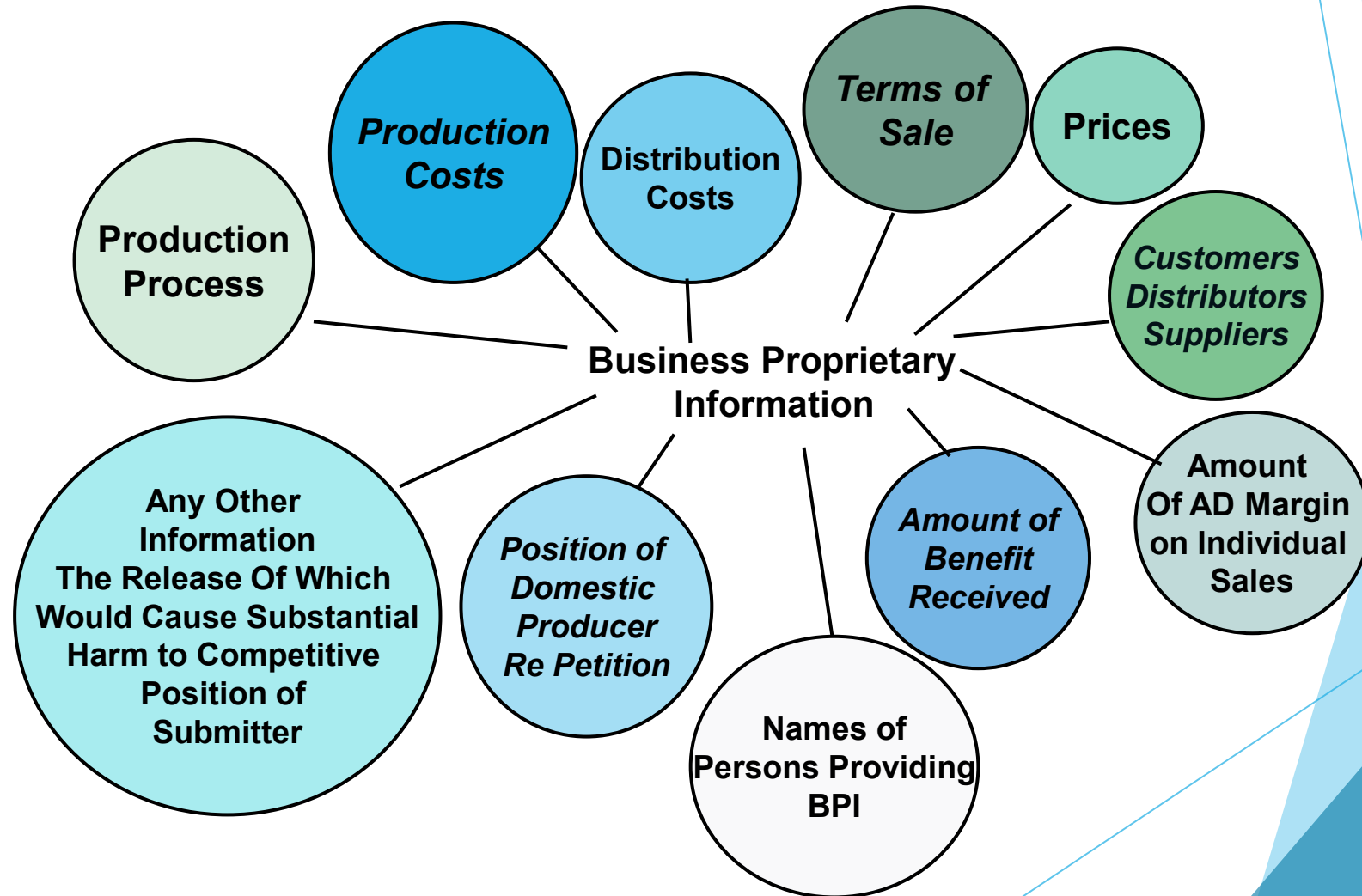
19 USC 1677f(a)(4); 19 CFR 351.105(b).

Business Proprietary Treatment

- A party must include a claim for business proprietary treatment under 19 CFR 351.304(a).
- The business proprietary information must be enclosed in square brackets.
- A party must explain how that information qualifies as business proprietary, citing to one of the reasons acknowledged by Commerce in 19 CFR 351.105(c)(1) - (11).

19 CFR 351.304(b)(1)

TREATED AS PROPRIETARY IF CLAIMED AS SUCH BY SUBMITTER
19 CFR 351.105(c)



Public Summary

Commerce requires information for which proprietary treatment is requested be accompanied by either a non-proprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or a statement that the information is not susceptible to summary.

If a party submits the latter, the statement must be accompanied by the reasons in support of the contention, *and* either a statement permitting release of the information under APO or a statement that the information is a type that should not be released under APO.

19 USC 1677f(b)(1)(B).

Unwarranted Designation

- If Commerce determines that a BPI designation is unwarranted, it shall notify the submitter and ask for an explanation of the reasons for the designation.
- Unless that person persuades Commerce that the designation is warranted, or withdraws the designation, Commerce shall return it to the submitter. The person may then submit other material concerning the subject matter of the returned information.
- Commerce's regulations require the submitter to take action within two business days. Because of electronic filing, Commerce no longer returns the submission, but instead rejects it from the record.

19 USC 1677f(b)(2); 19 CFR 351.304(d).

The APO

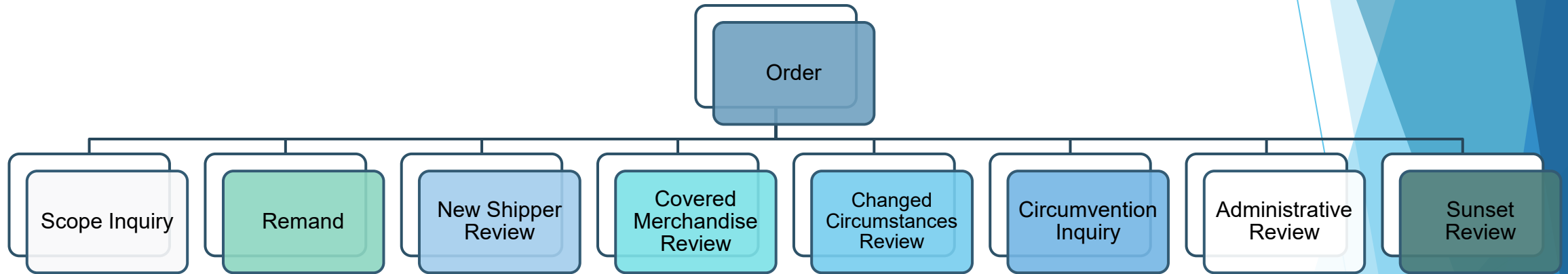
Limited disclosure of certain proprietary information under protective order.

Commerce shall make all BPI submitted in its AD/CVD proceedings available to the legal representatives of a party to the proceeding through an administrative protective order.

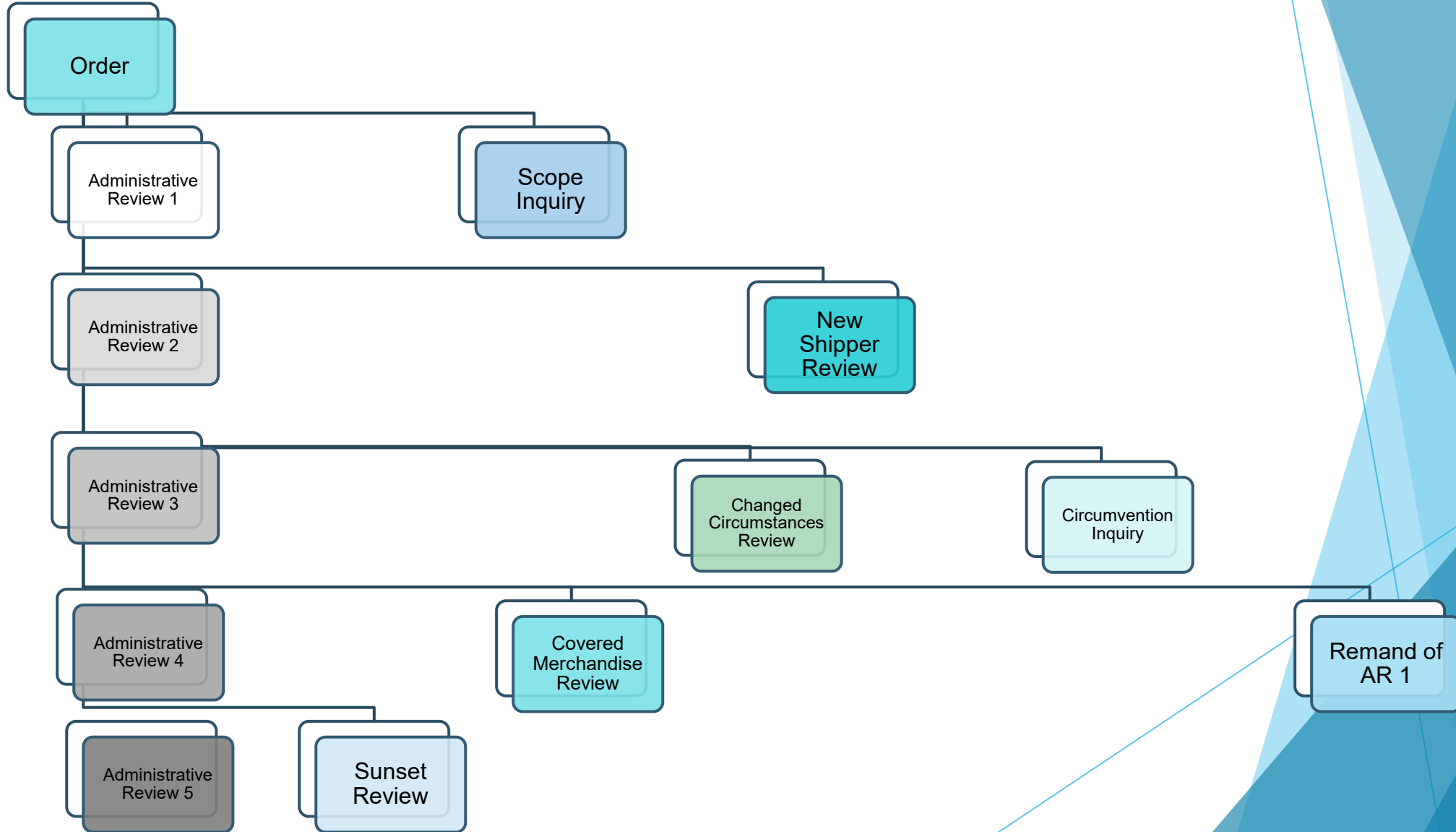
Such representatives must file an APO application and Commerce will approve the APO application by adding the representative to the APO service list for the relevant segment of the proceeding.

See 19 USC 1677f(c); 19 CFR 351.305(c).

One Order, Many Segments at the Same Time



One Order, Many Segments and Timelines



Commerce Practice and APO Terms of Use

- The terms of use for each APO varies by segment, but generally, BPI that is submitted to a segment of a proceeding may be used in that segment.
- If relevant, the BPI can be used in two subsequent consecutive administrative reviews of the proceeding, and any other segment that is initiated before the publication of the final results of the second subsequent consecutive administrative review.
- Check the specific APO that is placed on the record of each case segment for the specific terms of use.

APO Terms of Use, cont'd

- Different terms of use apply for the following segment types: scope, circumvention, covered merchandise inquiry and suspension agreement-related segments, specifically with regard to companion orders, pursuant to 19 CFR 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2), respectively.
- For remand segments, Commerce does not issue a new APO, but rather, the original APO for the underlying segment governs, as stated in that APO. Generally, Commerce grants APO access in a remand segment to representatives of parties to the litigation who were also APO-authorized in the underlying segment. In some cases, representatives who did not previously appear in the underlying segment may file an APO application in the underlying segment to gain APO access in the remand segment.

ITC Rules on BPI

Relevant Statutes

Statutory Provisions

I. The Statutory Provisions

- Under the statute, the Commission may not disclose information that is submitted to it which is designated business proprietary information by the person submitting it without the consent of that person, other than to (i) an employee of the Commission or Commerce that is carrying out the investigation or review in which the information is submitted, (ii) a Customs employee who is conducting a customs fraud or negligence investigation for the product in question, or (iii) an individual who is subject to administrative protective order in the proceeding. 19 U.S.C. § 1677f(b)(1)(A) & (c)(1).¹

¹ Specifically, the statute states:

Except as provided in subsection (a)(4)(A) and subsection (c), information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information, other than—

- (i) to an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise, or
- (i) to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding negligence, gross negligence, or fraud under this subtitle.

Statutory Provisions, cont'd

- The exceptions to this general rule are that the Commission “shall disclose (A) any proprietary information received in the course of a proceeding if it is disclosed in a form which cannot be associated with, or otherwise be used to identify, operations of a particular person {e.g., by using aggregations/descriptions of trends}, and (B) any information submitted in connection with a proceeding which is not designated as proprietary by the person submitting it.”²

² 19 U.S.C. § 1677f(a)(4).

Statutory Provisions, cont'd

- The statute provides the Commission with the authority to determine whether information is business proprietary information. 19 U.S.C. § 1677f(b)(2). It also provides that, if the Commission determines that the designation of information as business proprietary information by a submitter is unwarranted, the Commission shall return it to the party submitting it. *Id.* The submitting party may then submit other matter concerning the subject matter of the returned information if made within an appropriate time frame. *Id.*
- The statute gives the Commission the authority to make confidential business information available to interested parties who are parties to the proceeding under the terms of an administrative protective order. 19 U.S.C. § 1677f(c)(1). The Commission is given the authority to determine, by regulation, the terms under which such disclosure shall occur. *Id.*

Relevant Regulations

Regulatory Provisions

II. The Commission's Regulations

- In 19 CFR § 207.7, the Commission states that business proprietary information may be disclosed to an “authorized applicant” during an injury investigation or sunset review under an administrative protective order. 19 C.F.R. § 207.7.
 - An authorized applicant is (i) an attorney for an interested party who is a party to the proceeding, (ii) a consultant or expert under the direction or control of such an attorney, (iii) a consultant or expert that appears regularly before the Commission and represents an interested party who is a party to the proceeding, or a (iv) representative of such an interested party. 19 CFR § 207.7.
 - Each of these parties is subject to sanction by the Commission if they divulge any BPI to a person not on the APO. Moreover, none of these parties may be involved in competitive decision-making for the interested party in question. *Id.*

Regulatory Provisions, cont'd

- Under 19 CFR § 201.6, the Commission has defined confidential business information as “information concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either (i) impairing the Commission’s ability to obtain such information as is necessary to perform its statutory functions, or (ii) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.”

Regulatory Provisions, cont'd

- Under this regulation, the term “confidential business information” includes “proprietary information” within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. 1677f(b)).
- The Commission has also provided in its regulations that “{n}onnumerical characterizations of numerical confidential business information (e.g., discussion of trends) will be treated as confidential business information only at the request of the submitter for good cause shown.” 19 CFR § 201.6.

Other Considerations

- In its questionnaires, the Commission states that “the commercial and financial data submitted in response to this questionnaire that reveal the individual operations of your firm will be treated as confidential by the Commission to the extent that such data are not otherwise available to the public and will not be disclosed except as may be required by law (see 19 U.S.C. § 1677f).”
- Counsel for the parties, and the parties themselves, rely heavily on this representation by the Commission, which is consistent with – and indeed, required by – the statute, when they submit questionnaires containing their highly sensitive financial and commercial information to the Commission.

Final Considerations and Thoughts - Agencies

- It is important to remember that, under the statute and the agencies' regulations, every party must respect and protect the confidential nature of information that has been designated as business proprietary treatment by the submitter. No party has the right to disclose such information on their own to the public.
- The factors that weigh on a decision to designate information as confidential will vary by party and proceeding. The agencies have an obligation to respect those designations, so long as the party complies with the applicable statutes and regulations.
- The agencies only have a limited right to disclose such information publicly. In the case of the ITC, for example, the ITC can disclose such information if it is disclosed in "a form which cannot be associated with, or otherwise be used to identify, operations of a particular person," that is, by using aggregations or descriptions of trends.
- If the agency rejects the designation of information as business proprietary information, the submitter has the right to retract the information and submit new information in its place.

Final Considerations and Thoughts – Agencies, cont'd

- Most importantly, the confidential information that is submitted to the DOC or the ITC by a private party generally consists of highly sensitive international sales, cost, financial or marketing data of the submitting party. Its disclosure would have a very harmful effect on the submitter and provide important competitive information to other market participants.
- Moreover, the parties submit this information with the understanding that it will not be disclosed by the agencies or the parties to the public. The agencies, the parties and the Court need to understand and respect these underlying facts.
- The party requesting proprietary treatment should be given the opportunity to address any concerns regarding the apparent staleness of any such designation, particularly given certain information's relevance across multiple segments of a single proceeding and across proceedings before different agencies.

Other Considerations - Litigation

- Remember a court-ordered JPO overlays on top of an APO issued by the agency, and both create duties and responsibilities
- Conflicts in bracketing BPI in parties' briefs
 - These conflicts create challenges for the court
 - Examples –
 - Over bracketing
 - Differences between text and bracketed material from the administrative record

Bibliography

I. Model Rules of Professional Conduct and Related Materials:

Model Rule of Professional Conduct 1.0(e)

Model Rule of Professional Conduct 1.2(a)

Model Rule of Professional Conduct 1.4

Model Rule of Professional Conduct 1.6

Model Rule of Professional Conduct 1.13

ABA Formal Ethics Opinion 01-421 (2001)

ABA Formal Ethics Opinion 479 (2017)

N.Y. City Ethics Op. 2004-03 (2004)

D.C. Bar Legal Ethics Opinion 383 (2022)

D.C. Bar Legal Ethics Op. 312 (2002)

Government Counsel and Their Obligations, 121 Harv. L. Rev. 1409 (Mar. 2008)

Rethinking the Professional Responsibility of Federal Agency Lawyers, 115 Harv. L. Rev. 1170 (Feb. 2002)

Bibliography, cont'd

II. Statutes:

18 U.S.C. § 1905

19 U.S.C. § 1677f(a), (b) & (c)

19 U.S.C. § 3571(i)

III. Regulations:

19 C.F.R. § 201.6

19 C.F.R. § 207.7

19 C.F.R. § 351.105(b), (c)

19 C.F.R. § 351.304(a), (d)

19 C.F.R. § 351.305(c)

19 C.F.R. § 351.306(a)

IV. Other Documents and Publications:

International Trade Commission, *Antidumping and Countervailing Duty Handbook*, June 2015, at pp. II-26-II-28.

Questions