

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP
COUNSELORS AT LAW

1500 K STREET, N.W. • SUITE 975

WASHINGTON, DC 20005

TEL (202) 783-6881

FAX (202) 783-0405

www.gdlsk.com

OFFICES:

NEW YORK • BOSTON

LOS ANGELES • WASHINGTON, D.C.

AFFILIATED OFFICES:

SHANGHAI • BEIJING

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IMPORT ADMINISTRATION

Attention: James J. Jochum
Assistant Secretary for Import
Administration

Re: Notice of Proposed Rulemaking Concerning Certification of Factual
Information During Antidumping and Countervailing Duty Proceedings
Our Reference: 04-8999-1

Dear Mr. Jochum:

The following comments are being submitted in response to the Department's proposed changes to the certification requirement provided for under 19 C.F.R. § 351.303(g)(2). The proposal was published September 22, 2004 at 69 Fed. Reg., 56738.

1. **The proposed certification language requiring attorneys to notify Import Administration if they possess knowledge or have reason to know of a material misrepresentation or omission of fact in antidumping and countervailing duty submissions conflicts with a lawyer's duty of confidentiality to a client**

The proposed certification language imposes on attorneys an affirmative duty to "notify Import Administration, in writing, if at any point in this segment of the proceeding [the attorney] possess[es] knowledge or [has] reason to know of a material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission

relies.” 69 Fed. Reg., 56738 at 56741. This affirmative duty to notify the Department is in direct conflict with the New York Lawyer’s Code of Professional Responsibility. Disciplinary Rule 4-101 of that Code provides that “a lawyer shall not knowingly reveal a confidence or secret of a client [or]; use a confidence or secret to the disadvantage of a client.” See DR 4-101; see also, D.C. Rules of Professional Conduct, Rule 1.6. Under the Department’s proposed certification requirement, and in violation of the confidentiality promised the client by the attorney, an attorney would have no choice but to notify IA of a client’s misstatement or omission of fact.

Furthermore, while a duty of candor exists by which lawyers must abide, this duty is more limited in scope than that proposed by the Department in its certification language. See New York Disciplinary Rule 7-102. Disciplinary Rule 7-102 B(1) provides that if an attorney discovers that “[t]he client has, in the course of the representation, perpetrated a fraud upon a . . . tribunal [the lawyer] shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a confidence or secret.* Id. (emphasis added); see also, D.C. Rule of Professional Conduct, Rule 3.3(d). Information obtained by an attorney in preparation of a submission to IA typically consists of sensitive business information such as sales data, costs, and ownership information which is expected to be treated as secret and confidential (and for which, when submitted, counsel requests business proprietary treatment). Thus, discovery of a client’s misstatement or omission of proprietary business information in a current or previous submission to Import Administration, obtained in the course of representing the client, must be held inviolate by the attorney. In instances where a client refuses to rectify a falsehood, and that information is protected as a confidence or secret, the attorney’s proper course of action would be to withdraw from any further representation of that client – not to

disclose the impropriety to the Department. Therefore, within the confines of the rules of professional conduct, the Department's proposed certification requirement cannot be met in all cases. Any language requiring notification by counsel of a client's misstatements or omissions of business proprietary information should be removed from the certification.

2. **An affirmative duty to disclose misstatements and omissions along with a requirement that an attorney make an inquiry into the facts provided by a client creates a conflict of interest between an attorney and a client.**

In addition to imposing a duty to notify Import Administration of misstatements or omissions by a client, the Department's proposed certification requirement for attorneys establishes an affirmative duty to conduct "an inquiry reasonable under the circumstances." 69 Fed. Reg. 56738 at 56741. This language appears similar to language contained in Rule 11 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 11. That rule provides, in relevant part:

[b]y presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . .

(3) the allegations and other factual contentions have evidentiary support . . .; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. Id.

Although the language of Rule 11 appears similar to the Department's proposed certification requirement, there are a few important distinctions. A violation of Rule 11 may result in sanctions against the offending litigant. Id. These sanctions include, within the discretion of the court, striking the offending paper; issuing an admonition, reprimand or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court, or referring the matter to disciplinary authorities of the bar of the relevant jurisdiction. Id. The Department's proposed certification, however, requires the attorney to

perform an inquiry into and certify to the completeness and accuracy of all facts contained in a submission to IA under threat of criminal sanction. See 69 Fed. Reg., 56738 at 56741.

Furthermore, an attorney who has run afoul of Rule 11 may withdraw the offending pleading or motion without any further consequence to the attorney or prejudice to the client's case. See Advisory Committee Comments to 1987 Amendment, Fed. R. Civ. P. 11. In stark contrast to Rule 11, the Department's proposed certification provides for no such safeguard, but goes further by requiring the attorney to notify IA in the event of discovery of a violation. Such conflicting obligations would result in the attorney effectively representing Import Administration in each proceeding, rather than the client that retained the attorney.

Ethical Consideration 5-1 of the New York Lawyer's Code of Professional Responsibility provides that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests . . . nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." *Id.* It is clear that imposing a duty on an attorney to verify factual information provided by a client in a proceeding before Import Administration, and requiring the attorney to certify to a submission's accuracy and completeness under criminal penalty, necessarily places the interests of the attorney in direct conflict with the interests of the client. In fact, the Advisory Committee Comments to Rule 11 recognize that such a conflict exists even where an attorney's potential liability is relatively minor. The Comments to Rule 11 thus state that "the court may defer its ruling [on whether a Rule 11 violation has occurred] until after a final resolution of the case in order to avoid immediate conflicts of interest." Advisory Committee Comments, Fed. R. Civ. P. 11.

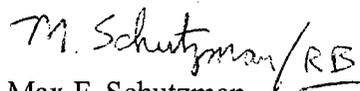
As an officer of the court, it is a lawyer's duty to protect the integrity of the legal system. To this end, a lawyer must advise a client of any potential criminal sanctions or other consequences that may follow from not candidly complying with demands for factual information by a government agency. Furthermore, that duty of candor necessitates examining information provided by clients prior to incorporating it into any submission. However, this examination is limited to the facts provided to an attorney and those gleaned through reasonable inquiry. Beyond advising a client on the consequences of falsifying or omitting material information and examining information provided or supplied by a client, an attorney must rely, to a significant extent, on the client's good faith. The Advisory Committee for Civil Rules has provided guidance on what an inquiry reasonable under the circumstances requires. The Committee's comments to Rule 11 state that factors to consider are the time available to the attorney for investigation and whether the attorney had to rely on the client for information as to the facts underlying the pleading, motion, or other paper. See Advisory Committee Comments, Fed. R. Civ. P. 11. Here, the Department has provided no such guidance on what an inquiry reasonable under the circumstances requires.

Thus, the Department's proposed certification imposing an affirmative duty to make an inquiry into facts provided by clients, together with an affirmative duty to notify IA of misstatements or omissions, may compromise the attorney's professional judgment by placing his own interest (in mitigating potential criminal liability) over that of the client. As a result, the Department's proposed certification should not impose a duty upon counsel independently to investigate facts provided by a respondent under threat of criminal penalty.

Alternatively, the Department may wish to clarify the language and scope of the proposed certification in order to render it more compatible with Rule 11 of the Federal Rules of Civil Procedure.

Sincerely,

GRUNFELD, DESIDERIO, LEBOWITZ,
SILVERMAN & KLESTADT LLP

Handwritten signature in cursive script, appearing to read "M. Schutzman / RB".

Max F. Schutzman
Bruce M. Mitchell
Andrew B. Schroth

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