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Labor and Employment Law Symposium

Presented by the Labor & Employment Law Practice Group

Friday, October 19, 2018

LABOR & EMPLOYMENT LAW SYMPOSIUM

Friday, October 19, 2018

8:30 a.m. **Back By Popular Demand: Federal Employment Law Update** **TAB A**

Employee perspective:
Stephen A. Simon, Esq., *Tobias Torchia & Simon*

Employer perspective:
Faith C. Whittaker, Esq., *Dinsmore & Shohl LLP*

9:45 a.m. **Buckle Up: Fast-Breaking Labor Law Changes in the Trump Era** **TAB B**

Employee perspective:
Clement L. Tsao, Esq., *Cook & Logothetis LLC*

Employer perspective:
Mark J. Stepaniak, Esq., *Taft Stettinius & Hollister LLP*

10:30 a.m. **Break**

10:45 a.m. **#TimesUp on Equal Pay: An Update on the Equal Pay Act and DOL Enforcement** **TAB C**

Employee Perspective:
Cori R. Besse, Esq., *The Law Firm of Sadlowski & Besse LLC*

Employer Perspective:
J. Corey Asay, Esq., *Dinsmore & Shohl LLP*

11:30 a.m. ***Epic* Encore: Employment Contracts, Arbitration Agreements and Waivers** **TAB D**

Employee perspective:
Mark J. Byrne, Esq., *Jacobs Kleinman Seibel & McNally LPA*

Employer perspective:
Katherine C. Weber, Esq., *Jackson Lewis PC*

12:15 p.m. **Lunch (on your own)**

1:30 p.m. **Wisdom from the Bench: Advice for Employment Litigators** **TAB E**

Honorable Michael Barrett, Honorable Stephanie Bowman, and Honorable Karen Litkovitz,
U.S. District Court, S.D. of Ohio

2:30 p.m. **How Not to #Metoo** **TAB F**

Employee perspective:
Donyetta D. Bailey, Esq., *Bailey Law Office LLC*

Employer perspective:
Richard L. Moore, Esq., *Frost Brown Todd LLC*

3:15 p.m. **Break**

3:30 p.m. **Common Ethical Issues Facing Employment Lawyers** **TAB G**

David T. Croall, Esq.,
Porter Wright Morris & Arthur LLP

4:30 p.m. **Adjourn**

TAB
A

Stephen A. Simon, Esq.

Stephen A. Simon is a partner with Tobias, Torchia & Simon. He received his B.A. degree from the University of Michigan, with distinction, and J.D. from the University Of Cincinnati College Of Law, where he was a member of the Order of the Coif. Mr. Simon is licensed to practice law in Ohio and Kentucky, and he has argued cases before the Ohio First District Court of Appeals and U.S. Sixth Circuit Court of Appeals. He has been recognized as an Ohio "Super Lawyer" since 2009.

Mr. Simon has spent his entire career practicing in the area of labor and employment law. He represents individuals in employment-related disputes and litigation, which includes matters involving the Family and Medical Leave Act, the Fair Labor Standards Act, the Americans with Disabilities Act, wrongful discharge, and claims of discrimination based on age, race, sex and pregnancy, among many other types of claims.

Mr. Simon is the current Vice-Chair, and former Chair, of the Cincinnati Bar Association's labor and employment committee. Mr. Simon regularly speaks to local groups and associations on the subject of employee's legal rights and responsibilities, and he served as Chapter Chair for two chapters of the American Bar Association treatise, Employment Discrimination Law, Lindemann & Grossman (4th Ed. 2007). In addition to his work as an attorney, Mr. Simon previously served on the community council of Pleasant Ridge, a neighborhood in Cincinnati where he and his family live.

Dinsmore

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UPCOMING EVENT

EEO Reporting & the Fair Credit Reporting Act: What

Faith has experience guiding clients through issues that arise in the workplace. She handles employment-related litigation for her clients, who range from local businesses to Fortune 500 companies.

Understanding each client has different tolerances and objectives in dealing with employment matters, Faith is passionate about learning her clients' industries and gaining insight into their operations. While prepared to vigorously proceed through litigation, she teams with her clients to conduct a thorough evaluation of the case, examining the risks and options, before crafting a unique strategy that meets their needs. She works with in-house counsel and legal departments, as well as human resources officials and company executives, to analyze each matter and chart the best course toward a resolution. Faith handles litigation relating to all facets of employment law, including, but not limited to, discrimination claims, retaliation claims, wrongful discharge claims, class

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Employment Discrimination Litigation

NLRB Issues

Wage/Hour Law

Wrongful Discharge

Audits, Counseling & Training

Class Action

Employers Need to Know

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UPCOMING EVENT

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November 30, 2018
Hyatt Regency Cincinnati

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and collective actions, claims relating to background checks, wage and hour claims, noncompetition issues, and common law tort claims. She also handles wage/hour and exemption issues for clients and has extensive experience in negotiating settlements.

Faith understands labor and employment law is constantly evolving, and she teams with clients to offer proactive counsel, including conducting training programs and drafting employee policies and procedures to ensure compliance. Her experience with companies and organizations enables her to provide counsel that mitigates her clients' risk, while also allowing their business to effectively operate. She conducts training for her clients related to a variety of issues, including Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, The Fair Credit Reporting Act, and other state and federal employment statutes and regulations. Faith has experience litigating in several different jurisdictions, which helps strengthen her ability to guide clients in compliance with the law.

Education

- Northern Kentucky University, Chase College of Law (J.D., 2007)
  - Northern Kentucky Law Review, symposium editor
- University of Dayton (B.A., cum laude, 2004)
  - History

Bar Admissions

- Ohio

Court Admissions

- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Western District of Michigan
- U.S. District Court for the Northern District of Illinois
- U.S. District Court for the District of Colorado

Affiliations/Memberships

- Cincinnati Bar Association
  - Board of Trustee, member
  - Young Lawyers Section
    - Executive Board
    - Past chair
    - Past vice-chair
    - Past secretary
    - Past chair-elect
    - Past Social Committee chair

    - Labor & Employment Law Committee
        - Chair
        - Past secretary

- Cincinnati Bar Foundation, past trustee
- Arts Innovation Movement (fka Ballet Tech), past board member
- Family Promise through St. Maximilian Kolbe Parish, volunteer
- Marjorie P Lee Assisted Living, past volunteer
- Destiny Hope, past volunteer
- Volunteer Lawyers Project, past volunteer
- Mamie Earl Sells Scholarship, past volunteer
- UC Economics Step-up, past volunteer
- Dress for Success, past volunteer
- Destiny Hospice, past volunteer
- Chase College of Law Alumni Council
- Cincinnati Academy of Leadership for Lawyers (CALL) (2016)
- Cincinnati Volunteer Leadership Council for the American Cancer Society, board member

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Distinctions

- YWCA Rising Star (2014)
- Outstanding Alumna of the Past Decade Award from Northern Kentucky University Chase College of Law (2016)

BACK BY POPULAR DEMAND:

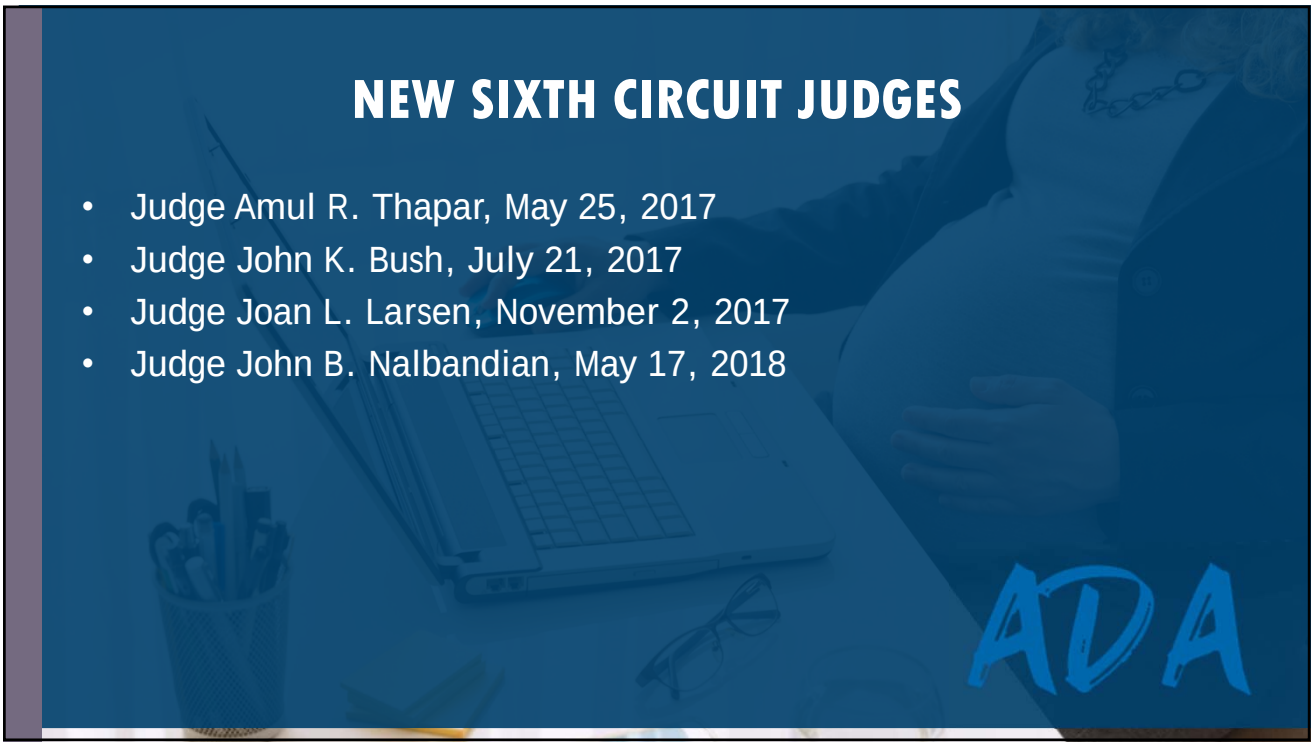
Federal Employment Law Update

Stephen A. Simon, Tobias Torchia & Simon
Faith C. Whittaker, Dinsmore & Shohl LLP

INTRODUCTION

NEW SIXTH CIRCUIT JUDGES

- Judge Amul R. Thapar, May 25, 2017
- Judge John K. Bush, July 21, 2017
- Judge Joan L. Larsen, November 2, 2017
- Judge John B. Nalbandian, May 17, 2018



AMERICANS WITH DISABILITIES ACT

AMERICANS WITH DISABILITIES ACT
WORKING FROM HOME: REASONABLE ACCOMMODATION?

- *Hostettler v. College of Wooster*, **895 F.3d 844 (6th Cir. 7/17/18)**
  - An employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full time schedule; merely stating that anything less than full-time employment is per se unreasonable will not relieve any employer of its ADA responsibilities.

AMERICANS WITH DISABILITIES ACT
WORKING FROM HOME: REASONABLE ACCOMMODATION?

- *Mosby-Meachem v. Memphis Light, Gas & Water Division* **(6th Cir. 2/21/18)**
  - Plaintiff won $92,000 for compensatory damages and $18,000 for lost pay at trial for disability discrimination after the Plaintiff's employer denied her request to work from home for 10 weeks due to complication with pregnancy.

AMERICANS WITH DISABILITIES ACT

- *Arndt v. Ford Motor Co.* **716 F. App'x 519 (6th Cir. 12/13/17)**
- The 6th Circuit affirmed summary judgment for the employer because there was insufficient evidence that Ford ever denied Plaintiff's request for a service dog at the manufacturing facility and Ford did not fail to engage in the interactive process.

AMERICANS WITH DISABILITIES ACT

- *Vaughn v. Parkwest Medical Center,* **(6th Cir. 11/20/ 17)**
  - The 6th Circuit reversed summary judgment for the employer finding there was an issue of fact regarding whether the plaintiff was qualified to perform the essential functions of the job as a floor nurse.

FAMILY MEDICAL LEAVE ACT

FMLA

Groening v. Glen Lake Community Schools, 884 F.3d 626 (6th Cir. 3/12/18)

- School superintendent took FMLA leave for knee surgery and to care for ill mother
- Missed a lot of board meetings
- Board member internal emails:
  - "Disappointed" that she missed another critical meeting
  - Complained that the district had been "spending too much time" working around her schedule
  - Groening's time away would be "subject to accountability on her annual evaluation"

FMLA

Groening v. Glen Lake Community Schools (con't)

- Board asked her to provide breakdown of leave she had taken that year
- Board then authorized audit of her office to determine if the district had a proper method for tracking administrators' time off
- Groening quit
- Sued school district for FMLA retaliation and interference

Groening v. Glen Lake Community Schools (con't)

- District court granted summary judgment and 6th Circuit affirmed (Thapar, Keith, Kethledge)
- Could not establish constructive discharge on FMLA retaliation claim
  - Not aware of internal emails when quit, so did not create "intolerable" working conditions
  - Board's critical comments insufficient to satisfy standard, even though criticism was about her taking leave

Groening v. Glen Lake Community Schools (con't)

- Failed to establish FMLA interference claim
- Groening alleged the board required her to work while on leave
- But board did not *require* her to attend any board meeting; she chose to attend meetings and initiated discussions with interim superintendent about work-related matters while on leave
- Board's request for her to provide a breakdown of her leave was a *de minimis* request and did not rise to level of actionable interference; *see Talley v. Kalamazoo Cty. Rd. Comm'n*, 654 Fed. Appx. 675, 680 (6th Cir. 2016)

Nowlin v. Nova Nordisk, Inc., 2018 WL 1805141 (6th Cir. 2/28/18)

- Plaintiff alleged FMLA interference
- Nowlin, a drug sales rep, took FMLA leave to care for ailing father
- During the leave, her supervisor and another employee sent her emails requesting that she return damaged drug samples
- Nowlin claimed this would have required her to leave her father's side to travel to Elizabethtown, KY to return samples . . .

Nowlin v. Nova Nordisk, Inc. (con't)

However:

- Employer via email requested her to return samples "as soon as possible," but she didn't have to read emails while on leave
- She also could have returned samples before she went on leave
- And she didn't really travel to E-town; instead she returned the samples by mailing them

Nowlin v. Nova Nordisk, Inc. (con't)

- "Multiple attempts at contact and demands to complete more than simple tasks could rise to level" of unlawful interference under FMLA
- This did not rise to that level
- Sixth Circuit affirms summary judgment

Tillotson v. Manitowoc Co., Inc., 727 Fed. Appx. 164 (6th Cir. 4/4/18)

- Tillotson suffered from gastrointestinal condition which required frequent visits to bathroom daily
- Doctor ordered travel restrictions: limited distance and time away from home
- Company executive frustrated by restrictions, "Can't have a sales guy who can't travel"
- Tillotson later terminated as part of company-wide RIF

Tillotson v. Manitowoc Co., Inc. (con't)

- Tillotson sued for FMLA retaliation
- Sixth Circuit affirms summary judgment: insufficient evidence of pretext
- Comments by executive were directed to request for travel accommodations, not request for FMLA leave; therefore "not probative of FMLA retaliation"
- Request for travel accommodations not protected conduct under FMLA; no reasonable-accommodations provision under FMLA

Tillotson v. Manitowoc Co., Inc. (con't)

- Court also rejects theory that travel restrictions request fell under protection for intermittent leave or reduced leave schedule
- On these facts, Tillotson never requested intermittent leave or a reduced work schedule

Establishing causal connection for *prima facie* case of FMLA retaliation

- Plaintiff fired 2 weeks after exhausting her FMLA leave (and on day she attempted RTW): sufficient to establish causal connection. *Cooley v. East Tennessee Human Resource Agency, Inc.*, 720 Fed. Appx. 734 (6th Cir. 12/22/17)
- Plaintiff fired 10 weeks after notifying employer of request for FMLA leave: not sufficient. *Stein v. Atlas Industries, Inc.*, 730 Fed. Appx. 313 (6th Cir. 4/9/18) (citing *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 283 (6th Cir. 2012) (8 weeks is sufficient)

Establishing causal connection for *prima facie* case of FMLA retaliation (con't)

Cooley: Judge Bush cites *Bryson v. Regis Corp.*, 498 F.3d 561, 571 (6th Cir. 2007) as holding temporal proximity "can be measured from the date employee's FMLA leave expired."

Stein: Judge Thapar cites *Bush v. Compass Grp. USA, Inc.*, 683 Fed.Appx. 440, 452 (6th Cir. 3/23/17), finding no causal connection where 10 weeks between notice of FMLA leave and termination.

> *Bush v. Compass Grp. USA (*Judge Clay): "the relevant timeframe for us to consider in determining whether there was a causal connection between the plaintiff's FMLA leave and the adverse employment action is the 'time after an employer learns of a protected activity,' not the time after the plaintiff's FMLA leave expires."

RELIGIOUS DISCRIMINATION

RELIGIOUS DISCRIMINATION

- *Abdi Mohamed v. 1st Class Staffing, LLC.*, **286 F. Supp.3d 884 (S.D. Ohio 2017)**
  - The Court denied summary judgment to the defendant finding there was a genuine issue of material fact regarding whether the religious accommodations Plaintiffs requested would cause an undue hardship.

LGBTQ UPDATE

LGBTQ UPDATE

- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, **884 F.3d 560 (6th Cir. 2018)**
  - The 6th Circuit reversed summary judgment for the employer finding that discrimination on the basis of being transgender and transitioning status is discrimination on the basis of sex and there was direct evidence of sex stereotype discrimination.

LGBTQ UPDATE

- *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, **138 S. Ct. 1719 (2018)**
  - In a 7-2 decision, the Supreme Court ruled on narrow grounds that the Commission did not employ religious neutrality, violating Masterpiece owner Jack Phillips' rights to free exercise, and reversed the Commission's decision after the baker refused to bake a wedding cake to a gay couple.

Sexual Orientation Discrimination Under Title VII – Circuit Split

- *Zarda v. Altitude Express,* 883 F.3d 100 *(2nd Cir. 2018) (en banc*) (majority finds "because of sex" includes sexual orientation)
- *Hively v. Ivy Tech Cmty. Coll.*,853 F.3d 339 (7th Cir. 2017) (*en banc*) (majority finds "because of sex" includes sexual orientation)
- *Evans v. Georgia Regional Hospital, et. al.,* 850 F.3d 1248 (11th Cir. 2017)(panel finds "because of sex" does not include sexual orientation) (rehearing *en banc* denied)
- *Bostock v. Clayton Cty. Board of Commissioners,* 723 Fed. Appx. 964 (11th Cir. 2018) (cites *Evans,* sexual orientation not covered)
  - Motion by appeals judge to hear *en banc* rejected
  - Petition for certiorari docketed June 1, 2018

FAIR LABOR STANDARDS ACT

Encino v. Motorcars, LLC v. Navarro, 138 S.Ct. 1134 (4/2/18)

- Are car dealership *service advisors* exempt under FLSA?
- Exemption: "Any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . ."
- Majority (5-4, Thomas, *et al.*): Service advisors are exempt because:
  - "Obviously" are salesmen, although do not sell autos
  - Primarily engaged in "servicing" automobiles, even though do not spend most of their time physically repairing automobiles

Encino v. Motorcars, LLC v. Navarro (con't)

- Majority rejects 9th Circuit's reasoning:
  - Rejects application of "distributive" canon of construction
  - Rejects reliance on legislative history
  - Rejects invocation of principle that the FLSA exemptions should be construed narrowly
- "Exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. We thus have no license to give the exemption anything but a fair reading."
- Dissent (Ginsberg, *et al.*): Congress meant this exemption to apply to three specific occupations at dealerships and majority added a fourth

RETALIATION

Mumm v. Charter Township of Superior, 727 Fed.Appx. 110 (6th Cir. 3/2/18)

- In meeting with her bosses, Mumm demanded immediate pay increase because she was tired of being underpaid in comparison to a male co-worker
- Mgmt. immediately suspended Mumm and then terminated her, claiming she was "belligerent" during the meeting
- Mumm sues for retaliation under Title VII
- District court grants summary judgment: Mumm did not clearly allege the pay discrepancy was result of gender discrimination

Mumm v. Charter Township of Superior (con't)

- Sixth Circuit (Sutton, Norris, Gibbons) reverses
- A plaintiff's objection to employment practice is protected activity if her supervisors "should have reasonably understood that she was making a complaint of sex discrimination"
- Mumm's bosses understood this: they knew the co-worker was male and had a similar job as Mumm
- Relies on *Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634 (6th Cir. 2015)
- Fact dispute about whether Mumm acted "belligerently" at meeting with bosses

Rogers v. Henry Ford Health System, 897 F.3d 763 (6th Cir. 7/31/18)

- Rogers sues employer for retaliation after filing second EEOC charge: subjected to a fitness-for-duty exam and transferred to an "inferior" job
- Employer: FTD exam based on complaints by multiple co-workers about Rogers' erratic behavior and alleged concerns for their safety
- Employer: transfer was not involuntary and offered to "give her kind of some space" from employees she had complained about in charge

Rogers v. Henry Ford Health System (con't)

- District court grants summary judgment and Sixth Circuit (2-1) (Moore, Stranch) reverses, in part
- Decision to compel FTD exam was legitimate, no evidence of pretext
- Transfer decision was pretextual, based on specific reason cited by manager; dispute whether transfer voluntary
- Dissent (Kethledge): new job had same pay and manager was "overly cautious," not retaliatory

Nailon v. UC, 715 Fed. Appx. 509 (6th Cir. 11/9/17)

- Nailon worked as a collections specialist in UC's Bursar's Office
- Her niece, a student at UC, filed internal complaint of race discrimination against Bursar's office
- Weeks later, UC terminated Nailon
- Nailon sued UC and individual employees in Bursar's office
- District court granted summary judgment on all claims except First Amendment retaliation
- District court denied qualified immunity for individual UC defendants

Nailon v. UC (con't)

- Sixth Circuit (Stranch, Moore, Donald) affirms denial of qualified immunity
- Clarifies this is not an association case; this is retaliation arising from close relative engaging in protected speech
- Niece is "close" enough; third-party reprisal not limited to parent-child relationships
- Plus, niece lived with Nailon for a period of time where acted as her mother and niece even called her "Mom"

SEXUAL HARASSMENT

Hylko v. Hemphill, 698 Fed. Appx. 298 (6th Cir. 10/3/17)

- Facts
  - Same-sex harassment
    - Victim: Hylko, a shift manager
    - Harasser: Hemphill, process coordinator
  - The company (and Hemphill himself) referred to Hemphill as Hylko's "supervisor"
    - Hemphill trained Hylko and assigned his daily job duties
    - But he did not have authority to demote, promote, or fire Hylko
    - Hemphill could make recommendation disciplinary action but US Steel managers were not bound to follow them

Hylko v. Hemphill (con't)

- Verbal and physical harassment alleged
  - Hemphill regularly asked Hylko about his sex life which made Hylko uncomfortable
  - Hemphill twice grabbed Hylko's buttocks, commenting that he had a "nice firm ass"
  - Another time in an elevator Hemphill painfully grabbed Hylko's penis
  - Hemphill also put banana in his pants zipper and poked Hylko's co-worker
- Hylko complained to HR
  - They offered to transfer Hylko to a different area and he accepted
  - HR met with Hemphill who admitted (partially) to misconduct
  - Suspended Hemphill for 1 week and ordered leadership training

Hylko v. Hemphill (con't)

- Hylko resigned a few months later
- Sued for sexual harassment; district court granted summary judgment to US Steel

- Sixth Circuit affirmed summary judgment for the employer
  - Hemphill not a "supervisor"
    - Per US Supreme Court's decision in *Vance v. Ball State Univ.* (2013), he did not have authority to take "tangible employment actions" against Hylko
    - *i.e.*, he could not effect "significant change in [Hylko's] employment status"
    - Therefore, no vicarious liability against US Steel
  - US Steel not otherwise liable because they did not respond unreasonably to his complaint
    - Not obligated to terminate Hemphill
    - And immaterial that allegedly took more severe actions where harassment victim was female

Age Discrimination

Alberty v. Columbus Township, 730 Fed.Appx. 352 (6th Cir. 4/30/18)

- Alberty worked for township as the Assistant to the Township Assessor
- Township is small rural area; 5 elected officials; budget of $800K
- Alberty earned $13.50/hour, was seeking pay raise

Alberty v. Columbus Township (con't)

- Township Board decided to terminate the Assessor, who was Alberty's boss; in same meeting, Board decided to terminate Alberty (age 74) for "budgetary reasons"
- Before her hire, the new Assessor told the Board Supervisor that she was looking for a job in assessing for her step-daughter (age 30)
- When Assessor hired, she told Board she had her own assistant – her step-daughter – who the Board then hired

Alberty v. Columbus Township (con't)

- Alberty sued for age discrimination
- Although Board terminated her for "budgetary reasons," the Township's revenue that year increased and they had a budget surplus
- Less than a year after replacement's hire, Township increased her pay from $12.00 to $13.50 and then later to $18.00/hour
- During deposition of Township Board member, she was asked why Township would hire the new Assessor's assistant with no knowledge of her experience or abilities:

  A: The knowledge we have was from [the new Assessor] that this **young lady** was working with her as her assistant. We took it at as face value.

Alberty v. Columbus Township (con't)

- District Court granted summary judgment and Sixth Circuit affirmed 2-1 (Gibbons, Bush)
- "Young lady" comment not direct evidence
- Analyzing pretext evidence, majority acknowledges that "budgetary reasons" rationale "seems to have arisen *after* Alberty initiated the lawsuit," but cannot say this rationale had "no basis in fact"
- Under "did not actually motivate decision" prong, which is an "admittedly easier task" than showing "no basis in fact," Alberty still fails to "show that an *illegal* motivation was the more likely reason for the Township's decision"

Alberty v. Columbus Township (con't)

Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000):

Majority: This statement from *Reeves* "describes Alberty's case perfectly"

-- Pretext evidence is "weak"

-No evidence of discrimination: no age-based comments or jokes, and no one mentioned Alberty's age

Alberty v. Columbus Township (con't)

- Majority: we "speculate" that Alberty's termination "may have had more to do with the Township's desire to get rid of her boss than with its budgetary concerns"
- Under *Gross*, plaintiff cannot show that she was fired *because of* her age
- Dissent (Clay):
  - Majority failed to apply Rule 56 standard
  - This is pretext-plus analysis

Millen v. Oxford Bank, 2018 WL 403374 (6th Cir. 8/23/18)

- Sixth Circuit (White, Siler, Cook): transfer of plaintiff as branch manager to bank's smallest and slowest branch was "adverse employment action" under ADEA
  - Transfer was over protest by plaintiff
  - Years earlier the branch had been open only several days per week and then closed, before reopening one year earlier
  - Received $2,000 salary increase after being transferred
  - Two years later, the bank closed this branch and eliminated her job
- Sixth Circuit: "under these unusual circumstances" transfer was adverse employment action because forced transfer to the slowest branch was more "disruptive than a mere inconvenience or an alteration of job responsibilities" (quoting *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177 (6th Cir. 2004))

Bradley v. Rhema-Northwest Operating LLC, 2017 WL 4804419 (6th Cir. 10/3/17)

- Plaintiff testified that she heard a facility administrator say, "I want to get rid of the older people in the company"
- This statement was reported to plaintiff by three "management nurses" who were in the meeting with the administrator
- Sixth Circuit (Rogers, Griffin, Kethledge) affirms summary judgment, claims the above statement is double hearsay

Bradley v. Rhema-Northwest Operating LLC (con't)

- Statements are not hearsay if "offered against an opposing party" and "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Rule 801(d)(2)(D).
- Sixth Circuit concedes that administrator's statement falls within exception because his position was "one in which he would have been expected to be privy to a plan to fire nurses."
- But finds that three management nurses were not speaking on a matter within the scope of their employment because their "mere presence at a daily nurses meeting" is insufficient "to show that they would be privy to a plan to terminate nurses."

MISCELLANEOUS

McClellan v. Midwest Machining, Inc., 900 F.3d 297 (6th Cir. 8/16/18)

- Plaintiff alleges pregnancy discrimination and Equal Pay Act claims; however signed release of claims on day of termination during meeting with company president
- Plaintiff claims duress:
  - He went over agreement with her "at rapid pace"
  - He told her she needed to sign if wanted severance pay
  - Felt bullied: felt like could not ask questions and supervisor's tone was "raised" during entire discussion
  - When challenged a paragraph early on (about unused vacation pay), president was dismissive and moved on
  - He shut the door and she did not feel free to leave
- Plaintiff did not tender back severance pay ($4,000) before filing lawsuit

McClellan v. Midwest Machining, Inc. (con't)

- Plaintiff's counsel filed lawsuit three days after first meeting with plaintiff and two days before RTS 90-deadline expired
- After receiving complaint, Midwest's counsel notified plaintiff's counsel of release
- Three weeks later, before Midwest filed any responsive pleading, plaintiff sent letter to Midwest rescinding the agreement and enclosed check for $4,000
- Midwest returned the check a week later advising "no legal basis for rescinding" the agreement

McClellan v. Midwest Machining, Inc. (con't)

- District court ultimately granted summary judgment:
  - Dispute of fact about whether plaintiff "voluntarily" and "knowingly" executed release
  - But claim dismissed because under common law was required to tender back the consideration before filing the lawsuit or else deemed to have ratified the contract
- Sixth Circuit: whether tender-back doctrine applies in Title VII and EPA context is question of first impression in this circuit

McClellan v. Midwest Machining, Inc. (con't)

- Supreme Court decisions rejecting tender-back doctrine under ADEA and FELA
  - *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998)
    - Release did not comply with OWBPA and plaintiff did not tender back $$
    - Employer did not comply with OWBPA requirements and could not assert defense of ratification based on plaintiff's retention of consideration and failure to tender back

McClellan v. Midwest Machining, Inc. (con't)

– "In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification. We ought not to open the door to an evasion of the statute by this device."

-- *Hogue v. Southern R.R. Co., 390 U.S. 516 (1968)*

McClellan v. Midwest Machining, Inc. (con't)

- Panel majority (Clay, Cole): Tender-back doctrine does not apply in Title VII or EPA context
  - Relies on "economic realities" policy argument from *Oubre*
  - Consistent with post-*Oubre* decisions from Third and Eighth Circuits
  - Abrogates decision in *Larkins v. Reg'l Elite Airline Servs., LLC*, 2013 WL 1818528 (S.D. Ohio April 2013) (J. Barrett) (failure to tender back leads to dismissal of Title VII claims)

McClellan v. Midwest Machining, Inc. (con't)

- Alternatively, majority finds that tendering back severance pay in this case was "within a reasonable time after learning of her rights" (quoting *Oubre)*
  - Notes that district court found plaintiff did not understand she had waived her claims until she engaged with counsel, long after signing release
- Concur/dissent (Thapar):
  - Congress did not clearly override common law doctrines of ratification and tender-back when enacted Title VII and EPA
  - Would have remanded to district court to analyze whether legal/equitable remedies apply and whether the tender back was within reasonable time on these facts

Watford v. Jefferson Cty. Public Schools 870 F.3d 448 (6th Cir. 11/9/17)

- Collective bargaining agreement:
  - If an employee believed they were discriminated against, could file a grievance
  - However, if the employee pursed a complaint "using another agency," the grievance was held in abeyance
- Plaintiff filed grievance on day she was terminated: October 13, 2010
- The grievance was tentatively scheduled for arbitration in July 2011
- She filed a charge of discrimination (age, gender, race) with the EEOC in February 2011
- The grievance was then held in abeyance for years
- She sued for discrimination and retaliation; the district court granted summary judgment

Watford v. Jefferson Cty. Public Schools (con't)

- The Sixth Circuit reversed in split 2-1 decision
  - Holding the grievance in abeyance while EEOC charge pending was "adverse employment action" and retaliatory under Title VII and ADEA
  - Sixth Circuit previously observed in 2006 (*EEOC v. SunDance*) that termination of grievance proceeding after filing EEOC charge was retaliation
  - Delaying the grievance interfered with her rights under Title VII and the ADEA because it eliminated chance for a speedy, extrajudicial resolution to her grievance
  - Delaying the grievance process would dissuade a reasonable employee from filing a charge
  - The union also could be held liable for this retaliation because it signed the labor agreement

THANK YOU!

- Questions?

TAB
B

MARK J. STEPANIAK is a partner in Taft Stettinius & Hollister's Labor and Employment group. He represents employers in all aspects of labor and employment law, including litigation for employers in the federal and state courts involving wrongful discharge, sexual harassment, race and age discrimination, retaliatory discharge and wage and hour matters. He is experienced in trade secret and non-competition agreement litigation.

Mark has extensive experience negotiating collective bargaining agreements in the broadcast, music, automotive, soft drink beverage, plastics, logistics, distributing, dairy and paper working industries and for public sector employers, including hospitals, the Cincinnati Public Schools and the University of Cincinnati. He has primary responsibility for all aspects of NLRB proceedings, strike preparedness, including coordination of security measures, obtaining injunctions against mass picketing and violence, pursuing contempt orders, initiating criminal prosecutions, coordinating the hiring of a replacement workforce and defending management in related proceedings.

Mark is honored with inclusion in *Best Lawyers in America*, *Chambers USA: America's Leading Lawyers for Business* and Ohio *Super Lawyers*. Mark served as chair of the firm's employment committee and is a former member of the executive committee. Mark was selected in *Best Lawyers* as "Lawyer of the Year" Employment Law-Management for 2016."

Clement L. Tsao is an associate attorney with Cook & Logothetis where he practices labor and employment law representing labor unions, individual plaintiffs, and employee benefit plans.

In addition to litigation and client advising, Clement is a contributing chapter editor to *The Developing Labor Law: the Board, Courts and the National Labor Relations Act* and was a contributing author to the *Workplace Data: Law and Litigation, 2014 Cumulative Supplement*. From 2016 to 2018, Clement served on the Board of Directors of the AFL-CIO Lawyers Coordinating Committee, the national network of lawyers representing AFL-CIO affiliated unions. He also currently serves as Chair of the Cincinnati Public Schools Preschool Workforce Development Council.

Prior to joining Cook & Logothetis, Clement spent six years working as a union organizer, first for UNITE HERE organizing hotel workers in New York and Washington DC, and then for AFSCME organizing family child care providers in the San Francisco Bay Area.

Clement earned his Juris Doctor in 2012 from the University of Cincinnati College of Law and his bachelor's degree from Brown University in 2003.

Buckle Up:

Fast-Breaking Labor Law Changes in the Trump Era

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October 19, 2018

Buckle Up: Fast-Breaking Labor Law Changes in the Trump Era

- Joint Employers/Bargaining
- Employee Misclassification
- Workplace Rules and Employee Handbooks
- Use of Employer Email Systems
- Surveillance and Workplace Monitoring
- Fair Share Fees (*Janus v. AFSCME*)
- Other News You May Have Missed

Joint Employers/Bargaining

Browning-Ferris Industries of California,
362 NLRB No. 186 (August 27, 2015)

"The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them, as the Board and the courts have done in the past."

Joint Employers/Bargaining

Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.,
365 NLRB No. 156 (December 14, 2017)

- Overruled Browning-Ferris Industries
- Reinstated prior joint-employer standard

Joint Employers/Bargaining

Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.,
365 NLRB No. 156 (December 14, 2017)

- "In all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has *exercised* control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine."

Joint Employers/Bargaining

Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.,
365 NLRB No. 156 (December 14, 2017)

- "Accordingly, under the pre–*Browning Ferris* standard restored today, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. The Board majority concluded that the reinstated standard adheres to the common law and is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships."

Joint Employers/Bargaining

Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.,

366 NLRB No. 26 (February 26, 2018)

- The National Labor Relations Board (3-0, Member Emanuel did not participate) issued an Order vacating the Board's decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), in light of the determination by the Board's Designated Agency Ethics Official that Member Emanuel is, and should have been, disqualified from participating in this proceeding.

Joint Employers/Bargaining

Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.,
366 NLRB No. 94 (June 6, 2018)

- Three-member panel – Ring, Pearce, McFerran – adopted recommendation and finding of Administrative Law Judge holding Respondents as single employers under *Browning-Ferris* standard.
- Board issues notice of proposed rulemaking (change) to Joint-Employer Standard (September 14, 2018)

Employee Misclassification *Per Se* 8(a)(1) violation?

Velox Express, Inc.,
Case 15-CA-184006 (September 25, 2017)

- Administrative Law Judge concludes that employee misclassification constituted Section 8(a)(1) violation (restraint or interference of protected concerted activity):
  - *"By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection."*

Employee Misclassification *Per Se* 8(a)(1) violation?

Velox Express, Inc.

- Board has invited, received, and evaluating submission of amicus briefs from various interested parties:
  - *Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?*

TBD…

Workplace Rules and Employee Handbooks

The Boeing Co.,

365 NLRB No. 154 (December 14, 2017)

- Overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)
  - If workplace rules explicitly prohibit PCA, unlawful.
  - If rules do not explicitly prohibit PCA, still unlawful if:
    - employees would reasonably construe the language to prohibit Section 7 activity; or
    - rule was promulgated in response to union activity; or
    - rule has been applied to restrict the exercise of Section 7 rights.

Workplace Rules and Employee Handbooks

The Boeing Co.,

365 NLRB No. 154 (December 14, 2017)

- In place of the *Lutheran Heritage* "reasonably construe" standard, the Board established a new test:
- When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things:
  - nature and extent of the potential impact on NLRA rights, and
  - legitimate justifications associated with the rule.

Workplace Rules and Employee Handbooks

Guidance on Handbook Rules Post-*Boeing* (GC 18-04)

- Category 1: Rules that are Generally Lawful to Maintain
  - Civility Rules
  - No-Photography Rules and No-Recording Rules
  - Rules Against Insubordination, Non-Cooperation, or on the Job Conduct that Adversely Affects Operations
  - Disruptive Behavior Rules
  - Rules Protecting Confidential, Proprietary, or Customer Information or Documents
  - Rules against Defamation or Misrepresentation
  - Rules against Using Employer Logos
  - Rules Requiring Authorization to Speak for the Company
  - Rules Banning Disloyalty, Nepotism, or Self-Enrichment

Workplace Rules and Employee Handbooks

Guidance on Handbook Rules Post-*Boeing*

- Category 2: Rules Warranting Individualized Scrutiny
  - Ex. Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of *employees*)
- Category 3: Rules that are Unlawful to Maintain
  - Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions
  - Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer

Purple Communications, Inc.: Use of Employer Email Systems

365 NLRB No. 50 (2017)

- "employee use of email for statutorily protected communication on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email system."
- Employers may rebut the presumption -
  - by demonstrating special circumstances necessary
  - to maintain production or discipline justify restricting its employees' rights

Purple Communications, Inc.: Use of Employer Email Systems

- *Purple Communications, Inc.* appeal to 9th Circuit on hold
- *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 28-CA-060841 (pending before full Board)
  - GC seeking to reverse *Purple Communications, Inc.*
- Board invited submission of amicus briefs (issued on August 1, 2018)

Surveillance and Workplace Monitoring

Aladdin Gaming, LLC,

345 NLRB 585 (2005)

- Board has long held that an employer engages in unlawful surveillance
  - "*when it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and therefore coercive*."
- Under the Board's three-part test, indicia of coerciveness involves:
  - duration of the observation,
  - the employer's distance from its employees while observing them, and
  - whether the employer engaged in other coercive behavior during its observation.

Surveillance and Workplace Monitoring

East Coast Mechanical Contractors,
(GC Advice Memo, February 26, 2003)

- Employer installed GPS units in 2 (out of 8 total) trucks driven by two employees with known union affiliation during a union organizing campaign.

- NLRB General Counsel found "legitimate business concern" lacking:

  "[W]here such increased surveillance, or the impression of increased surveillance, is not justified by legitimate business concerns and company officials "do something out of the ordinary" by increasing surveillance of employees during an organizing drive, the employer violates section 8(a)(1)."

Janus v. AFSCME, Council 31

Issue:

- Whether public sector agency, or "fair share," fees are permitted under the First Amendment?
- Under longstanding labor law, any worker who is represented by a union may choose not to join the union or pay membership fees.
- The union, however, must represent all employees in the bargaining unit.

Janus v. AFSCME, Council 31

Precedent:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

- Agency-shop or union ship clauses in public sector union contracts cannot compel nonunion employees to fund political activities of the union to which they object.
- Nonunion public sector employees may be required to fund union activities related to collective bargaining, contract administration, and grievance adjustment purposes.
- "The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights."

Janus v. AFSCME, Council 31

Overturned *Abood* (June 27, 2018):

- Agency-shop provisions violate "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."

Lawsuits Attacking Exclusive or "Forced" Representation

- Buckeye Institute post-*Janus* litigation

Other News You May Have Missed

Local Right to Work Ordinances

- UAW Local 3047 v. Hardin County, Case No. 16-5246
- IOUE Local 399 v. Village of Lincolnshire, Case No. 17-1300

E-verify as a Mandatory Subject

- Ruprecht Co., 16-CA-187792

"Stand and Stretch," Slow Downs and Discipline

- Consolidated Communications Holdings Inc., 16-CA-187792

- *See handout*

Other News You May Have Missed Cont'd

Union Rights to Supervisor Disciplinary Information

- E.I. Du Pont de Nemours, Inc., 5-CA-101359

Lawsuits Attacking "Forced" Representation

- Buckeye Institute post-*Janus* litigation

NLRB General Counsel Advice Memoranda

- Lyft, Inc., Case 20-CA-171751
- Kumho Tires, Cases 10-CA-208153, 10-CA-208414
- International Warehouse Group, Inc., Case 29-CA-197057
- UHS Corona, Inc. d/b/a Corona Regional Medical Center, Cases 21-CA-105489

- *See handout*

QUESTIONS??

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BUCKLE UP: FAST-BREAKING LABOR LAW CHANGES IN THE TRUMP ERA

OTHER NEWS YOU MAY HAVE MISSED

1. LOCAL "RIGHT TO WORK" ORDINANCES

Section 14(b) of the National Labor Relations Act permits states to outlaw Union membership as a requirement of employment. Historically, "right to work" legislation is enacted on a state wide basis. Previously, the Kentucky Senate repeatedly passed right to work laws but the formerly Democratic-controlled House of Representatives would not. (Kentucky has since passed state-wide RTW legislation) However, Kentucky, like many other states, has "home rule" provisions which allow counties to pass laws that do not conflict with state law. Hardin County, and eleven others, used their home rule authority to pass local right to work laws. Upon review, a panel of the Sixth Circuit in UAW Local 3047 v. Hardin County, Case No. 16-5246 (November 18, 2016) overturned a District Court decision and concluded that the term "state" in the NLRA included political subdivisions unless Congress expressly says otherwise. This panel held that local governments can pass right to work laws if the state has given them sufficient home rule power.

On September 28, 2018, the Seventh Circuit held that the NLRA does not grant local governments the power to regulate Union membership invalidating a "right to work" ordinance passed by the Village of Lincolnshire, Illinois. IOUE Local 399 v. Village of Lincolnshire, Case No. 17-1300. The Seventh Circuit panel reasoned that any home rule interpretation would create a patchwork of different rules for the 90,000 general and specific purpose governments across the United States. With the seemingly irreconcilable conflict between the Sixth and Seventh Circuits, expect this issue to end up before the United States Supreme Court.

2. E-VERIFY AS A MANDATORY BARGAINING SUBJECT

In Ruprecht Co., NLRB held that a meat processing company in Illinois violated the NLRA when it unilaterally enrolled itself in e-verify, the national electronic employment verification system. Case No. 13-CA155048.

3. "STAND AND STRETCH," SLOW DOWNS AND DISCIPLINE

In Consolidated Communications Holdings Inc., 16-CA-187792, a divided NLRB panel held that the employer unlawfully issued a warning to a customer service representative after she initiated a so-called "stand and stretch" demonstration, concluding that the practice did not amount to a prohibited work slowdown. During difficult contract negotiations, the disciplined employee recruited co-workers to simultaneously "stand and stretch" during the work day as a sign of solidarity. NLRB concluded that no slow down occurred because none of the customer service representatives "unplugged" their headsets during the demonstration and that the activity was protected concerted activity within the meaning of the NLRA.

4. UNION RIGHTS TO SUPERVISOR DISCLIPLINARY INFORMATION

In E.I. Du Pont de Nemours, Inc., 5-CA-101359, a bargaining unit employee was terminated after he fell asleep several times while on his second consecutive eight hour shift for which he volunteered. Employee's union sought to establish whether the employee had been treated the same as supervisors who were also guilty of alleged safety violations. The Union claimed the information was necessary to determine if the employee was treated disparately. NLRB overturned its ALJ, holding that the issue is whether the Union had a reasonable belief supported by objective evidence that a safety violation warning issued to supervisors was relevant and that the information would be of use in deciding whether to arbitrate the discharge.

5. LAWSUITS ATTACKING FORCED REPRESENTATION

Following the U.S. Supreme Court's Janus v. AFSCME decision, the Buckeye Institute filed three lawsuits and actions for preliminary injunction in Minnesota, Ohio and Maine calling for an end to compelled exclusive representation. These actions seek to expand the Janus decision ended forced dues payment to include a holding that employees cannot be forced to accept a Union's representation and must be freed from forced association in every respect. The cases are pending in the U.S. District Court for the District of Maine, the United States District Court for the Southern District of Ohio and the United States District Court for the District of Minnesota.

6. ADVICE MEMORANDA

On July 13, 2018 the Board's general counsel ("GC") issued advice memoranda construing recent NLRB decisions. One such memo involved Lyft. The GC concluded the company's intellectual property rule which barred the use of the Company's logo without written permission was lawful and also approved a confidentiality rule which barred individuals from using or disclosing "user information." This was an application of the recent Boeing Co. rule.

In an advice memorandum issued regarding Kumho Tires, the GC wrote that the employer did not violate the NLRA by firing an employee who posted a picture of a team leader's form requesting a bonus in a closed Facebook posting. GC reasoned that the employee knew that the form had been purloined by a colleague from the team leader's desk before he posted it.

On August 16, 2018, NLRB's Division of Advice issued guidance stating that Latino workers were fired unlawfully for skipping work on February 16, 2017 to take part in "A Day Without Immigrants." Thousands of workers across the country skipped work in response to the Administration's increased enforcement against illegal immigration. The advice memo found protected concerted activity because of the intersection of their political interests and their interests as employees. Employees claimed that they protested in significant part because of employer mistreatment, and not mere politics. This contrasts with a 2006 Day Without Immigrant's protest which was found not protected because it was aimed at influencing legislation and not employer conduct.

Another memo released the same day clarified that an employee's right to union representation under the 1975 Supreme Court decision in NLRB v. J. Weingarten gave workers the right to have Union representation immediately after the vote but even before a Union achieves official certification from the NLRB.

TAB
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Corey works with clients across a broad range of industries - from local businesses to large, national companies. He regularly litigates and counsels clients on a wide range of employment issues, including matters arising under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act and the National Labor Relations Act. He also has extensive experience representing clients in cases involving non-competition and non-solicitation agreements, as well as the misappropriation of trade secrets. Corey frequently appears before the Equal Employment Opportunity Commission and state and federal courts throughout the country. He has also represented clients before the Ohio Civil Rights Commission and the National Labor Relations Board.

Understanding the importance for employers to proactively mitigate risk, he teams with clients to conduct training programs and draft employee policies and procedures to ensure compliance. He regularly provides advice and counsel to employers on personnel policies, employee discipline, and harassment investigations.

Prior to joining Dinsmore, Corey served as a judicial law clerk to U.S. District Court Judge Jack Zouhary and U.S. Magistrate Judge James R. Knepp, II. In addition to participating in various trial matters at the district court, as a law clerk he gained valuable experience at the appellate level during sittings on the Ninth Circuit and the Sixth Circuit. Prior to his clerkships, Corey was a member of the litigation department at a firm in Evansville, Indiana, where he handled all phases of litigation. During law school, he served as a judicial extern to U.S. District Court Judge Gregory L. Frost.

Services

- Employment
- Labor
- Employment Discrimination Litigation
- Audits, Counseling & Training
- Wage/Hour Law
- Wrongful Discharge

- Labor Arbitrations
- NLRB Issues
- Appellate

Education

- Ohio Northern University, Claude W. Pettit College of Law (J.D., *with high distinction*, 2009)
  - Ohio Northern University Law Review, manuscript editor
- Wabash College (A.B., *cum laude*, 2005)
  - Psychology

Bar Admissions

- Indiana
- Ohio

Court Admissions

- U.S. Supreme Court
- U.S. Court of Appeals for the Sixth Circuit
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Northern District of Indiana
- U.S. District Court for the Southern District of Indiana

Affiliations/Memberships

- Grow PBPO Advisory Council, secretary
- Cincinnati Bar Association Arbitration Service, program director
- Cincinnati Bar Association
  - Young Lawyers Section, secretary and executive board
  - YLS Social Committee, past chair
  - Labor & Employment Committee
- Cincinnati Bar Foundation, trustee
- Federal Bar Association, Labor & Employment Section
- Ohio State Bar Association, Labor & Employment Section
- American Bar Association
  - Section of Labor & Employment Law
  - Section of Litigation
  - Young Lawyers Division

- Potter Stewart Inn of Court, barrister
- Over-the-Rhine Kitchen, Board of Directors, former member
- Professional Leadership Network
- Rotary Club of Cincinnati

Distinctions

- Ohio *Rising Stars*®

Publications

May 22, 2018
Supreme Court Upholds Class and Collective Action Waivers

November 17, 2016
Same Sex Rights Flourish – Except at work?

August 30, 2016
EEOC Issues Enforcement Guidance on Retaliation

March 9, 2015
OSHA Issues Final Rule on SOX Whistleblower Claims

August 1, 2014
How to Keep Your Unpaid Internship Program Legal, Employee Benefit Plan Review, Vol. 69, No. 2

May 22, 2014
How to Keep Your Unpaid Internship Program Legal

October 29, 2013
Six Steps to Reduce Your Legal Risks in Workplace Harassment Cases

July 8, 2013
Another Background Check Pitfall? Following a State Law Mandate to Conduct Background Checks May Not Be a Defense in Title VII Disparate Impact Cases

August 1, 2012
Keeping Unpaid Internships Legal: Six Requirements You Can’t Ignore

March 1, 2012
"Doing the Little Things: How to Write a Better Brief," The Young Lawyer, Vol. 16, No. 5

Cori Besse graduated from the University of Dayton School of law, cum laude, in 2006. At the beginning of her career, she practiced complex business litigation. In 2010, she began focusing exclusively on labor & employment law. She worked in Dinsmore & Shohl for four years, where she practiced management side employment law. In 2014, Cori left Dinsmore and opened a small firm in Blue Ash, where she and her law partner now represent individual clients and small businesses in all aspects of employment law. She also focuses a portion of her practice on consumer protection laws, such as the Fair Credit Reporting Act, the Telephone Consumer Practices Act and the Fair Debt Collection Practices Act.

#TimesUp on Equal Pay: An Update on the Equal Pay Act and DOL Enforcement

Cincinnati Bar Association
October 19, 2018

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Equal Pay

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#TimesUp on Equal Pay

- → **The #TimesUp movement began as a reaction to the #MeToo movement.**
- → **Initiatives include:**
  - ⇒ A $13 million legal defense fund
  - ⇒ Draft legislation penalizing companies that tolerate persistent harassment, and to discourage the use of nondisclosure agreements to silence victims.
  - ⇒ Policy initiatives to reach gender equality in opportunities and pay.

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Current Status of Equal Pay Initiatives

- → **EEOC has increased enforcement of the EPA**
- → **States are passing more aggressive equal pay bills**

TIME'S UP™

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What is the Equal Pay Act of 1963? (EPA)

→ The EPA is an amendment to the Fair Labor Standards Act ("FLSA") passed by Congress in 1963.

→ The EPA is a federal law, and different states may have their own versions of this law.

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Who enforces the EPA?

→ The Equal Employment Opportunities Commission ("EEOC") has been charged with enforcement of the EPA since 1979.

→ The EPA also contains a private right of action.

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Who is protected by the EPA?

→ The EPA protects all employees covered by the FLSA.

→ The EPA further applies to executive, administrative, and professional employees.

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Who must comply with the EPA?

→The EPA applies to all employers, both public and private, that have employees covered by the FLSA.

→The EPA also applies to labor organizations.

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Increased Enforcement by the EEOC

→ In the fall of 2017, the Equal Employment Opportunity Commission (EEOC) released its 2018-2021 Strategic Plan announcing pay equity would be one of its six major priorities.

→ The EEOC will be vigorously enforcing the Equal Pay Act and Title VII to ensure wage equality.

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EEOC to Collect Summary Pay Data

→ September 2016--EEOC announced it would collect summary employee pay data from certain employers on EEO-1 form starting March 2018.

→ The new data will improve investigations.

→ August 2017--EEOC announced that OIRA Administrator Rao informed the EEOC that OMB issued stay

→ EEO-1 form has not changed.

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EEO-1

- **What is an EEO-1?**
  - The EEO-1 Report mandated compliance survey.
- **Who must file an EEO-1?**
  - All private employers subject to Title VII with 100 or more employees.
  - Private employers who have fewer than 100 employees under certain circumstances.
  - Some Federal Contractors.

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DOL Audit Program (PAID)

- **Six month pilot program**
- **Expedites voluntarily permitting the DOL to audit your company.**
- **Employers interested in participating in PAID must:**
  - **1) have coverage under FLSA**
  - **2) proactively resolve potential minimum wage and/or overtime claims; and**
  - **3) commit to future FLSA compliance.**

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PAID

- → If a violation is discovered, the employer and the DOL will determine what amount of wages are outstanding.
  - ⇒ Employer must pay 100% of unpaid wages, as defined by the DOL.
  - ⇒ Employee does not have to accept
- → Not available to employers already under investigation

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Will PAID shield me from liability?

- → Pros
  - ⇒ DOL will not seek liquidated damages or civil monetary penalties.
  - ⇒ Can identify any errors in advance.
  - ⇒ If most employees accept the remuneration, class actions may be limited.
- → Cons
  - ⇒ Employees are notified of the underpayment.
  - ⇒ Waivers have no effect on state law claims.
  - ⇒ May be subject to FOIA requests and any attorney-client privilege will be waived.
  - ⇒ No limits on the scope of DOL investigation.

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State Equal Pay Laws

- → Almost every state has equal pay laws.
  - ⇒ Several states have recently enacted laws aimed at ensuring greater pay equity, which exceed the protections of federal law.
- → Few states without Equal Pay Laws.
- → Some localities also have Equal Pay Laws.

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Which States have Expanded their Equal Pay Laws?

States	EPA Law	No retaliation	Sex, Race, or Ethnicity	Can't reduce another employee's pay to comply with the law	No Salary History Required	Clarified employer defenses for pay disparity
California	X	x	X		X	X
Delaware	X	x	X	X	X	
Illinois	X	x		X		
Maine	X	x		X	X	X
Maryland	X	x		X		X
Minnesota	X	x		X		
New York	X	x	x			x
Vermont	X	x		X		X
Washington	X	x	X			X
Massachusetts	x	x			x	X

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Ohio, Kentucky, and Indiana

States	EPA Law	No Retaliation	Sex, Race, or Ethnicity	Can't reduce another employees pay to comply with the law	No Salary History Required	Clarified employer defenses for pay disparity
Ohio	X	x	X	X		
Kentucky	X	x		X		
Indiana	X	x				

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Comparing EPA Laws

- → Federal, state and local laws have different standards for which employees must be paid equally.
- → The Comparison Groups are:
  - ⇒ Similarly Situated Employees (Title VII; E.O. 11246)
  - ⇒ Equal work and similar working conditions (Federal EPA)
  - ⇒ Substantially similar skill, effort, and responsibility and performed under similar working conditions (Massachusetts Equal Pay Act)
  - ⇒ Equal work and similar working conditions (NY Achieves Pay Equity)
  - ⇒ Substantially similar work and working conditions (CA Fair Pay Act)

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California's Aggressive Pay Equity Provisions

California's four bills address compensation issues including:

→ **Pay Equity (race and gender);**

→ **Pay Transparency; and**

→ **Salary History**

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SB 358
(Took effect January 1, 2016)

Pay Equity

→ **SB 358 requires equal pay for employees who perform "substantially similar work."**

→ **No longer requires employees to only be compared with those who work at the "same establishment."**

→ **Legitimate factors must be demonstrated by the employer. These factors must be reasonable and must rationalize the entire pay difference.**

Dinsmore

SB 358
(Took effect January 1, 2016)

Pay Transparency

→ **Employers may not prohibit employees from discussing or questioning their co-workers' wages.**

Records Holding

→ **Employers must maintain records of wages, and pay rates along with other employment related records for at least three years. (This was an increase from two years.)**

Enforcement

→ **The act created an additional private right of action with a one-year statute of limitations.**

Dinsmore

SB 1063 and AB 1676
(Took effect January 1, 2017)

Race or Ethnicity

→ **SB 1063 prohibits employers from paying employees' wages less than rates paid to other employees of another race or ethnicity for "substantially similar work."**

Prior Salary***

→ **AB 1676 prohibits employers from defending sex, race, or ethnicity based pay differences solely on the grounds of prior salary.**

⇒ ***(Massachusetts, Delaware, Oregon, New York, San Francisco, Boston, Philadelphia, Pittsburg, and New Orleans have all implemented this same bill. More states and localities are expected to join the above.)

Dinsmore

What Factors May You Use in Determining Pay?

- → California:
  - ⇒ A bona fide factor other than sex, such as certifications, geographic, shift, or hours differentials
- → Massachusetts
  - ⇒ A system which uses sales or revenue;
  - ⇒ the geographic location in which a job is performed;
  - ⇒ education, training, or experience to the extent such factors are reasonably related to the particular job in question; or
  - ⇒ travel, if the travel is a regular and necessary condition of the particular job.

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Federal Use of Prior Salary

On April 9, 2018, the Ninth Circuit held that using prior salary alone, as a "factor other than sex," or in combination with other factors cannot justify a wage differential.

******Rizo v. Yovino*, No. 16-15372 (Decided. April 9, 2018)

Dinsmore

Why Conduct an Audit?

- → Identify pitfalls of wage payment and create systems for ensuring compliance.
- → Produce objective data for self-awareness.
- → Employee retention and morale.
- → Affirmative defense to claims in some states.

Dinsmore

Private, Voluntary Audits

- → As enforcement of pay practices are on the rise, government-mandated audits are likely to follow.
  - ⇒ EEOC/DOL already collecting wage data.
  - ⇒ Requiring employers to self-report if a violation is found.
  - ⇒ EPA enforcement may uncover multiple violations.
- → Private, Voluntary Audits provide employers privacy, while ensuring compliance.
  - ⇒ Self-audits examine a range of issues, including:
    - Uncompensated off-the-clock work;
    - Overtime and Comp Time;
    - Deductions;
    - Misclassification of employees as independent contractors or exempt employees;
    - Minimum wage, including tip pooling; and
    - Equal Pay

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Types of Audits

Internal Audits

→ **HR or Legal conduct an internal review of policies, procedures and outcomes.**

→ **Private, but not necessarily privileged.**

External HR Auditors

→ **Professional expertise, objective, and private.**

Outside Counsel

→ **Professional expertise, objective and privileged.**

Dinsmore

Recommendations

→ **Review wage policies**

→ **Analyze pay (cohort and statistical methods)**

→ **Modify policies and practices**

- ⇒ Do not ask for pay history;
- ⇒ Keep in mind exceptions for seniority policies, such as maternity leave;
- ⇒ Amend standard application;
- ⇒ Train employees on applicable equal pay laws;
- ⇒ Consider making salary ranges for comparable positions; and
- ⇒ Document all compensation decisions.

Questions?

TAB
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30 Garfield Place, Suite 905
Cincinnati, Ohio 45202
(513) 381-6600
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Education

B.B.A. University of Cincinnati, 1980

J.D. University of Cincinnati, 1983

Professional Employment

1983 - Present: Jacobs, Kleinman, Seibel and McNally, LPA
Cincinnati Club Building
30 Garfield Place, Suite 905
Cincinnati, Ohio 45202
(513) 381-6600
Email: mbyrne@jksmlaw.com
Partner since 1986

Admitted to: Ohio Bar, United States District Court for the Southern District of Ohio, United States District Court for the Northern District of Ohio, United States Court of Appeals for the Sixth Circuit and United States Court of Claims. Also admitted to Federal District Courts for the Southern District of Indiana, Eastern District of Kentucky, Southern District of Mississippi, Middle District of Tennessee, and Northern District of Texas on a pro hoc vice basis.

Professional Experience

- Representation of plaintiffs and defendants as lead trial counsel in civil litigation in federal and state courts. This representation includes, but is not limited to, claims involving discrimination, retaliation, wrongful discharge, tortious interference with contractual rights, intentional tort, breach of commercial contracts, non-compete agreements, insurance defense, medical malpractice, wrongful death, product liability, anti-trust, and False Claims Act litigation.

- Lead trial counsel for over 200 trials to judgment or verdict.

- Rated AV and AV Preeminent by Martindale Hubbell continuously since 1990 to the present.

- Chosen by numerous Bar and professional associations as a speaker on various litigation issues.

- Continually selected for inclusion in the publication of the Best Lawyers of America on a yearly basis from 1996 to 2018.

- Continually selected for inclusion in the Ohio Super Lawyer publication on a yearly basis from 2004 to 2018.

- Chosen in 2011 for inclusion as a member of the American Board of Trial Advocates.

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Katharine C. Weber

Principal
Cincinnati

P 513-898-0050
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katharine.weber@jacksonlewis.com

Biography

Katharine C. Weber is a Principal in the Cincinnati, Ohio, office of Jackson Lewis P.C. She has successfully assisted countless clients in handling their labor and employment issues in both Ohio and Kentucky.

Ms. Weber has experience litigating wrongful discharge cases; managing discrimination cases; negotiating collective bargaining agreements; representing employers before the Equal Employment Opportunity Commission and other federal, Ohio and Kentucky agencies; advising management on employment relations; drafting employee handbooks; and negotiating severance agreements.

Ms. Weber regularly advises clients on wage and hour issues. Over the past five years she has served as lead counsel on various wage and hour class and collective actions filed in both Ohio and Kentucky involving claims of misclassification, off the clock work, and other violations for which the plaintiffs claimed to be owed substantial overtime.

Additionally, Ms. Weber is extremely knowledgeable in the area of the Americans with Disabilities Act, and the Family and Medical Leave Act, and brings sophisticated, yet easy to understand advice on handling and defending against sexual harassment claims. From helping clients analyze options and making recommendations on how to handle employee relations issues, to representing clients in complex discrimination cases, Ms. Weber always provides creative solutions and passionate advocacy for her clients. She is also very involved in the transportation industry and has successfully litigated several cutting-edge employment law cases which have been of great benefit to transportation industry employers.

In addition to her counseling and litigation duties, Ms. Weber frequently provides on-site training seminars for employers on how to formulate and enforce effective personnel policies to avoid and minimize employee lawsuits. She has presented seminars and mock trials involving labor and employment law at a host of local, state, and national conferences where she receives kudos for her engaging and entertaining presentations. Ms. Weber has served numerous times as a guest faculty speaker for Denver University Sturm College of Law, lecturing on labor and employment law in the transportation industry.

Ms. Weber has appeared numerous times as a guest on the nationally syndicated radio talk show, “The Bill Cunningham Show,” and the Cincinnati radio talk show, “The Mike McConnell Show.”

Ms. Weber’s extensive knowledge and expertise in the areas of labor and employment law and transportation law have led to her publishing articles in the *Kentucky Bench and Bar Magazine* and the Kentucky Motor Transportation Association monthly newsletter and magazine.

Ms. Weber currently serves as Chairman of the Board of Directors of the Employers Resource Association, a Cincinnati based organization providing companies in the greater Cincinnati, Dayton, Columbus, Northern Kentucky and Eastern Indiana areas with HR answers and advice, training and development, updates on legal issues and HR consulting services.

Honors and Recognitions

Education

Salmon P. Chase College of Law
J.D., 1989

University of Kentucky
B.B.A., 1986

Admitted to Practice

U.S. Supreme Court
1997

6th Circuit Court of Appeals
1993

Indiana - N.D. Ind.
2013

Indiana - S.D. Ind.
2013

Kentucky - E.D. Ky.
1990

Kentucky - W.D. Ky.
2004

Ohio - N.D. Ohio
2014

Ohio - S.D. Ohio
1989

Kentucky
1990

Ohio
1989

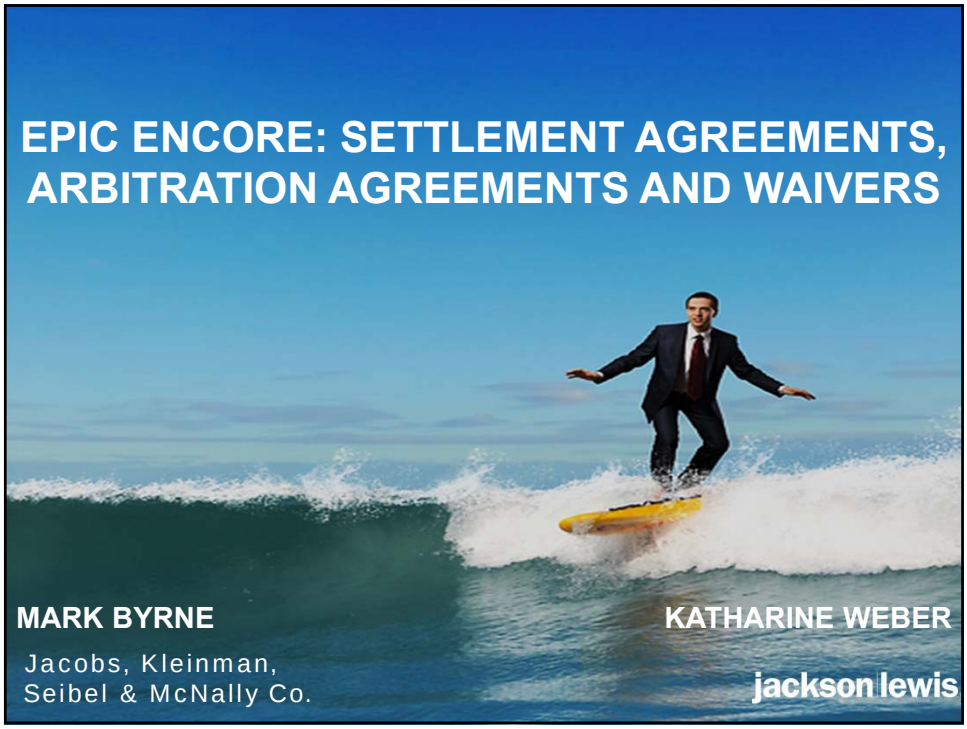
Professional Associations and Activities

- American Bar Association
- Cincinnati Bar Association
- Employers Resource Association, Chairman of the Board of Directors
- Kentucky Bar Association
- North American Transportation Employee Relations Association, Board of Directors Member, Past National Chairman
- Northern Kentucky Bar Association
- Ohio Bar Association
- Society for Human Resource Management
- Transportation Lawyers Association

Pro Bono and Community Involvement

- Susan G. Komen Foundation, pro bono advice and counsel
- Girl Scouts, pro bono advice and counsel

EPIC ENCORE: SETTLEMENT AGREEMENTS, ARBITRATION AGREEMENTS AND WAIVERS



MARK BYRNE
Jacobs, Kleinman, Seibel & McNally Co.

KATHARINE WEBER
jackson lewis

INTRODUCTION

MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY JACKSON LEWIS P.C. AND JACOBS, KLEINMAN, SEIBEL & MCNALLY CO. LPA. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.

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What's So Epic About Settlement Agreements?

Effective January 1, 2018 - employers may no longer take a business tax deduction for any settlement or payment related to sexual harassment or sexual abuse (or attorneys' fees related to the same) if the settlement or payment is subject to a nondisclosure agreement.

State initiatives from California to New York

- Limits on use of mandatory **arbitration** agreements for sexual harassment claims
- Limits on use of **confidentiality** agreements for sexual harassment claims
- Limits on **settlement agreements** for sexual harassment claims

What's So Epic About Arbitration Agreements And Class Action Waivers?

- Prior to 5/21/18, there was uncertainty regarding whether employers could require employees to sign arbitration agreements with class action waivers without violating the NLRA
- More than 50% of private employers already use arbitration agreements
- More than 30% of private employers use class action waivers

Background: *Epic Systems Corp. v. Lewis*

- Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?
- The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.
  - *Epic Systems Corp. v. Lewis (US Supreme Court 5/21/18)*

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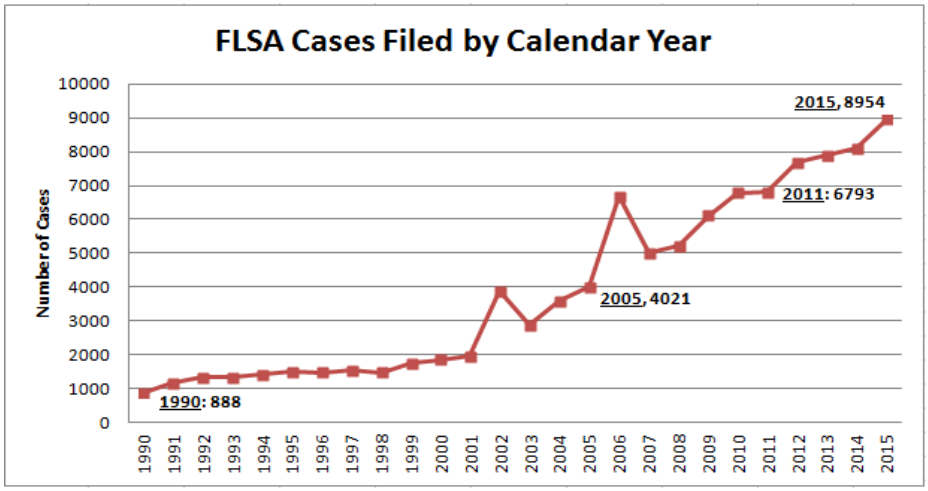
Background



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SCOTUS Arbitration Decisions Still To Come

- *New Prime v. Oliveria*: Whether the FAA's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies to independent contractors. Who decides whether the dispute is arbitrable, the court or an arbitrator?
- *Henry Schein Inc. v. Archer and White Sales Inc.*: Whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."
- *Lamps Plus Inc. v. Varela*: Whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

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Should A Company Implement An Arbitration Agreement and Class Action Waiver?

Advantages of Arbitration

- No risk of runaway jury
- Greater privacy
- Shorter time to resolution
- Ability to tailor discovery rules

Should A Company Implement An Arbitration Agreement and Class Action Waiver?

Disadvantages of Arbitration

- In individual cases, arbitration tends to be more expensive for employers.
- Risk of coordinated, individual actions
- Difficult to obtain summary judgment
- Arbitrators may be prone to “split the difference”
- Almost no right to appeal

Should A Company Implement An Arbitration Agreement and Class Action Waiver?

Deciding Factor: **Class Action and Brand Damage Risk**

Understand your risk of a class action and brand damage

If Risk is HIGH or Moderate	If Risk is Low
• Address the risk	• Address the risk
• Use Arbitration Agreement and Class Action Waiver	

Answer does not have to be all or nothing. For example:

- Use Arbitration Agreement with segment of workforce.
- Use Arbitration Agreement with contingent workers or independent contractors.

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The Agreement

- FAA enforces written agreements to arbitrate
- State law is applied for general contract rules such as offer, acceptance, consideration:
  - New at-will employment
  - Continued at-will employment
  - Money
  - PTO (that gets paid out if unused)
  - Commission plans/incentive compensation/stock options/bonuses
- Who decides whether the claim is subject to arbitration?
- Does the arbitrator have authority to arbitrate a class, collective or multi-party claim?
- Is the agreement to arbitrate mutual?
  - Does the employer agree to arbitrate all claims too?
  - Carve-outs for non-competes or trade secret injunctive relief?

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The Agreement

- Who pays forum costs (including arbitrator fees)?
- What arbitration rules apply and how can the employee learn about the rules?
- What is the impact of a severability clause?
- Should the agreement include mandatory pre-arbitration mediation and other mechanisms for dispute resolution?
- Should the agreement include a class action waiver?
- What will happen if employees don't want to sign the arbitration agreement?
- If the employer is involved in a putative collective or class action, can the employer still roll out an arbitration agreement?

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Frequently Asked Questions

- Q: Can current employees be required to agree without additional consideration?
  - A: Depends on the state.
  - Most states hold that continued employment of an at-will employee is sufficient consideration. Other states will require additional consideration.

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Frequently Asked Questions

- Q: Are there certain types of disputes that cannot be forced into arbitration?
  - A: Yes. Individuals cannot be barred from pursuing claims with the EEOC, state agencies or through workers compensation or unemployment systems.
  - New York and Washington have passed laws that bar mandatory arbitration of sexual harassment claims (although these laws may be preempted by the FAA).
  - Kentucky Supreme Court issued *NKADD v. Snyder* on 9/27/18 that may mean employers cannot condition an offer of or continued employment on signing an arbitration agreement (although the statute relied upon, KRS 336.700(2), is very likely preempted by the FAA). On the same day, the Kentucky Supreme Court issued *Grimes v. GHSW Enterprises* in which the court upheld an arbitration clause contained in an employment agreement and made many favorable statements about the enforceability of arbitration clauses.

Frequently Asked Questions

- Q: Can an employer have a class action waiver without an arbitration agreement?
  - A: The law is unclear. Some courts have enforced these agreements while others have rejected them.
  - Including a class action waiver in an arbitration agreement increases the likelihood that the waiver will be enforced. As discussed, certain states have enacted laws (and we expect there will be more) that prohibit arbitration of certain types of claims. There is a strong argument that the Federal Arbitration Act preempts these laws.

Frequently Asked Questions

- Q: Can an enforcement agency (like the DOL or EEOC) bring a claim on behalf of multiple employees?
  - A: Yes. A private arbitration agreement does not trump the enforcement powers of federal, state or local agencies.
  - The EEOC may challenge employers who require employees to sign arbitration agreements that are perceived to interfere with an employee's right to file a charge of discrimination.

Frequently Asked Questions

- Q: Can an employer include a shortened statute of limitations clause in an arbitration agreement limiting the time to bring a claim to 6 months?
  - A: Yes, in the 6th Circuit a 6 month shortened statute of limitations clause is enforceable in an arbitration agreement or as a stand alone agreement. Be careful of wording regarding impact on claims that require an administrative charge and notice of right to sue first.
  - Check the applicable circuit law and state law regarding whether a shortened statute of limitations agreement is enforceable.

TAB
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Judge Michael Ryan Barrett was born and raised in Cincinnati, Ohio and received his undergraduate and Juris Doctor degrees from the University of Cincinnati. He later served as a member of the University of Cincinnati Board of Trustees, including one term as Chairman.

Judge Barrett was admitted to practice law in Ohio in November 1977. From July 1977 through January 1978, he served as an Administrative Hearing Officer for the State of Ohio. On February 1, 1978 he joined the Hamilton County Prosecutor's Office as an Assistant Prosecutor and later was named a Chief Assistant Prosecuting Attorney, Felony Trial Division. Following the Prosecutor's Office, he joined Graydon, Head & Ritchey where he worked from March 1984 through December 31, 1994 first as an associate and later as a partner concentrating in general litigation. He joined Barrett & Weber as a shareholder where he remained from January 1, 1995 until May 24, 2006.

On May 25, 2006, Judge Michael R. Barrett was sworn as a Judge of the United States District Court for the Southern District of Ohio.

Magistrate Judge Stephanie K. Bowman was born in Kankakee, Illinois. She received her B.A. in Political Science from the University of Illinois at Urbana-Champaign in 1997 and received her J.D. from DePaul University, College of Law in 2000.

Magistrate Judge Bowman spent the first year of her legal career practicing immigration law at McKinney & Namei. In late 2001, she joined Barrett & Weber, LPA as an associate attorney where her practice focused on the fields of estate planning, zoning, real estate, business transactions and litigation. In 2006 she transitioned to a chambers law clerk to the Honorable Michael R. Barrett, United States District Judge. Magistrate Judge Bowman was appointed to her first eight-year term as a United States Magistrate Judge for the Southern District of Ohio on October 29, 2010.

Magistrate Judge Bowman is a Fellow of the Cincinnati Academy of Leadership for Lawyers and currently serves as Chair of the Steering Committee. She is a past president and member of the Ohio Women's Bar Association and sits on the board of the Cincinnati-Northern Kentucky John W. Peck Chapter of the Federal Bar Association. Magistrate Judge Bowman is also a member of the Cincinnati Bar Association, the Federal Magistrate Judges Association, and the Potter Stewart American Inn of Court. Magistrate Judge Bowman was named an Ohio Rising Star by Super Lawyers in 2005.

Judge Karen Litkovitz was appointed as a United States Magistrate Judge for the Southern District of Ohio on October 14, 2010. She received her B.S. degree, cum laude, in Statistics and Business Pre-Law from Bowling Green State University and is a 1984 graduate of the University of Cincinnati College of Law. Following a federal clerkship, she practiced law for eight years at the Legal Aid Society of Greater Cincinnati. From 1994 to 2010, she served as a law clerk to Magistrate Judges Robert A. Steinberg and Timothy S. Hogan in the Southern District of Ohio. Magistrate Judge Litkovitz is the Chair of the Cincinnati Criminal Justice Act Committee, a Trustee on the Board of the Cincinnati Bar Association, co-chair of the CBA's Diversity and Inclusion Committee's Lawyer to Lawyer program, a Fellow of the Cincinnati Academy of Leadership for Lawyers, a judicial advisor with the Potter Stewart Inn of Court, and a member of the Federal Magistrate Judges Association.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
_____,	)	Magistrate Judge Litkovitz (Consent)
	)	
Defendant.	)	

STANDING ORDER FOR CERTAIN EMPLOYMENT CASES

This Court is participating in a Pilot Program for **INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION,** initiated by the Advisory Committee on Federal Rules of Civil Procedure (see "Discovery protocol for employment cases," under "Educational programs and materials," at www.fjc.gov).

The Initial Discovery Protocols will apply to all employment cases pending in this court that challenge one or more actions alleged to be adverse, except:

i. Class actions;
ii. Cases in which the allegations involve only the following:
    1. Discrimination in hiring;
    2. Harassment/hostile work environment;
    3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
    4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
    5. Violations of the Family Medical Leave Act (FMLA);

6. Violations of the Employee Retirement Income Security Act (ERISA).

Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 30 days following the defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial Discovery Protocols for the relevant time period. This obligation supersedes the parties' obligations to provide initial disclosures pursuant to F.R.C.P. 26(a)(1). The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the F.R.C.P. 26(f) discovery plan.

The parties' responses to the Initial Discovery Protocols shall comply with the F.R.C.P. obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in F.R.C.P. 26(b)(2)(B).

Date:

Karen L. Litkovitz
United States Magistrate Judge

INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.

b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
   i. Class actions;
   ii. Cases in which the allegations involve only the following:
      1. Discrimination in hiring;
      2. Harassment/hostile work environment;
      3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
      4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
      5. Violations of the Family Medical Leave Act (FMLA);
      6. Violations of the Employee Retirement Income Security Act (ERISA).

   If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

a. ***Concerning*.** The term "concerning" means referring to, describing, evidencing, or constituting.

b. ***Document*.** The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

c. ***Identify (Documents)*.** When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.

d. ***Identify (Persons)*.** When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.

b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.

d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.

e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

b. Describe the categories of damages the plaintiff claims.

c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
   i. The plaintiff and the defendant;
   ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
    i. Discipline;
    ii. Termination of employment;
    iii. Promotion;
    iv. Discrimination;
    v. Performance reviews or evaluations;
    vi. Misconduct;
    vii. Retaliation; and
    viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

a. Identify the plaintiff's supervisor(s) and/or manager(s).

b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.

c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

STANDING ORDER RE CIVIL CASES

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

OPPORTUNITIES FOR NEWER ATTORNEYS

The Federal District Court for the Southern District of Ohio is a teaching court. Each year, scores of law students serve as externs in the chambers of magistrate judges and district judges. The externs are a valuable resource, and through their work at the Court, begin to learn the basics of federal litigation. Judges of the Court also engage in outside educational activities such as lecturing, teaching, and writing.

This Judge encourages less experienced members of legal teams representing clients to argue motions they have helped prepare and to question witnesses with whom they have worked. Opportunities to train newer attorneys in oral advocacy are rare because of the decline of trials. Instead, less experienced lawyers are often silent participants in oral argument proceedings. Where lawyers newer to the practice are familiar with the matter under consideration, but have little experience arguing before a court, they should be encouraged nonetheless to have a speaking role in court. Their law firms should encourage their participation. This Judge is amenable to permitting a number of lawyers to argue for one party if this helps create opportunities for a lawyer newer to the practice to participate. Nevertheless, the ultimate decision of who speaks on behalf of the client is for the client and the lawyer in charge of the case, not for the Court.

To test the Court's ability to foster increased opportunities for oral advocacy by newer lawyers, this Judge is adopting the following procedure relating to oral argument of civil motions:

STANDING ORDER

After a civil motion is fully briefed, any party may forthwith alert the Court by a docketed Notice that, if oral argument is granted, the noticing party intends to have a newer attorney (who has graduated from law school within the past six years) argue the motion (or a portion of the motion). Any other party may file a similar Notice addressing counsel's desire to staff the argument with a newer attorney, but the Court will not entertain opposition briefing or lengthy memoranda.

If such a Notice is docketed, the Court will grant the request for oral argument if it is at all practicable to do so, will schedule it immediately (thereby advancing its expeditious resolution), and will strongly consider allocating more time for oral argument beyond what the Court may otherwise have allocated, were a newer attorney not arguing

the motion. Moreover, the Court will permit other more experienced counsel of record to provide some assistance to the newer attorney who is arguing the motion where appropriate during oral argument. In fact, counsel requesting oral argument by a newer attorney is strongly encouraged, in counsel's independent judgment, to have an experienced lawyer accompany the newer attorney.

If counsel's request for oral argument is granted, opposing counsel is not in any way compelled to send a newer lawyer to argue as well; it remains perfectly acceptable for a seasoned practitioner to argue the opposite side of the motion.

All attorneys, including newer attorneys, will be held to the highest professional standards. All attorneys appearing in court are expected to be adequately prepared, thoroughly familiar with the factual record and the applicable law, and to have a degree of authority commensurate with the proceeding.

The Court recognizes that there may be many different circumstances in which it is not appropriate for a newer attorney to argue a motion. The Court emphasizes that it draws no inference from a party's decision not to have a newer attorney argue a motion before the Court. And the Court will draw no inference whatsoever about the importance of a particular motion, or the merits of a party's argument regarding the motion, from the party's decision to have or not to have a newer attorney argue the motion.

The participation of newer attorneys in all court proceedings – including, but not limited to, preliminary pretrial Rule 16 conferences, pre-motion conferences, hearings on discovery disputes and motions, dispositive motions, final pretrial conferences, and examination of witnesses at trial – is strongly encouraged.

In complex cases, the Court will inquire prior to the Rule 16 conference how the parties intend to provide opportunities for newer lawyers to participate actively in the case, especially in Court, by, *inter alia*, arguing motions, taking depositions, and examining witnesses at trial. Counsel shall also advise the Court whether it would be useful to require client representatives to attend the upcoming case management conference where this subject will be discussed.

The purpose of this Standing Order is to facilitate one generation teaching the next how to argue and try cases and to maintain and strengthen our district's reputation for excellence in trial practice.

IT IS SO ORDERED.

TAB
F

BAILEY LAW OFFICE, LLC

COUNSEL YOU CAN TRUST

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Overview

Donyetta has 18 years of experience representing clients in all aspects of employment litigation, including cases concerning wrongful discharge, promissory estoppel, breach of contract, enforcement of non-compete agreements, wage and hour claims and discrimination claims under the Americans with Disabilities Act, Family Medical Leave Act, Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964.

She has represented some of the largest employers in the country and in the Cincinnati region regarding employment law matters and litigation. She frequently advises employers on various human resource matters such as reviewing employee handbooks, terminations, employee discipline, pre-employment screening and drug testing.

Donyetta also represents employers in workers' compensation matters before the Industrial Commission, common pleas courts and appellate courts. She handles all aspects of workers' compensation claims including, initial allowances, additional conditions, appeals regarding the Right to Participate (R.C. 4123.512), temporary total disability claims, permanent partial awards, permanent total disability claims, wage loss claims, loss of use awards, violation of Specific Safety Requirements (VSSR) claims and intentional tort claims.

She also handles general civil litigation matters including high stakes personal injury, wrongful death and product liability cases. Her commercial litigation practice involves handling disputes arising from various business arrangements including matters relating to breach of contract and various business tort claims including fraud, anti-trust and unfair competition.

Her family law practice includes representing clients in dissolutions, custody, visitation and child support matters.

Experience

• Represented one of Ohio's largest employee staffing and leasing companies in all aspects of workers' compensation.

• Currently represents one of the region's largest banks in employment law matters.

• Currently represents the nation's largest electric utility company concerning employment law and general civil litigation matters.

• Successfully defended Duke Energy by obtaining summary judgment in Hybrid LMRA and wrongful discharge case filed by former union employee alleging wrongful discharge and breach of the union contract by Duke Energy and inadequate representation by the IBEW.

Successfully defended Duke Energy in a personal injury lawsuit involving a firefighter hit by Duke Energy driver.

• Won favorable judgment in a high profile dispute (covered by WCPO-Channel 9 news) for a hierarchical church with over 50,000 local church members in a lawsuit concerning church governance, employment and real estate valued at over $2.1 million.

• Drafted nationwide employer's background check policies in compliance with the Fair Credit Reporting Act (and equivalent state laws) and managed the employer's nationwide pre-employment screening and drug testing process for three years.

• Drafted and implemented nationwide employer's military leave policy in compliance with USERRA.

• Experience as an Assistant Attorney General for the state of Ohio in the Workers' Compensation Section, the largest litigation section of the office, during which time she handled over 150 active workers' compensation cases at one time.

• Successfully represents clients in appellate courts, drafting appellate briefs, supporting briefs in oral arguments and defending against mandamus actions.

• Second chair in high profile antitrust lawsuit involving claims of over $600 million.

• Certified Arbitrator for the Better Business Bureau's BBB Auto Line Program, through which she served as an Arbitrator over cases involving the nation's top auto manufacturers.

Practice Areas

- Employment Law
- Workers' Compensation
- Commercial Litigation
- Family Law
- Personal Injury

Education

• **Capital University Law School**, With Honors, Order of the Curia (J.D., 2000)

• **University of Illinois at Springfield**, Political Science, Member of National Political Science Honor Society (B.A., 1997

Honors/Distinctions

• Adjunct Law Professor, NKU Salmon P. Chase College of Law 2011-2017

• Ohio Rising Star- Ohio Super Lawyers (2007)

• Cincinnati Academy of Leadership for Lawyers (CALL), Class X

Admissions

• State of New York (2005)

• State of Ohio (2000)

• U.S. Court of Appeals, Sixth Circuit

• U.S. District Court, Southern District of Ohio

Professional Affiliations

• Cincinnati Bar Association

(Board of Trustees, Women Lawyers Committee, Labor & Employment Committee, Workers' Compensation Committee, The Fee Arbitration Committee, Admissions Committee, BLAC-CBA Roundtable)

• Black Lawyers Association of Cincinnati (President)

• Ohio State Bar Association

• New York State Bar Association

• American Bar Association

• Southwestern Ohio Self-Insurers Association

• African American Chamber of Commerce

• Greater Cincinnati Minority Counsel Program (Board Member, CLE Committee Chair)

Community Involvement

- President, Black Lawyers Association of Cincinnati (2015 - Present)
- Board of Trustees, Cincinnati Bar Association (2015-Present)
- Volunteer Lawyers for the Poor
- NAACP- Life Member
- Village Life Outreach Project (VLOP)- Volunteer Legal Counsel (2008-2010), Chair of Marketing Committee (2008-2010) and Brigade Member (2005)

Presentations

• "Recent Developments in Employment Law: What YOU Need to Know," CLE program for members of the Greater Cincinnati Minority Counsel Program (September 2012)

• "Hot Topics in Workers' Compensation Law," Rendigs Fall Client Seminar (August 2012)

• "You Say Goodbye and I Say Hello: Managing The Revolving Door of Employee Workplace Leave," Rendigs Spring client seminar (May 2012)

• "Tales from The Employment Law Crypt," Rendigs client seminar (November 2011)

• "Handling the Workers' Compensation Case from Start to Finish," National Business Institute (December 2010)

• "Injuries Received in the Course of and Arising Out of Employment," Lorman Education Services (January 2007)

- “Workers’ Compensation Update,” Employer’s Resource Association (January 2007)

- “Avoiding Hiring Criminals, Terrorists, and Imposters- the Dos and Don’ts for Pre-employment Screening,” Human Capital Magazine/Douglass Publications Audio Conference (March 2006)

- “Pre-Employment Screening for the Smart Employer,” Employer’s Resource Association (March 2006

Richard L. Moore
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Rich is located in Frost Brown Todd's Cincinnati office and is a member of the firm's labor and employment practice group. He defends clients in federal and state court litigation arising from claims of wrongful termination and allegations of various forms of protected class discrimination, violations of the Family and Medical Leave Act, the Americans with Disabilities Act, and other statutory and common law claims. Rich also defends employers in workers' compensation court appeals.

Rich also both prosecutes and defends claims involving enforcement of non-compete agreements and allegations of misappropriation of trade secrets in state and federal court.

Rich is a frequent lecturer and author on topics related to employment law and workers' compensation and frequently provides customized anti-harassment and anti-discrimination training to employers and industry groups.

Rich currently serves as Co-Chair of the Greater Cincinnati Minority Counsel Program and also serves as President for the Mercantile Library Association. Rich is a former trustee of the Cincinnati Bar Association, past Chair of the CBA's Community Service Committee, and past Chair of both the Cancer Support Community of Greater Cincinnati and Northern Kentucky and the Urban League of Greater Cincinnati.

Rich received his J.D. from the University of Cincinnati College of Law where he was a member of the Law Review. He received his B.S. in Business Administration from Bowling Green State University, specializing in Management Information Systems.

How Not to #Metoo:

Cincinnati Bar Association
Labor and Employment Law Symposium
October 19, 2018
Cincinnati, Ohio

Presented By:

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How Not to #Metoo:

Confidentiality and Non-Disparagement Provisions in Settlement Agreements: Tax and Other Implications[1]

Enforceability of Non-Disparagement Clauses & Confidentiality Clauses

- Freedom of Contract vs. Public Policy
    - Restatement (Second) of Contracts § 178 - When a Term Is Unenforceable on Grounds of Public Policy
        - "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."
        - *Bowman v. Parma Board of Education*, an Ohio Court of Appeals panel refused to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts. The court stated that "the only possible conclusion under the circumstances of the instant case is that the non-disclosure clause is void and unenforceable and no cause of action will lie for its breach."
        - Factors that have weighed against the enforcement of contractual waivers include the " 'critical importance' " of the right to speak on matters of public concern; *Leonard v. Clark*, 12 F.3d at 891; the fact that the agreement restricts a party from communicating with a public agency regarding the enforcement of civil rights laws; *Equal Employment Opportunity Commission v. Astra USA, Inc*., 94 F.3d 738, 744 (1st Cir.1996); the fact that the agreement requires the suppression of criminal behavior; *Bowman v. Parma Board of Education*, 44 Ohio App.3d 169, 172, 542 N.E.2d 663 (1988); the fact that the information being suppressed is important to protecting

[1] The presenters would like to thank Katherine M. Collier, Esq. for her work in helping prepare these materials. Ms. Collier earned her J.D. for the University of Tennessee and is an associate in the Litigation Department at Frost Brown Todd LLC, focusing her practice in Labor and Employment litigation.

the public health and safety; *Pansy v. Stroudsburg*, 23 F.3d at 787; and the fact that the party benefiting from the confidentiality provision is a public entity or official. *Id*., at 788. Ryan M. Philp, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 Seton Hall L. Rev. 845, 880 (2003).

- NLRA:

  - Section 7 of the National Labor Relations Act (NLRA) guarantees employees the right to act together to try to improve their pay and working conditions and prohibits organizations from interfering with people's ability to exercise that right. To many employers' surprise, the law applies whether or not workers are unionized. Confidentiality provisions and NDAs that ignore NLRA provisions may result in lengthy and costly litigation.

  - Nondisparagement: Richard F. Griffin, Jr. issued a memo entitled "Report of the General Counsel Concerning Employer Rules," Memorandum GC 15-04 in 2015. It stated that nondisparagement clauses and other provisions typically included in severance agreements are illegal because they violate employees' guaranteed right to concerted activity.

    - Examples of nondisparagement policies that the NLRB's general counsel has previously denounced:
      - "Do not make '[s]tatements' that damage the company or the company's reputation or that disrupt or damage the company's business relationships."
      - "Never engage in behavior that would undermine the reputation of [the employer], your peers or yourself."

  - In *The Boeing Company*, 365 NLRB No. 154 (2017), the NLRB overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and announced a new standard for addressing the legality of facially neutral work rules applicable to union and non-union workplaces in December 2017. In a 3-2 decision, the board replaced the "reasonably construe" standard with a new balancing test that will consider the following factors with regard to a "facially neutral" handbook policy (*i.e.*, a policy that is not worded to intentionally interfere with workers' Section 7 rights): (1) the nature and extent of the potential impact on NLRA right and (2) the employer's legitimate justifications associated with the rule. However, the NLRB has not applied this new standard specifically in the context of confidentiality or non-disparagement agreements. The first ALJ ruling to apply the NLRB's new standard in the context of confidentiality and non-disparagement clauses was *Baylor Univ. Med. Ctr.*, Case No. 16-CA-195335 (Fort Worth, TX, February 12, 2018).

- Notwithstanding the new, more pro-business *Boeing* standard, the ALJ found that Baylor violated federal labor law when it offered a terminated employee $10,000 in exchange for signing a severance agreement and general release that included two unlawful provisions – the confidentiality provision and no participation in claims provision. However, the ALJ found the non-disparagement provision to be lawful. The provisions in question were as follows:

    - *No Participation in Claims* [Employee] agrees that, unless compelled to do so by law, [Employee] will not pursue, assist or participate in any Claim brought by any third party against [Baylor] or any Released Party…

    - *Confidentiality* [Employee] agrees that … she must … keep secret and confidential and not … utilize in any manner all … confidential information of … [Baylor] or any of the Released Parties made available to her during her … employment … including … information concerning operations, finances, … employees, … personnel lists, financial and other personal information regarding … employees …

    - *Non-Disparagement* [Employee] agrees that she shall not … make, repeat or publish any false, disparaging, negative, … or derogatory remarks … concerning … [Baylor] and the Released Parties … or otherwise take any action which might reasonably be expected to cause damage … to … [Baylor] and the Released Parties …

- The ALJ reasoned that the prohibition on disclosing confidential information was worded broadly enough to suggest ex-employees could not discuss their own wages and benefits and that this limitation on NLRA-protected conduct was not outweighed by Baylor's reported concern that ex-employees might divulge private health-care related information. In contrast, the ALJ concluded that the non-disparagement language was a basic civility standard and lawful under *Boeing*.

- OSHA has also adopted the approach adopted by the U.S. Securities and Exchange Commission barring agreements that require workers to waive their right to receive monetary awards from any government agency. U.S. Dep't of Labor, OSHA, Memo re: New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases (Aug. 23, 2016), available

at: http://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.html.

- EEOC
  - The EEOC stated, in its Strategic Enforcement Plan for FY 2013-2016, that it intends to "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations." *See EEOC Strategic Enforcement Plan FY 2013-2016* at p. 10 (December 17, 2012). As proof see: *E.E.O.C. v. Montrose Memorial Hospital, Inc.*, 1:16-CV-02277-WYD-GPD (D. Colorado); *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc*., 14-cv-863 (N.D. Ill.)

  - The standard: "Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf." *See EEOC v. Eastman Kodak Co*., no. 06-cv-6489 (W.D.N.Y. 2006).

Legislative Reform

Federal

Tax Reform:

- New Section 162(q) of the Internal Revenue Code provides:
    - (q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE. — No deduction shall be allowed under this chapter for —
        - (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, *or*
        - (2) attorney's fees related to such a settlement or payment.

- Most separation and release agreements include non-disclosure and release provisions that cover a "laundry list" of possible alternative causes of action — generally including sexual harassment. This is true, of course, even though most executive separations do not involve an allegation by the terminating executive of sexual harassment. The question is whether, even in these routine separation agreement situations, we need to allocate a portion of the severance compensation to the non-disclosure and release of sexual harassment claims, which portion then would be non-deductible.

- Neither the new statutory language nor the conference report further defines whether and when a payment is "related" to sexual harassment or abuse. IRS representatives have indicated that they would not deny a deduction in the case where the sexual harassment waiver was part of many possible alternative causes of action and there had been no allegations or claims of sexual harassment or abuse. The IRS intended to provide guidance on section 162(q) in the 12 to 24 months after the section was released, but no guidance has been released yet.

Sunlight Bill:

- In February 2018, Massachusetts Sen. Elizabeth Warren(D) introduced the "Sunlight in the Workplace Harassment Act." *No further action has been taken.*

- The Bill would require public corporations to:
    - Detail any harassment allegations and settlements within their ranks;
    - Disclose just how much it paid in settlements, though it won't mandate that the company disclose any specific names involved;
    - The total number of complaints;
    - Report their record on an annual basis and give a "description of the measures taken" to address workplace harassment and discrimination;
    - Report on the "average length of time" it took for a complaint against alleged sexual or racial harassment to get resolved.

- If the Sunlight in Workplace Harassment Act becomes law, public companies would be required to openly share relevant data on allegations and settlements regarding issues like sexual abuse in the workplace or discrimination against race, age, sexual orientation, or against people with disabilities.

- Potential investors would have the opportunity to look at the company's record of harassment complaints and any settlements through the publicly-available data.

State Bills:

- **Washington:** passed two new laws that restrict employers' ability from requiring employees to sign NDAs as a condition of employment preventing them from disclosing sexual harassment or assault.

    - It specified that NDAs that predate the law will be void and unenforceable.
    - Importantly, the new law specifically carves out an exception for confidentiality provisions contained in settlement agreements entered between employers and employees.

- **Arizona:** Under the new law, people who previously signed non-disclosure agreements would be allowed to break those agreements without penalty if (1) asked by law enforcement or a prosecutor; or (2) if to make a statement in a criminal proceeding not initiated by that party. Public monies also may not be used as consideration in exchange for a nondisclosure agreement that is related to an allegation of or attempted sexual assault or sexual harassment.

    - The original bill, before it was amended and passed, would have voided all NDAs in these types of situations, including civil cases, allowing victims to speak publicly without fear of legal retaliation.

- **California:** Existing law established confidentiality agreements are not enforceable if they are attached to civil settlements involving certain enumerated sexual offenses including felony sexual assault and child sex abuse. In such a case, if a victim broke the confidentiality agreement, a court could reject a breach of contract lawsuit.

- **California New Law:** As of September 2018, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action in which the pleadings state a cause of action for: sexual assault, sexual harassment, an act of workplace harassment or discrimination based on sex, failure to prevent an act of workplace harassment or discrimination based on sex, an act of harassment or discrimination based on sex, or an act retaliation against a person for reporting harassment or discrimination based on sex, by the owner of a housing accommodation. A court may not enforce a provision that restricts the disclosure of information in a manner that conflicts with the above. a provision within a settlement agreement that prevents the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy. This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

    - http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB820

- **New York:** The 2018-2019 New York State budget enacts the following (New York General Obligations Law § 5-336 and New York Civil Practice Law § 5003-b):

    - NDA: ban nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims, unless the condition of confidentiality is complainant's and/or plaintiff's preference. The term "sexual harassment claim," however, is not defined in either of these two new sections. Similar to the requirements under the federal Age Discrimination in Employment Act, if the complainant and/or plaintiff prefers to include a confidentiality clause in a settlement or agreement, then the complainant and/or plaintiff will be provided 21 days after receiving such settlement or agreement to consider the clause. Further, the complainant and/or plaintiff will have a seven-day revocation period following the execution of such settlement or agreement, and the confidentiality clause will not become effective or enforceable until the revocation period has expired. These provisions will take effect 90 days following the Budget's enactment, on July 11, 2018.

    - Training: Public and private employers in New York State will be required to maintain a written sexual harassment policy, and to provide annual training to employees, pursuant to a new provision, New York Labor Law § 201-g. To assist employers in creating a policy and training program, the New York State Department of Labor ("NYSDOL"), in consultation with the New York State Division of Human Rights, will (i) create and publish a model sexual harassment prevention guidance document and a sexual harassment prevention policy that employers may use to satisfy their obligations under the law, and (ii) create a model sexual harassment training program addressing appropriate conduct and supervisor responsibilities. Employers will be required to either adopt the model sexual harassment prevention policy or establish a policy that equals or exceeds the minimum standards provided by the model policy. The policy must be provided in writing to all employees. Employers will be required to either use the model sexual harassment prevention training program or establish a training program for employees to prevent sexual harassment that equals or exceeds the minimum standards provided by the model training. In addition, employers will be required to provide the training programs to all their employees and apply the NYSDOL's sexual harassment prevention policy. The law does not specify the length of the training or the format (i.e., in person versus online). These sexual harassment policy and training provisions will take effect 180 days following the Budget's enactment, on October 9, 2018.

    - The Budget will create a new provision—New York Labor Law § 296-d—that expands sexual harassment protections to non-employees. Employers may be liable to contractors, subcontractors, vendors, consultants, or other non-employees providing services to the employer with respect to sexual harassment. Such liability will be available when (i) the employer, its agents, or supervisors knew (or should have known) that a non-employee was subjected to sexual

harassment in the workplace, and (ii) the employer failed to take immediate and appropriate corrective action. This provision took effect on April 12, 2018.

- https://www.ebglaw.com/news/new-york-state-enacts-sweeping-sexual-harassment-laws/
- https://www.jdsupra.com/legalnews/new-york-says-metoo-to-stronger-sexual-60940/

- **Pennsylvania:** introduced legislation 2017 that would, if enacted, prohibit non-disclosure agreements in the settlement of civil claims for sexual assault or harassment.
    - The bill would bar any contract or out-of-court settlement from containing provisions that:
        - Prohibit disclosure of the name of any person suspected of sexual misconduct or any information relevant to a claim.
        - Would block reports of such claims to an "appropriate person."
        - Requires the destruction or expungement of related evidence.
    - The bill would, however, grant a shield of confidentiality to victims making allegations of abuse, giving them rights similar to juveniles in a child welfare case who can have cases brought through their initials or other identifiers.
        - http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=999
    - **April 2018:** The Governor, along with the House and Senate Democrats, announced a package of reforms to strengthen protections against sexual harassment and discrimination for employees, provide new legal options for victims and hold those who are responsible accountable for their actions.
        - Bann on NDA in cases of sexual assault and harassment
        - Protect all workers, regardless of the size of the employer or type of job
        - Required training for employees and supervisors
        - PA fairness act – prohibit discrimination based on sexual orientation or gender identity or expression
        - Extend statute of limitations for victims and whistleblowers
        - Right to a jury trial for victims and whistleblowers
        - Punitive damages
        - https://www.governor.pa.gov/gov-wolf-legislative-democrats-announce-sexual-harassment-discrimination-protections-workers/

- **Connecticut:** sexual harassment laws were passed by a legislative committee in March 2018 and went up to the General Assembly for consideration – the "Times Up Act." The Senate Bill passed in the state Senate 31-5 but recently failed to pass in the House.

    - The proposal would have significantly altered the way the state handles and combats sexual harassment and sexual assault in the workplace. It would have modified sexual harassment training laws by requiring employers with three or more employees provide such training to all of them. Under current law, only employers with 50 or more employees must provide the training, and only to employees in supervisory roles. Additionally, the "Time's Up Act" would have reformed the complaint process of the Connecticut Commission on Human Rights and Opportunities ("CHRO"). Now, a victim cannot sue immediately in Superior Court, but must go to the CHRO first. Victims of sexual harassment must file a civil complaint with the CHRO within six months of the incident or lose the right to file a complaint or sue. The act would have extended the deadline to three years after the incident.

    - One Connecticut bill that did pass was Senate Bill 175. However, it only applies to government and quasi-public agencies (not private employers). It prevents state and quasi-public agencies from making a payment in excess of $50,000 to a departing employee to avoid litigation costs or as part of a non-disparagement agreement.

- **Illinois:** Amended the General Assembly Compensation Act – provides that no public funds, including, but not limited to, funds appropriated for the pay and allowances of members of the General Assembly, shall be used to create a payout of money to any person involved with and relevant to allegations and investigations of sexual harassment by a member of the General Assembly.

- **Vermont:** Prohibits employment agreements from containing provisions that waive an employee's rights or remedies with respect to a claim of sexual harassment; requires agreements to settle a sexual harassment claim to state that the employee may report sexual harassment or cooperate with any investigation thereof; and requires notification to the Attorney General of any settlements, authorizes workplace audits for compliance, provides protections to independent contractors.

Sheri MINARSKY, Appellant

v.

SUSQUEHANNA COUNTY; Thomas Yadlosky, Jr.

No. 17-2646

United States Court of Appeals, Third Circuit.

Argued April 18, 2018

(Opinion Filed: July 3, 2018)

Background: County employee brought action against county, asserting claims for gender discrimination, sexual harassment through a hostile work environment, and quid pro quo sexual harassment under Title VII, seeking to hold county vicariously liable for sexual harassment committed by her supervisor. The United States District Court for the Middle District of Pennsylvania, No. 3-14-cv-02021, Robert D. Mariani, J., 2017 WL 4475981, adopted report and recommendation of Martin C. Carlson, United States Magistrate Judge, 2017 WL 4475978, and entered summary judgment in county's favor. Employee appealed.

Holdings: The Court of Appeals, Rendell, Circuit Judge, held that:

(1) fact issue as to whether county exercised reasonable care to avoid harassment and to eliminate it when it might occur precluded summary judgment on employer's *Faragher-Ellerth* affirmative defense, and

(2) fact issue as to whether employee held genuine, subjective belief of potential retaliation from reporting her harassment and as to whether that belief was well-founded precluded summary judgment on employer's *Faragher-Ellerth* affirmative defense.

Vacated and remanded.

1. Civil Rights ⚿1149, 1528

To successfully invoke the *Faragher-Ellerth* affirmative defense in action in which employee seeks to hold employer vicariously liable, under Title VII, for actionable hostile environment created by supervisor, an employer must show that: (1) it exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that (2) the plaintiff failed to act with reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Federal Courts ⚿3604(4)

Court of Appeals exercises plenary review over the grant or denial of summary judgment and applies the same standard the district court should have applied. Fed. R. Civ. P. 56(a).

3. Federal Civil Procedure ⚿2546

Federal court will deny summary judgment if there is enough evidence for a jury to reasonably find for the nonmovant. Fed. R. Civ. P. 56(a).

4. Civil Rights ⚿1185

To establish a Title VII hostile work environment claim against one's employer, a plaintiff employee must prove: (1) the employee suffered intentional discrimination because of his/her sex; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person in like circumstances; and (5) the existence of respondeat superior liability. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⚿1528

For purposes of Title VII workplace sexual harassment claims, a supervisor's power and authority invests his or her

harassing conduct with a particular threatening character. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights ⚿1528

On Title VII claim, if a supervisor's workplace harassment against an employee resulted in a tangible employment action against the employee, then the employer is strictly liable. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⚿1183

For purposes of Title VII workplace sexual harassment claim, a "tangible employment action" includes hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights ⚿1167, 1184

To prove a claim of gender discrimination under Title VII or the PHRA and quid pro quo sexual harassment under Title VII, a plaintiff must show that she suffered an "adverse employment action," or an action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Pennsylvania Human Relations Act 43 Pa. Stat. Ann. § 951 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

9. Civil Rights ⚿1149, 1528

The existence of a functioning anti-harassment policy can prove an employer's exercise of reasonable care to avoid harassment and to eliminate it when it might occur, as required for employer to invoke *Faragher-Ellerth* affirmative defense in action in which employee seeks to hold employer vicariously liable, under Title VII, for actionable hostile work environment created by a supervisor. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Civil Rights ⚿1149, 1528

Proof that an employee failed to exercise reasonable care to avoid harm will normally suffice to prove that the plaintiff unreasonably failed to avail herself of the employer's preventive or corrective opportunities, as required for employer to invoke *Faragher-Ellerth* affirmative defense in action in which employee seeks to hold employer vicariously liable, under Title VII, for actionable hostile work environment created by a supervisor. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Federal Civil Procedure ⚿2497.1

Genuine issue of material fact as to whether county exercised reasonable care to avoid harassment and to eliminate it when it might occur precluded summary judgment on issue of whether county was entitled to invoke *Faragher-Ellerth* affirmative defense on county employee's Title VII claim seeking to hold county vicariously liable for workplace sexual harassment committed by her supervisor. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Civil Rights ⚿1104

Objective of Title VII is to avoid harm rather than provide redress. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

13. Federal Civil Procedure ⚿2497.1

Genuine issue of material fact as to whether county employee's failure to take advantage of employer's safeguards against sexual harassment was reasonable,

given her genuinely held, subjective belief of potential retaliation from reporting her harassment, precluded summary judgment on issue of whether employer was entitled to invoke *Faragher-Ellerth* affirmative defense on employee's Title VII claim seeking to hold county vicariously liable for workplace sexual harassment committed by her supervisor. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

14. Civil Rights ⚿1189, 1528, 1555

An employee's mere failure to report workplace sexual harassment is not per se unreasonable, as would support employer's invocation of *Faragher-Ellerth* affirmative defense to employee's claim seeking to hold employer vicariously liable for sexual harassment committed by her supervisor; if an employee's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, a trial court should not find, as a matter of law, that the defendant has proven that the employee who has not reported the harassment has failed to act with reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided, and instead, the court should leave the issue for the jury to determine at trial. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

15. Civil Rights ⚿1555

Workplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions, for purposes of employer's invocation of *Faragher-Ellerth* affirmative defense to employee's claim seeking to hold employer vicariously liable for sexual harassment committed by her supervisor, is a paradigmatic question for the jury, in certain cases. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⚿1189, 1528

Nature of working relationship between supervisor and employee is relevant to issue of whether employee failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided, as required for an employer to invoke *Faragher-Ellerth* affirmative defense to employee's claim seeking to hold employer vicariously liable for sexual harassment committed by her supervisor, under Title VII; degree of a supervisor's control over an employee and the specific power dynamic can offer context to an employee's subjectively held fear of speaking up. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

On Appeal from the United States District Court for the Middle District of Pennsylvania (District Court No.: 3-14-cv-02021) District Judge: Honorable Robert D. Mariani

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Gerald J. Hanchulak, Esq. [ARGUED], The Hanchulak Law Offices, 604 South State Street, Clarks Summit, PA 18411, Counsel for Appellee Thomas Yadlosky, Jr.

Before: GREENAWAY, JR., RENDELL, and FUENTES, Circuit Judges

OPINION

RENDELL, Circuit Judge:

Thomas Yadlosky, the former Director of Susquehanna County's Department of Veterans Affairs, made unwanted sexual advances toward his part-time secretary, Sheri Minarsky, for years. She never reported this conduct and explained in her deposition the reasons she did not do so. Although Yadlosky was warned twice to stop his inappropriate behavior, it was to no avail. The County ultimately terminated Yadlosky when the persistent nature of his behavior toward Minarsky came to light.

[1] Minarsky seeks to hold Yadlosky, her supervisor, liable for sexual harassment, and her former employer, Susquehanna County, vicariously liable for said harassment. At issue in this case are the two elements of the *Faragher-Ellerth* affirmative defense that Susquehanna County has raised.[1] In granting summary judgment in favor of the County, the District Court held that the elements of this defense had been proven as a matter of law. We conclude that given the facts of this case, the availability of the defense regarding both the first element, whether the County took reasonable care to detect and eliminate the harassment, as well as the second element, whether Minarsky acted reasonably in not availing herself of the County's anti-harassment safeguards, should be decided by a jury. Accordingly, we will vacate the judgment of the District Court and remand for further proceedings.[2]

I. Factual Background

On appeal from the grant of summary judgment in favor of Defendant Susquehanna County, we view the facts in the light most favorable to Plaintiff Minarsky. Nevertheless, the facts are largely undisputed.

A. Yadlosky's Alleged Harassment

Minarsky served as a part-time secretary at the Susquehanna County Department of Veterans Affairs, working Mondays, Wednesdays, and Fridays. On Fridays, Minarsky worked for Defendant Yadlosky. They worked together in an area separate from other County employees.[3] Minarsky alleges that soon after she started working at the Department in September of 2009, Yadlosky began to sexually harass her. Yadlosky would attempt to kiss her on the lips before he left each Friday, and would approach her from behind and embrace her, "pull[ing] [her] against him." A. 98. When Minarsky was at her computer or the printer, Yadlosky would purportedly massage her shoulders or touch her face. She testified that these advances were unwanted, and happened frequently—nearly every week. As they worked together, alone, others were seldom present to observe Yadlosky's conduct, other than during the holiday season each year, when Yadlosky asked Minar-

1. To successfully invoke the *Faragher-Ellerth* affirmative defense, an employer must show that (i) it "exercised reasonable care to avoid harassment and to eliminate it when it might occur," and that (ii) the plaintiff "failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

2. Minarsky also challenges the District Court's dismissal of her remaining state law claim of assault against Yadlosky for lack of supplemental jurisdiction, but that issue is moot in light of our decision.

3. Yadlosky was a full-time employee, but worked out of different offices on the other days.

sky and other female employees to kiss him under mistletoe.[4]

Yadlosky engaged in other non-physical conduct that Minarsky found disturbing. For example, he often questioned Minarsky about her whereabouts during her lunch hour and with whom she was eating. He called her at home on her days off under the pretense of a work-related query but proceeded to ask personal questions. Yadlosky allegedly became hostile if she avoided answering these calls. He sent sexually explicit messages from his work email to Minarsky's work email, to which Minarsky did not respond. He also behaved unpredictably, as on one occasion when he insisted that Minarsky take two full days off, unpaid, to drive her daughter to her cancer treatment, but soon after, he chastised her for seeking time off—even though it fell on days they did not work together.

Minarsky alleges that the harassment intensified as time passed. When the harassment first began, she mildly and jokingly told him to stop. He did not. She claims that Yadlosky knew that her young daughter was ill and thus knew Minarsky depended on her employment to pay medical bills. She states that she feared speaking up to him in any context, let alone to protest his harassment, because he would react and sometimes become "nasty." A. 142.

B. Prior Reprimands

Yadlosky reported to Sylvia Beamer, the Chief County Clerk, who reported to the Susquehanna County Commissioners. On two separate occasions, Beamer became aware of Yadlosky's inappropriate behavior toward other women, and reprimanded him. County Commissioner Maryann Warren was aware of one of these incidents. First, in 2009, Beamer observed Yadlosky embrace a female employee. Beamer verbally admonished Yadlosky and told him that such behavior was inappropriate. Second, Commissioner Warren observed Yadlosky act inappropriately with the County's Director of Elections in late 2011 or early 2012. Warren notified Beamer that she saw Yadlosky hug the Director and kiss her on the cheek. Beamer verbally reprimanded Yadlosky once again and told him he could face termination if his inappropriate behavior continued. After both incidents, there was no further action or follow-up, nor was any notation or report placed in Yadlosky's personnel file.

Minarsky became aware of the first reprimand, but not the second. In Minarsky's deposition, she recounted a time when another employee, Connie Orangasick, saw Yadlosky approaching Minarsky from behind and hugging her. Orangasick walked by, noticed the situation, and said to Yadlosky, "I thought you said yesterday you're not supposed to do that anymore." A. 99. A few minutes later, he responded that he could do whatever he wanted "[o]ver here," referring to the building where he and Minarsky were largely separated from other employees. A. 100. When Minarsky followed up with Orangasick, she learned that Beamer had warned Yadlosky about his inappropriate behavior. After being warned, he then allegedly came back to his office and joked about the incident to Orangasick.

Minarsky also learned that other women had similar encounters with Yadlosky. In addition to the mistletoe episodes, Minarsky spoke to another secretary, Rachel Carrico, who mentioned that she had problems with Yadlosky's hugging, as well. Also, once when Beamer was in the Veter-

4. Another instance noted in the record of an employee observing Yadlosky's behavior toward Minarsky is the incident involving Connie Orangasick. *See infra* pp. 307–08.

ans Affairs office, Minarsky observed Yadlosky as he was attempting to embrace Beamer, but she stopped him and said, "Get away from me." A. 111.

C. The County's Anti-Harassment Policy

On her first day of work, Minarsky read and signed Susquehanna County's General Harassment Policy. It states that harassment based upon "sex, age, race, religion, national origin, ethnicity, disability, sexual preference and any other protected classification" is prohibited. A. 166; A. 205–06. According to the policy, an employee could report any harassment to their supervisor; if the supervisor is the source of the harassment, the employee could report this to the Chief County Clerk or a County Commissioner.

During the four years Minarsky avers that she was harassed by Yadlosky, she did not report this harassment to either Beamer, the Chief County Clerk, or any of the County Commissioners. Minarsky alleges that she feared elevating the claims to County administrators, because Yadlosky repeatedly warned her not to trust the County Commissioners or Beamer. She claims that he would often tell her to look busy or else they would terminate her position. These warnings, Minarsky contends, along with the fact that Yadlosky had been reprimanded unsuccessfully for his inappropriate advances toward others, prevented her from reporting Yadlosky.

D. Yadlosky's Termination

In her deposition, Minarsky recounted that she finally revealed the harassment and its emotional toll on her health to her physician in April of 2013. The doctor discussed the situation with Minarsky and emphasized the need to bring an end to the conduct. She encouraged Minarsky to compose an email to Yadlosky, so she would have some documentation.

Minarsky testified that she agonized over this, but finally sent Yadlosky an email on July 10, 2013, prompted by the incident in which Yadlosky allegedly reacted negatively when Minarsky asked to take time off for her daughter's treatment. She wrote, "I want to just let you know how uncomfortable I am when you hug, touch and kiss me. I don't think this is appropriate at work, and would like you to stop doing it. I don't want to go to Sylvia [Beamer]. I would rather resolve this ourselves." A. 170. Yadlosky responded,

> First and more importantly, I never meant to make you feel uncomfortable nor would I ever want to offend you in any way and I will STOP IMMEDIATELY. Secondly, almost from the first day you started (3 years and 9 months) I have been affectionate to you, among other people I was close to[ ] (only in a friendly manner, no other way intended), why have you never said anything to me before. Third, and to me most important, I thought we had a very good working relationship where we could approach one another on any matters. It disturbs me that you would put this out on an e-mail and not talk to me about this. Apparently I was wrong on thinking that. If you wanted to do this in writing, for proof, you could have typed this out and I would have signed it and you could have kept it.

A. 170. He confronted Minarsky about the email on July 12; she claims that he seemed mostly concerned that his reputation might be tarnished if someone else read her email.

Around the same time, Minarsky confided in her friend and co-worker, Rachel Carrico, about Yadlosky's harassment. When Carrico mentioned what was happening between Yadlosky and Minarsky to

another employee, Carrico's supervisor overheard the conversation and reported Yadlosky's conduct to Beamer. At first, Minarsky objected, for fear of losing her job. But Beamer had already been notified, and she interviewed Minarsky about her allegations within a few days. Beamer informed the County Commissioners, who agreed that Yadlosky should be terminated. The next day, Beamer interviewed Yadlosky. When he admitted to the allegations, Yadlosky was immediately placed on paid administrative leave, and then terminated. The County then hired a Human Resources Director to oversee personnel issues.

Minarsky quit several years later, and she alleges she was uncomfortable in her role after Yadlosky was fired, because her workload increased, and because of inquiries from her new supervisor asking about what had transpired with Yadlosky and who else she had caused to be fired.

II. Procedural History

Plaintiff Minarsky filed a Complaint, Amended Complaint, and a Second Amended Complaint with five causes of action against Susquehanna County and two against Yadlosky. The counts against the County were: gender discrimination, sexual harassment through a hostile work environment, and quid pro quo sexual harassment, all under Title VII of the Civil Rights Act; gender discrimination under the Pennsylvania Human Relations Act (PHRA); and negligent hiring and retention under Pennsylvania state law. The counts against Yadlosky, all under state law, were: gender discrimination under the PHRA (later withdrawn), intentional infliction of emotional distress (IIED), and assault.

The District Court granted Yadlosky's Motion to Dismiss the IIED claim but denied the County's Motion for Judgment on the Pleadings. After discovery, the County moved for summary judgment. The District Court adopted the Magistrate Judge's Report and Recommendation and granted the County's Motion for Summary Judgment, while dismissing the remaining count of assault against Yadlosky—the lone remaining state law claim—for lack of supplemental jurisdiction.

On appeal, Minarsky claims that the District Court erred in finding that the County had satisfied both elements of the *Faragher-Ellerth* affirmative defense as to the claim of sexual harassment through a hostile work environment and erred in dismissing the state law claim for lack of supplemental jurisdiction.

III. Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over final orders of the District Court pursuant to 28 U.S.C. § 1291.

[2, 3] We exercise plenary review over the grant or denial of summary judgment and apply the same standard the district court should have applied. *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009). Summary judgment is appropriate when, drawing all reasonable inferences in favor of the nonmoving party, "the movant shows that there is no genuine dispute as to any material fact," and thus the movant "is entitled to judgment as a matter of law." *Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). We deny summary judgment if there is enough evidence for a jury to reasonably find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

IV. Hostile Work Environment Claim

[4] On appeal, Minarsky does not contest the District Court's grant of summary judgment on the claims for gender discrimination and quid pro quo sexual harassment in violation of Title VII and the PHRA. Thus, we focus our analysis on the claim of sexual harassment based on a hostile work environment. To establish a Title VII hostile work environment claim against one's employer, a plaintiff employee must prove:

> 1) the employee suffered intentional discrimination because of his/her sex, 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of *respondeat superior* liability.

Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013) (internal citations omitted). Defendant Susquehanna County only contests the fifth prong, vicarious liability, which frames our analysis on appeal.

A. The *Faragher-Ellerth* Affirmative Defense

[5] In the companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), the U.S. Supreme Court established standards for when an employee who was harassed in the workplace by a supervisor may impute liability to the employer. In doing so, the Court acknowledged the sensitive nature of workplace harassment: "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character." *Ellerth*, 524 U.S. at 763, 118 S.Ct. 2257.

[6–8] If the harassment resulted in a "tangible employment action" against the employee, then the employer is strictly liable. *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 328 (3d Cir. 2015) (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 143, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004)). The Supreme Court has described a tangible employment action as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761, 118 S.Ct. 2257.[5]

However, if the harassed employee suffered no tangible employment action, as in the present scenario,[6] the employer can avoid liability by asserting the *Faragher-Ellerth* affirmative defense. The employer must show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807, 118

5. To prove a claim for gender discrimination under Title VII or the PHRA and quid pro quo sexual harassment under Title VII, a plaintiff must show that she suffered an adverse employment action, or "an action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Jones*, 796 F.3d at 326 (quoting *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004)). "Regardless of whether [tangible employment action] means precisely the same thing as 'adverse employment action,' we think it clear that neither phrase applies" in this case. *Id.* at 328.

6. Minarsky did not proffer evidence that she was reassigned, discharged, or demoted.

S.Ct. 2275; *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257.

[9] The cornerstone of this analysis is reasonableness: the reasonableness of the employer's preventative and corrective measures, and the reasonableness of the employee's efforts (or lack thereof) to report misconduct and avoid further harm. Thus, the existence of a functioning anti-harassment policy *could* prove the employer's exercise of reasonable care so as to satisfy the first element of the affirmative defense. *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275.

[10] To prove the second element of the affirmative defense, that the plaintiff unreasonably failed to avail herself of the employer's "preventive or corrective opportunities," the Supreme Court has held that "proof that an employee failed to [exercise] reasonable care to avoid harm . . . will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.* at 807–08, 118 S.Ct. 2275; *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257.

B. District Court Rulings

The Magistrate Judge recommended that the District Court grant summary judgment on all counts. He determined that the County acted reasonably: first, for maintaining an anti-harassment policy, with which Minarsky was familiar, and second, for reprimanding Yadlosky for his inappropriate conduct two times in the past and for promptly terminating Yadlosky once his misconduct toward Minarsky came to light.

The Judge also found Minarsky's silence—her failure to report the harassment—unreasonable. "The County's reasonable policies and responses," the Magistrate Judge wrote, "are set in stark contrast to the plaintiff's refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of County officials." *Minarsky v. Susquehanna Cty.*, 2017 WL 4475978, at *6 (M.D. Pa. May 22, 2017). The Magistrate Judge dismissed Minarsky's alleged apprehension of the Chief Clerk and County Commissioners as unreasonable, because her mistrust of them came "from the very employee Minarsky claims was harassing her," and was not sufficient to excuse her failure to report. *Id.* He cited to caselaw for the principle that a prolonged failure to report misconduct, when a policy existed to report the conduct, is unreasonable as a matter of law, under the facts of those cases.[7]

The Magistrate Judge acknowledged that a failure to avail oneself of a sexual harassment policy, in fear of retaliation, may be reasonable when grounded in fact, which he distinguished from what he found to be Minarsky's unfounded concerns. He contrasted Minarsky's situation with the plaintiff's in *Still v. Cummins Power System*, who observed fellow employees suffer retaliation for having followed the anti-harassment policy, and was thus justified in not reporting. 2009 WL 57021, at *13 (E.D. Pa. Jan. 8, 2009).

Minarsky lodged objections to the Magistrate Judge's Report and Recommendation, but the District Court rejected Minarsky's objections and adopted the Report and Recommendation in its entirety. The Court found that the County

7. *E.g., Newsome v. Admin. Office of the Courts of the State of N.J.*, 51 F. App'x 76, 80 (3d Cir. 2002) (non-precedential) (a two-year delay in reporting harassment was unreasonable); *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (seven-month delay unreasonable); *Cacciola v. Work N Gear*, 23 F.Supp.3d 518, 531–32 (E.D. Pa. 2014) (nine-month delay unreasonable).

satisfied the *Faragher-Ellerth* defense: although the County was unaware of Yadlosky's misconduct toward Minarsky, it warned him after each prior incident and fired him as soon as Beamer and the Commissioners were made aware of the allegations, all while Minarsky did not avail herself of the County's sexual harassment policy because she feared the consequences of reporting. The District Court concluded, "no reasonable jury could find that Plaintiff acted reasonably in failing to avail herself of the protections of the sexual harassment policy." *Minarsky v. Susquehanna Cty.*, 2017 WL 4475981, at *1 (M.D. Pa. June 28, 2017).

C. Analysis

1. Element One

The first element of the *Faragher-Ellerth* affirmative defense concerns whether the County "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275; *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257. We acknowledge that the County maintained a written anti-harassment policy, which Minarsky was asked to read and sign on her first day. The policy prohibited harassment in the workplace, directed employees to report any harassment to a supervisor, and provided that an employee "may" report to the Chief Clerk or a County Commissioner if the supervisor was the source of harassment. A. 166–67.

The District Court determined that the County had reasonable policies and responses so as to satisfy the first prong of *Faragher-Ellerth* as a matter of law. We disagree. While Yadlosky was reprimanded twice and ultimately fired, we cannot agree that the County's responses were so clearly sufficient as to warrant the District Court's conclusion as a matter of law. Yadlosky's conduct toward Minarsky was not unique; Minarsky's deposition testimony revealed a pattern of unwanted advances toward multiple women other than herself. *See, e.g.*, A. 102–03.

In addition to the mistletoe incidents and his advances toward Rachel Carrico and Connie Orangasick, Yadlosky had also made inappropriate physical advances to two of the women in authority, Chief Clerk Beamer and Commissioner Warren. Minarsky testified that when she later attended the hearing to determine Yadlosky's eligibility for unemployment benefits, she was shocked to learn of the extent to which Beamer knew of Yadlosky's pattern of inappropriate physical contact: apart from the two times Beamer reprimanded Yadlosky for hugging other employees, Yadlosky tried to hug Beamer, too.[8] In her deposition, Commissioner Warren also testified that Yadlosky attempted to hug her, put his arm around her, or kiss her on the cheek approximately *ten times*.[9] Although as a Commissioner, Warren was in a position to discipline Yadlosky for his behavior, and although she raised his misconduct to County Commissioner Hall, neither Warren nor Hall reprimanded Yadlosky.[10] Thus, County officials were faced with indicators that Yadlosky's behavior formed a pattern of conduct, as opposed to mere

8. In her deposition, Beamer testified, "Once I believe he was going to [hug me]. It was in my office and he started to come around my desk and I just said don't go there. That was early on." A. 192:10–12.

9. Warren: "He would kind of giggle like a girl, come around the table and lean over and ... hug me and tried to kiss me on the cheek.... I backed the chair up, told him to get away, [asked him what he was] doing and to stop being a jerk." A. 260:16–18, 21–22.

10. In her deposition, Warren stated that she needed another Commissioner to sign off if she were to take any action against Yadlosky.

stray incidents, yet they seemingly turned a blind eye toward Yadlosky's harassment.

[11] Was the policy in place effective? Knowing of his behavior, and knowing that Minarsky worked alone with Yadlosky every Friday, should someone have ensured that she was not being victimized? Was his termination not so much a reflection of the policy's effectiveness, but rather, did it evidence the County's exasperation, much like the straw that broke the camel's back? We do not answer these questions, but conclude that there exists enough of a dispute of material fact, and thus a jury should judge all of the facts as to whether the County "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275; *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257, and thereby determine whether the County satisfied the first element of *Faragher-Ellerth*.

2. Element Two

The second element, regarding the reasonableness of Minarsky's failure to report Yadlosky's behavior, presents a similarly troubling set of facts. On the one hand, she remained silent and did nothing to avoid further harm. On the other hand, her silence might be viewed as objectively reasonable in light of the persuasive facts Minarsky has set forth.

[12] We are sensitive to the Supreme Court's emphasis that the second *Faragher-Ellerth* element is tied to the objective of Title VII, to avoid harm, rather than provide redress. *Faragher*, 524 U.S. at 806–07, 118 S.Ct. 2275 ("[N]o award against a liable employer should reward a plaintiff for what her own efforts could have avoided."). We also acknowledge that our case precedent has routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable, as did the District Court here. *E.g.*, *Jones*, 796 F.3d at 329.[11]

[13] Nevertheless, we cannot ignore Minarsky's testimony as to why she did not report Yadlosky's conduct, and we believe that a jury could find that she did not act unreasonably under the circumstances.[12]

11. In *Jones*, the plaintiff's ten-year delay in reporting her alleged harassment was just one factor we credited in concluding that the defendant satisfied *Faragher-Ellerth*.

12. This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.

Recent news articles report that studies have shown that not only is sex-based harassment in the workplace pervasive, but also the failure to report is widespread. Nearly one-third of American women have experienced unwanted sexual advances from male coworkers, and nearly a quarter of American women have experienced such advances from men who had influence over the conditions of their employment, according to an ABC News/Washington Post poll from October of

[14, 15] Although we have often found that a plaintiff's outright failure to report persistent sexual harassment is unreasonable as a matter of law, particularly when the opportunity to make such complaints exists, we write to clarify that a mere failure to report one's harassment is not *per se* unreasonable. Moreover, the passage of time is just one factor in the analysis. Workplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury, in certain cases. If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.

Here, Minarsky asserts several countervailing forces that prevented her from reporting Yadlosky's conduct to Beamer or a County Commissioner: her fear of Yadlosky's hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; and the futility of reporting, since others knew of his conduct, yet it continued. All of these factors were aggravated by the pressing financial situation she faced with her daughter's cancer treatment.

[16] First, the particular nature of Minarsky's working relationship with Yadlosky complicated the situation. They worked alone one day each week, away from others, and on other days he continued to monitor her, ostensibly utilizing his control over her work environment to harass her. Appellees argue that the superior-subordinate dynamic is unremarkable, because all *Faragher-Ellerth* cases involve a power imbalance wherein the harasser controls the working conditions of the harassed. We disagree that this is irrelevant; the degree of control and specific power dynamic can offer context to the plaintiff's subjectively held fear of speaking up, for instance, if the supervisor "took advantage of the power vested in them ... to facilitate their abuse" or harassment. *Vance v. Ball State Univ.*, 570 U.S. 421, 458, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013) (quoting *Faragher*, 524 U.S. at 801, 118 S.Ct. 2275).

Second, when Minarsky attempted to assert herself in the workplace, she alleges that Yadlosky became "nasty," which deepened her fear of defending herself or disclosing Yadlosky's misconduct. For example, if she tried to request personal days off or ignored his phone calls on days she

2017. Most all of the women who experienced harassment report that the male harassers faced no consequences. ABC News/Washington Post, *Unwanted Sexual Advances: Not Just a Hollywood Story* (Oct. 17, 2017), http://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf. Additionally, three out of four women who have been harassed fail to report it. A 2016 Equal Employment Opportunity Commission (EEOC) Select Task Force study found that approximately 75 percent of those who experienced harassment *never* reported it or filed a complaint, but instead would "avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior." EEOC Select Task Force, *Harassment in the Workplace*, at v (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Those employees who faced harassing behavior did not report this experience "because they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation." *Id.*; *see also* Stefanie Johnson, et al., *Why We Fail to Report Sexual Harassment*, Harvard Business Review (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (women do not report harassment because of retaliation fears, the bystander effect, and male-dominated work environments).

was not working, he became ill-tempered. She said,

> He was just unpredictable with his temperament. I had to watch what I said to him. I had to watch how I acted around him. It seemed if he didn't get what he wanted, I seemed to get treated more miserably. The day would be harder if I spoke up about anything he said or [did] in the office. I had to just watch what I did.

A. 153:15–20; *see also* A. 158:6 ("[H]e had a temper."). Moreover, when asked why she was unable to vocally protest Yadlosky's attempts to kiss her, Minarsky stated that she needed her job to pay her daughter's medical bills, and worried that she might lose her job or otherwise be retaliated against if she voiced her distress.[13] When Yadlosky would approach Minarsky because "he thought he should kiss [her] on the lips before he left" each Friday, A. 97:21–22, Minarsky stated in her deposition, "I did not know how to respond. It happened so quickly. I was under probation so I was concerned that . . . if I did not, what was going to happen [to my job]."[14] A. 98:10–12. Although she avers that she meekly protested, she states, "I know I didn't dare speak up to him." A. 99:10–11.

We distinguish this situation from one in which the employee's fear of retaliation is generalized and unsupported by evidence. Several courts have held that a generalized fear of retaliation is insufficient to explain a long delay in reporting sexual harassment. *See, e.g.*, *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009) (citing cases from the Fifth, Sixth, Eighth, and Eleventh Circuit Courts of Appeals where a generalized fear of retaliation did not excuse a two-to-four month delay in reporting harassment).[15] The First Circuit Court of Appeals has held that a fear of retaliation that is substantiated by evidence in the record may excuse a failure to report, and the jury should decide the credibility of the witness expressing this fear. *See Burns v. Johnson*, 829 F.3d 1, 19 (1st Cir. 2016) (finding "evidence in the record that Burns feared retaliation, which is bolstered by the fact that others expressed fear of retaliation for mere participation in the . . . investigation into [the harassment, along with] evidence that Burns had earlier reported her concerns, including to her direct supervisor").

Here, Minarsky identifies instances where asserting herself rendered her working conditions even more hostile, and she was led to believe that she should not protest her supervisor's conduct. Presented with these facts, a reasonable jury could find that Minarsky's fear of aggravating her work environment was sufficiently specific, rather than simply a generalized, unsubstantiated fear.[16]

Third, although Minarsky's fear of retaliation was subjective, we disagree with the

13. Minarsky did, however, refuse to walk into his office if there was mistletoe hanging, and admits that this was the only time she specifically voiced her discomfort.

14. When Minarsky first began working at the County, her employment was probationary for the first six months.

15. *See Casiano v. AT & T Corp.*, 213 F.3d 278, 280–81, 287 (5th Cir. 2000) (a four-month delay was unreasonable); *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (two-month delay); *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005) (four-month delay); *Walton v. Johnson & Johnson Svcs., Inc.*, 347 F.3d 1272, 1277, 1290–91 (11th Cir. 2003) (two-and-a-half-month delay).

16. The trial judge can instruct the jury that a plaintiff's fears must be specific, not generalized, in order to defeat the *Faragher-Ellerth* defense.

District Court's view that it was clearly unfounded. Yadlosky discouraged her from using the anti-harassment policy by underscoring that she could not trust the Commissioners or the Chief Clerk—those to whom she would report the harassment. He warned her that they might "get rid" of Minarsky and her job, which she alleged "made it very hard for [her] to think of going to them." A. 101:20–21, 24–25. The District Court discounted this because it was Yadlosky himself who made these comments. But the fact that he was the harasser does not mean that Minarsky should have disbelieved his comments about people in authority whom he knew better than she did, and does not render her fear unfounded. Minarsky was merely a part-time employee. Yadlosky was the Director of Veterans Affairs for the County. We do not think that her failure to avail herself of this avenue was necessarily unreasonable, and a jury could find the same.

Fourth, Minarsky discovered that the County had known of Yadlosky's behavior and merely slapped him on the wrist, without more—bolstering Minarsky's claim that she feared the County would ignore any report she made. "[H]e had been warned and it went nowhere," she observed. A. 142:21. She proffered evidence that Yadlosky openly disregarded his behavioral warnings in front of Minarsky and continued to emphasize distrust with the County officials. She said,

> [The warning] didn't phase him at all and he's telling me not to trust the Chief Clerk, the Commissioners; they would get rid of me; they would get rid of my job. I didn't know how to perceive that. Was this going to mean my job if I speak up? *It didn't help the first time with the first person speaking up.*

A. 142:22–143:1 (emphasis added). A jury could find that Minarsky reasonably believed that availing herself of the anti-harassment policy would be futile, if not detrimental. *See, e.g.*, *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 437 (5th Cir. 2005) (a harassed employee "is not obligated to go through the wasted motion of reporting the harassment" if the employee reasonably believes that subsequent complaints would be futile).

Fifth, a reasonable jury could consider the pernicious nature of the harassment compounded with its frequency and duration to contextualize Minarsky's actions. Minarsky endured over three-and-a-half years of being kissed on the lips, touched, and embraced by her boss, without her consent, all while he sent her explicit emails and monitored her whereabouts. She witnessed him hugging others and asking female employees to kiss him under mistletoe. Minarsky seemingly agonized over her situation. She only revealed her harassment to her husband years later, because she knew he would have urged her to quit even though her family desperately needed the money. When Minarsky eventually did share her situation with her husband, she expressed that if she quit, she then feared Yadlosky would harass her replacement.[17] Even then, it was only after Minarsky's medical doctor emphasized that Minarsky was being treated inappropriately, and encouraged her to confront Yadlosky to hopefully bring an end to the harassment and its physical and emotional toll, did Minarsky finally do so.

Rather than view this merely as Minarsky's idle delay in reporting, a jury could consider the aggravating effect of prolonged, agonizing harassment as a way to

17. Minarsky: "I relayed to him that I was concerned about, if I quit, Tom [will do] this to the next person.... How do I quit, knowing that [Yadlosky is] going to continue this? How do I get him to understand that it's wrong?" A. 157:20–21, 22–24.

credit Minarsky's fear of worsening her situation.

Appellees argue that Minarsky's behavior was unreasonable, given her knowledge of the County's anti-harassment policy and her failure to use the policy, by pointing to the line in Minarsky's email to Yadlosky, "I don't want to go to Sylvia. I would rather resolve this ourselves." A. 170. While Appellees characterize this as evidence Minarsky deliberately refrained from using the policy's protections, Minarsky averred in her deposition that it was her way of informing Yadlosky that she *would* resort to the harassment policy if his conduct did not change.[18] Whether this evidence negates the reasonableness of Minarsky's non-reporting is for the jury, not us, to decide.

In sum, Minarsky has produced several pieces of evidence of her fear that sounding the alarm on her harasser would aggravate her work environment or result in her termination. A jury could consider this evidence and find her reaction to be objectively reasonable. We therefore cannot uphold the District Court's conclusion that Minarsky's behavior was unreasonable as a matter of law.

Thus, we will vacate the District Court's Order granting summary judgment in favor of the County and remand for further proceedings consistent with this opinion.

V. Supplemental Jurisdiction

Minarsky appeals the District Court's ruling not to exercise supplemental jurisdiction over her sole state-law claim of assault against Yadlosky. Because we vacate the dismissal of the hostile work environment claim under Title VII of the Civil Rights Act, on remand, the District Court will have a federal claim once again. The Court can therefore choose to exercise supplemental jurisdiction over the state-law claim, and thus we vacate the dismissal of the assault claim, as well. *See Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 140–41 (3d Cir. 2013).

VI. Conclusion

For the foregoing reasons, the judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

18. "That was my way of saying I hadn't gone to the Chief Clerk but, if I need to, I will." A. 115:22–23.

Felicia STROTHERS, Plaintiff-Appellant,

v.

CITY OF LAUREL, MARYLAND, (Mayor & City Council), Defendant-Appellee.

No. 17-1237

United States Court of Appeals, Fourth Circuit.

Argued: March 21, 2018

Decided: July 6, 2018

Background: African-American employee brought action in state court against municipal employer, alleging discrimination and retaliation based on her race in violation of Title VII. Employer removed action. The United States District Court for the District of Maryland, Paul W. Grimm, J., 232 F.Supp.3d 763, granted summary

THE REPORT OF THE INDEPENDENT INVESTIGATION OF DALLAS BASKETBALL LIMITED

SEPTEMBER 19, 2018

KRUTOY LAW, P.C.

LS Lowenstein Sandler

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I. Introduction

On February 20, 2018, *Sports Illustrated* published an article chronicling multiple allegations of sexual harassment and other workplace misconduct by current and former employees at Dallas Basketball Limited (the "Mavericks" or the "Company"). Within days of the article's publication, the Mavericks retained our law firms to conduct an independent investigation into these allegations and any other allegations of serious workplace misconduct that we might uncover. The investigation ultimately included the review of misconduct spanning over twenty years.

Over the following seven months, we conducted interviews of 215 witnesses. The witnesses included all current employees of the Mavericks, dozens of former Mavericks employees, and a number of other individuals with knowledge relevant to the investigation. We interviewed most witnesses with the promise of anonymity in this report, and some witnesses would only speak with us if we promised not to name them or otherwise disclose identifying information. One exception to the general rule of maintaining anonymity was for people identified in news articles as engaging in problematic behavior as to whom we found sufficient and credible evidence of misconduct. These individuals have been referenced by name.[1]

As part of the investigation, we reviewed a large number of documents and emails. We retained an independent forensics firm to review the Mavericks' current and former computer servers. Through a combination of manual and technology-assisted review, we reviewed 1.6 million documents. We were successful in obtaining emails and documents from 2015 and after (when the current server went into use). The forensics team was also able to recover a number of emails from a server in use until 2015. We also gathered additional emails and documents from Mark Cuban, Terdema Ussery, and Buddy Pittman. Through the Mavericks, we obtained and reviewed all relevant Human Resources files, some of which contained documents going back twenty years, as well as all employee handbooks, policies, and training.

We also sought to obtain employee data from the Mavericks, including relevant information on hiring, firing, promotions, salaries, salary increases, and bonuses. Due to poor record-keeping and a lack of automated data systems, we were only able to gather a fraction of this information.

In conducting this investigation, we received full cooperation from the Mavericks and Cuban. The Mavericks provided us with complete and unfettered access to employees and to documents within its control. Cuban encouraged all employees and anyone who contacted him to speak with us. Throughout the investigation, we were in regular communication with the NBA and its outside counsel retained to lead the NBA's oversight function. We updated them weekly on progress and findings and provided access to the investigatory materials for their review. NBA counsel participated directly in questioning Cuban on two occasions. Near the end of the process, we also met with NBA Commissioner Adam Silver to discuss our findings.

[1] The Investigative Team has not included other individuals who were alleged to have engaged in misconduct in news articles where we did not find sufficient and credible evidence to sustain those allegations.

The Investigative Team does not and will not represent the Mavericks in any other capacity related to this report or its findings.[2] Prior to this investigation, no member of the Investigative Team represented or even met any current or former employees of the Mavericks, including Cuban.

This report contains seven sections: Snapshot of the Mavericks Organization; Summary of Public Allegations; Sexual Harassment Law and Policy; Allegations and Findings as to Specific Individuals; Management and Organizational Issues; Recommendations; and Conclusion.

II. Snapshot of the Mavericks Organization

Mark Cuban, who purchased a majority stake in the Mavericks in 2000, presently operates the Mavericks through a limited partnership, Dallas Basketball Limited.

Dallas Basketball Limited is structured as two distinct divisions: basketball operations and business operations. The divisions are physically separated from one another, with offices in different buildings, and have been since 2001.

The basketball operations division consists of personnel dedicated to running the team and managing its players. The basketball division is led by a President and General Manager.

The business division generates revenue for the team and includes the following departments: Ticket Sales and Services, Marketing and Communications, Corporate Sales, Finance, Human Resources, and Information Technology. The business division has a President and CEO, as well as a senior leadership team made up of Executive Vice Presidents, Senior Vice Presidents, and Vice Presidents. At the time this investigation commenced, the Mavericks did not employ a full-time, in-house General Counsel. Rather, the General Counsel for Mark Cuban Companies served as General Counsel of the Mavericks.[3]

Prior to this investigation, Cuban was rarely in the Mavericks' business office. Instead, Cuban spent the majority of his time managing the basketball operations division, which until fall of 2017 was located three miles from the business office. Cuban's involvement in business operations was undertaken remotely via email.

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[2] The lead investigators were Evan Krutoy and Anne Milgram. Krutoy was an Assistant District Attorney in the Manhattan District Attorney's Office for more than twenty years, during which time he handled thousands of cases including high-profile homicide and sex crimes cases and also served as the Acting Deputy Bureau Chief of the Sex Crimes Unit. Milgram is a former New Jersey Attorney General, where she served as the state's chief law enforcement officer. Milgram also worked as a state prosecutor in the Manhattan District Attorney's Office and a federal prosecutor in the United States Department of Justice, where she was the Special Litigation Counsel for the prosecution of human trafficking crimes. The following individuals served as members of the Investigative Team: Jamie Gottlieb Furia, Joseph Fischetti, Rebecca Ryan, Alexander Strohmeyer, Natalie Dallavalle, Craig Dashiell, Cruz de Leon, and Angelique Loffredo.

[3] The General Counsel did not have an office in the Mavericks' business office, and estimated that he spent approximately 25 to 30% of his time on Mavericks matters, along with another attorney who dedicated about 35 to 40% of his time to Mavericks matters.

At the time that this investigation commenced in February 2018, the Mavericks had approximately 150 full-time employees across both divisions, with 120 of those employees working in the business division. Approximately 70% of the employees in the business division were men and 30% were women. The corporate sponsorship department, for instance, was 94% white and 76% male. Also at that time, the Mavericks did not employ a single woman or person of color at the executive level (*i.e.*, C-Suite, Vice President, Senior Vice President, Executive Vice President).[4]

III. Summary of Public Allegations

On February 20, 2018, *Sports Illustrated* published an article, "Exclusive: Inside the Corrosive Workplace Culture of the Dallas Mavericks," chronicling multiple allegations of sexual harassment and other workplace misconduct by current and former employees on the business side of the Mavericks.

In the article, allegations were made against Terdema Ussery (former President and CEO), Buddy Pittman (then-Senior Vice President of Human Resources, who was subsequently suspended), Earl Sneed (then-beat writer for the Mavericks, who was immediately terminated), Paul Monroe (former Vice President of Marketing), and an unnamed former employee later identified in a May 27, 2018 article in *The Dallas Morning News* as Chris Hyde (former senior ticket sales employee).

Over the course of our investigation, we uncovered additional allegations against some of these same individuals. Later news articles included allegations against other individuals who were not named in the initial article: George Prokos (then-Senior Vice President of Ticket Sales and Service, who was later suspended) and Rob Erwin (former Director of Ticket Sales).[5]

Finally, the news articles questioned whether, and to what extent, team owner Mark Cuban knew about serious workplace misconduct within the Mavericks.

IV. Sexual Harassment Law and Policy

In conducting this investigation, we were mindful of the applicable legal frameworks for sexual harassment under both federal and Texas law.

Title VII of the Civil Rights Act of 1964 and Texas Labor Code § 21.051 make it unlawful for an employer to discriminate against any individual because of that individual's sex. Sexual harassment is a form of sex discrimination. There are two ways in which a person can violate the law: through a hostile work environment or quid pro quo.

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[4] One female employee held the title of Vice President of Basketball Communications. However, the position is on the basketball operations side, and the employee did not attend executive level meetings or otherwise serve in a way that suggests she was a part of the executive leadership team. Another female employee briefly held the acting title of Interim Vice President of Marketing on the business side.

[5] Multiple news outlets published original content articles after the February 20, 2018 *Sports Illustrated* article, including *Sports Illustrated* (an op-ed by a former employee), *The Dallas Morning News*, and *Deadspin*.

A hostile work environment exists when unwelcome sexual advances, requests for sexual favors, sexually abusive or vulgar language, or other verbal, visual, or physical conduct unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment.[6] Pursuant to federal and Texas law, to establish sexual harassment under a hostile environment claim, an employee must demonstrate that: (1) he or she was subjected to unwelcome harassment; (2) the harassment was based on sex; and (3) the harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment.[7] The standard is judged both objectively and subjectively. Objectively, the conduct complained of must be severe or pervasive enough that a reasonable person would find it hostile or abusive. Subjectively, the victim must perceive the work environment to be abusive.[8] The complainant must demonstrate that he or she reasonably perceived the conduct as hostile.[9]

Quid pro quo sexual harassment occurs when submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual (*e.g.*, termination, denying or granting a promotion).[10]

Over the time period covered in this investigation, the Mavericks issued at least three separate employee handbooks, dated 2000, 2008, and 2017.[11] Each of these handbooks contained content regarding sexual harassment and provided accurate statements of what constitutes unlawful sexual harassment.

The Mavericks also provided anti-discrimination and anti-harassment training to employees in 2008 and 2015, to supervisors in 2008, 2013, and 2015, and to scouts in 2014. These trainings included an accurate statement of what constitutes unlawful sexual harassment and advised that harassment should be reported to Human Resources.

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[6] *See* 29 C.F.R. §1604.11(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986); *Mackey v. U.P. Enterprises, Inc.*, 935 S.W.2d 446, 455-56 (Tex. App.—Tyler 1996, no writ).

[7] *See* 29 C.F.R § 1604.11(a)(1); *Meritor Sav. Bank FSB*, 477 U.S. at 66-67; *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)); *Cox v. Waste Mgmt. of Texas, Inc.*, 300 S.W.3d 424, 435 (Tex. App.—Fort Worth 2009).

[8] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *Twigland Fashions, Ltd. v. Miller*, 335 S.W.3d 206, 219 (Tex. App.—Austin 2010).

[9] *Harris*, 510 U.S. at 21-22; *Waffle House v. Williams*, 313 S.W.3d 796, 806 (Tex. 2010).

[10] 29 C.F.R § 1604.11(a)(2); 29 C.F.R. § 1604.11(a)(3).

[11] The 2000 handbook set forth a procedure calling for any employee who feels that he or she is a victim of sexual harassment to bring those concerns to his or her supervisor, or if the supervisor is the alleged harasser, then to the Vice President of Human Resources. The 2008 and 2017 handbook called for reports to be made in the first instance to the Vice President of Human Resources, and if he is unavailable, then to the CEO. None of the handbooks advised employees on how to proceed if the complaint involved the CEO's conduct.

V. Allegations and Findings as to Specific Individuals

This report sets forth two groups of findings: (1) serious workplace misconduct by former and current employees; and (2) improper or ineffective management (including problematic responses to serious workplace misconduct).[12]

In evaluating allegations, we substantiated claims where we found sufficient, credible evidence to support them. We made a number of determinations as to witness credibility, which we have explained when helpful.

As set forth in more detail below, we have substantiated claims that include: allegations by fifteen current and former employees regarding inappropriate comments and touching by Terdema Ussery; allegations by dozens of current and former employees that Chris Hyde made inappropriate comments, viewed pornographic images and videos at the office, had a used condom fall out of his pants leg onto the office floor, and had violent and threatening outbursts in the workplace; and allegations by two women, including a former Mavericks employee, that they were victims of domestic violence at the hands of Earl Sneed.

To distinguish each witness's account, we have assigned each witness an appellation that consists of their affiliation with the Mavericks and a random witness number (*e.g.*, Current Employee 4, Former Employee 8). In reporting our findings, we have been sensitive to the fact that several of the complainants are still employed by the Mavericks. Therefore, we have not reported on certain facts of a personal or private nature if they were not necessary to our findings or if their disclosure might reveal a witness's identity.

A. Terdema Ussery

Ussery graduated from the Woodrow Wilson School of Public and International Affairs at Princeton University, earned a master's degree from the John F. Kennedy School of Government at Harvard University, and graduated from the University of California, Berkeley, School of Law. After some time as an attorney at Morrison & Foerster LLP, he became Commissioner of the Continental Basketball Association. He later became president of Nike Sports Management and left that company in 1996.

Ussery was the President and CEO of the Mavericks from 1997 to 2015. Ross Perot, Jr., who purchased a majority interest in the Mavericks in 1996, hired Ussery as CEO.

When Ussery joined the Mavericks, the team already had established leadership in the basketball operations division. Specifically, Mavericks minority owner Frank Zaccanelli joined the team with Perot and was actively involved in the management of basketball operations. Upon his arrival, Ussery sought to take an active role in basketball operations, which caused conflict between Ussery and Zaccanelli.[13]

[12] Over the course of our investigation into serious workplace misconduct, we deferred to the new Mavericks leadership to handle allegations of other misconduct that fell outside the scope of our investigation or that we felt would be most appropriately addressed internally.

[13] Perot and Zaccanelli declined to be interviewed for this investigation.

When Cuban bought the team in 2000, he invited existing staff, including Ussery, to remain with the Company. Ussery continued as CEO until 2015, when he took a senior position at Under Armour. Ussery left Under Armour within three months.[14]

Our investigation found that during his time at the Mavericks, Ussery engaged in improper workplace conduct toward fifteen current and former employees. Ussery's conduct ranged from inappropriate comments to touching to forcible kissing, and varied in severity and scope.

i. *The 1998 Investigation and Allegations of Sexual Harassment by Ussery between 1997 and 1999*

a. The 1998 Investigation

Sexual harassment allegations against Ussery surfaced less than a year into his tenure as President and CEO of the Mavericks. The individuals who made the allegations have never been identified publicly, and our investigation has not been able to discern with certainty who made the allegations that formed the basis of that investigation. However, our interviews of current and former employees pointed to three former employees who were the most probable sources of the allegations against Ussery in 1998.

We interviewed two of the three former employees. (The third declined to be formally interviewed; however, she did speak briefly with us and stated that she left the organization because of harassment by Ussery.) We found the accounts of the two former employees with whom we spoke to be credible.

First, Former Employee 4 recounted that she and Ussery started at the Mavericks around the same time. Ussery spoke with her about the difficulty of being in a new city, and asked her to call him at his hotel so that they could talk. Ussery then wrote down his hotel room number on a piece of paper and handed it to her. Former Employee 4 called that evening and, during the conversation, Ussery asked Former Employee 4 if she would go to dinner with him sometime. He then asked her, "Are you going to love me someday?" When she asked him to repeat what he had said, not believing that she had heard him correctly, Ussery again said, "Are you going to love me someday?" Former Employee 4 believed that Ussery was asking her to be sexually intimate with him; she quickly ended the phone call after that. She was very upset and immediately told a friend what had happened. The following day, Ussery approached Former Employee 4 in the office. He wrote another note stating "#," which Former Employee 4 interpreted as a request for her telephone number. She refused his request and did not call him at his hotel again. Ussery continued dropping by her desk to speak with her; for instance, on one occasion while they were discussing chocolate at her desk, he suggested that but for his marriage, he would take her to Switzerland so that she could taste Swiss chocolate. During her

[14] During his interview, Ussery refused to answer questions about his time at Under Armour. We contacted Under Armour for information about the circumstances regarding Ussery's departure, but Under Armour declined to comment beyond what had already been said publicly. In its statement after the publication of the *Sports Illustrated* article, Under Armour stated: "While we cannot disclose specific personnel matters, Under Armour takes these matters very seriously."

interview with the Investigative Team, Former Employee 4 produced the two notes that Ussery wrote to her. She also noted Ussery never physically touched her.

Second, Former Employee 2 recounted that Ussery frequently made comments about her appearance. He noted that Former Employee 2, like his college girlfriend, wore glasses that made her look sexy. This caused Former Employee 2 to stop wearing glasses when Ussery was in the office. She also said that when her manager was not present, he would sometimes come up behind her, give her a shoulder rub, and tell her that she was working too hard. Former Employee 2 said that Ussery's comments and touches made her uncomfortable. She eventually reported this to a manager, who said that he would look into it; one week later, Former Employee 2 was terminated by the manager and told that the organization wanted "a quiet, older person" in her role.[15]

After supervisors in whom these women had confided alerted senior management, Perot ordered an investigation into Ussery's conduct. Perot's outside attorneys conducted that internal investigation in 1998. No records from the investigation are available and the attorney who handled the witness interviews declined to be interviewed by the Investigative Team, citing concerns about the attorney-client privilege. Two other Perot attorneys, who oversaw the 1998 investigation, agreed to be interviewed. Also, a number of former and current employees provided information regarding the investigation.

None of the three women whom we believe made the initial allegations against Ussery were interviewed as part of the 1998 investigation; two declined to be interviewed and the third said that she was not contacted by the attorney who conducted the investigation.

The attorneys who oversaw the investigation could not specifically recall the substance of the women's complaints. However, they recalled that when confronted with the allegations against him, Ussery did not appear to be particularly offended by the accusations. They also noted that Ussery did not offer an outright denial of the accusations, but rather claimed that his interactions with the women were not exactly as they had been alleged. Perot's attorneys could not recall the specific findings they made, though they recalled that Ussery's behavior was "boorish" and "juvenile." Perot's attorneys remembered that they ordered Ussery to attend counseling and to provide written confirmation that he had done so. Ussery was also warned that further incidents would result in termination. Perot's attorneys also required that the Mavericks hire a full-time Human Resources manager.[16]

b. Investigative Findings and Analysis

We found credible the two witnesses who offered accounts of Ussery's misconduct. Both Former Employee 2 and Former Employee 4 contemporaneously confided in colleagues and supervisors that Ussery had acted inappropriately with them. Moreover, the reports were wholly independent of one another. We also found no evidence that either woman conspired with one another, or with anyone else, against Ussery.

[15] The manager, who is a former employee, did not respond to our request for an interview.

[16] Following the investigation, Ussery hired Buddy Pittman as the first head of Human Resources for the Mavericks.

In his interview with the Investigative Team, Ussery stated that he believed the 1998 investigation was a product of false allegations manufactured by Frank Zaccanelli, who wanted him fired. We found no evidence to support this claim.

With respect to the 1998 investigation itself, Ussery recalled being interviewed by an attorney who asked him questions about whether he made certain suggestive comments along the lines of "we should hang out" or "would love to get to know you better." Ussery stated that after meeting with that attorney, Perot and one of his attorneys separately called Ussery and said that everything was fine and that he could go back to work but that he should be careful. During his interview, Ussery did not recall any findings that he made inappropriate comments, nor did he recall being instructed to go to counseling. However, later in the interview, he conceded that he may have been ordered to attend sensitivity training.

Ussery denied any recollection whatsoever of Former Employee 2 and categorically denied ever commenting to an employee in her position about her appearance or massaging her shoulders. He did recall Former Employee 4, but said that he only tried to develop a rapport with her because he would often contact her in order to get in touch with her boss. Ussery did not recall the phone conversation from his hotel room with Former Employee 4 or asking her if she would love him one day. When the Investigative Team showed Ussery the slips of paper that Former Employee 4 had provided, Ussery noted the handwriting was sloppy but acknowledged that it might have been his handwriting. He then stated that he could have spoken with Former Employee 4 at night if he was trying to find her boss.

The Investigative Team does not credit Ussery's claim that the 1998 allegations were manufactured by a vindictive colleague vying for power. Rather, we find that the investigation was triggered by Ussery's inappropriate conduct in the workplace.

ii. *Allegations of Sexual Harassment by Ussery between 2000 and 2015*

a. Specific Allegations

In total, we find that Ussery engaged in misconduct towards fifteen current and former employees during his tenure at the Mavericks. In addition to substantiating the above-referenced allegations by two former employees against Ussery in 1998, we also substantiated allegations made against him by an additional thirteen current and former employees between 2000 and 2015.

We have provided a brief summary below of the allegations of misconduct against Ussery.

- Former Employee 8, an entry-level employee, reported that Ussery often held her hand during meetings and kissed her on the hand or cheek at the end of meetings. She also reported that one day, while they were speaking in Ussery's office, the conversation veered to the topic of an old surgery that resulted in a long scar down the length of her back. Ussery then suggested that they could go somewhere private so that he could see the scar. When Former Employee 8 equivocated, Ussery responded, "Never mind, I want to see it right now." He then grabbed her hand, stood her up, led her over to his side of

the desk, and lifted the side of her shirt up over her waist to about the bottom of her ribcage. A receptionist then walked into Ussery's office, apologized for intruding, and walked out the door. The meeting then ended and Former Employee 8 returned to her desk. Former Employee 8 was upset about this incident and told several other employees about it; she shared details of the incident with the other employees years before the publication of the *Sports Illustrated* article.

At his interview, Ussery denied having ever asked to see Former Employee 8's scar and instead recalled that when the topic of her scar came up, she walked around his desk and told him to feel it. He said he felt the scar for a "nanosecond" before a receptionist walked into the room.

- Former Employee 7 described how Ussery would touch her thighs and calves and would place his hand in her hand while stating aloud how perfectly they fit together. She stated that he would sometimes touch her leg while in meetings, but that he would do so under the table so that no one else in the room would notice. She described Ussery as very "touchy-feely" and stated that he also made several suggestive comments to her. In 2008, for example, Ussery asked her "if in another life I would marry him"; he repeated similar comments numerous times over the course of several years. When Former Employee 7 was traveling for a dancer photo shoot on the beach, Ussery asked her if she could send him "just one photo" while there. Ussery's conduct made her feel uncomfortable. When Former Employee 7 confided in a male colleague about Ussery's behavior, her colleague advised her to take notes of incidents as they arose. She did so, and she provided them to the Investigative Team. We also spoke with nine current and former employees with whom Former Employee 7 contemporaneously shared all or part of her allegations.

  Ussery described Former Employee 7 as "like a little sister" who he tried to get "settled and situated" within the Company.

- Former Employee 9 said that Ussery would often stop by her desk to chat, asking about her personal life and whom she was dating. She stated that he began complimenting her appearance and clothes, and that he would sometimes brush against her hip, chest, or arm. At first, Former Employee 9 thought that these touches happened "accidentally," but over time, she believed that they were intentional. For example, she and Ussery would sometimes be talking in a group and Ussery would put his hand on her back and swirl one finger along her back. At other times, he would make a swirling motion on her hand with his finger. Former Employee 9 said that he would sometimes make this swirling motion with his finger while in the presence of other people but from a position that prevented others from being able to see it. Former Employee 9 recalls that one time, while they were outside in a parking lot, Ussery kissed her on the lips in what she described as a "peck." She found it "shocking" and said it was not something she asked for or wanted. She pushed him back and made clear that she did not want to be kissed.

  Ussery denied kissing Female Employee 9 on the lips. Without mentioning Former Employee 9, we asked Ussery whether he ever said anything to anyone at the Mavericks that could have been construed as inappropriate. Ussery responded by noting that when Former Employee 9's pastor invited her to dinner, Ussery told her that the pastor must

have wanted something more. He also noted that he once gave her a CD and said, "if this doesn't get you going, nothing will," implying that it contained music suitable for intimacy. However, he denied having kissed her or having other sexual conversations with her.

- Current Employee 7 stated that after her first couple of weeks on the job, Ussery began telling her that she was "good looking" and "sexy." Ussery continued making these types of comments and escalated them over time. Current Employee 7 said these comments occurred not quite every time she saw him, but at least once a week. Current Employee 7 also noted that Ussery had a semi-private office that was essentially an enclosed cubicle with high walls that did not reach the ceiling. She noted that Ussery had a practice of waiting until the air conditioning turned on before making inappropriate comments, so that nobody outside could hear. In addition to comments, Current Employee 7 reported that Ussery's touching of her also escalated over time. From the start of her employment, it bothered her when Ussery touched her leg. It did not initially stand out to her when he would touch her arm, but over time, she felt more uncomfortable since he would touch her arm while also making comments like "one time." Current Employee 7 believed that the term "one time" meant something sexual because of the tone of voice in which he used it and because he would say it while physically touching her. This made Current Employee 7 uncomfortable, especially as Ussery's touches began lasting longer over time. On one occasion when she was meeting with Ussery in his office, he grabbed her face and forcibly kissed her on the lips. She pushed him away and told him that what he did was "absolutely not ok." She described the kiss as "sloppy and wet and made me feel really dirty." She also said that after she pushed him away, he said, "come on" and "just give me a chance."

- Former Employee 31 stated that her interactions with Ussery were professional at first, but as time went on, he began to act inappropriately with her. For instance, she said that Ussery would hold her hand for too long, hug her tightly, and put his hand around her waist. She also noted that once, when she was speaking to Ussery on the phone, he told her, "I would leave my wife for you." She thought that he might be "testing the waters" to see if she was receptive to his advances. Former Employee 31 said that Ussery would also brush up against her rear end, which at first she thought was an accident but later came to believe was intentional. She further stated that Ussery would approach her from behind when she was at her desk and massage her back. Other times, while she was standing, he would hug her from behind and put his full body against hers. She also noted that he would hold her hand and tickle her palm with his finger. Former Employee 31 stated that this conduct made her feel uncomfortable.

  When asked about Former Employee 31 during his interview, Ussery denied knowing who she was.

- Current Employee 8 stated that Ussery sometimes bumped into her and brushed up against her in a way that caused her to walk away questioning whether it even really happened. But as these incidents kept happening, and even escalating, Current Employee 8 came to believe that the conduct was intentional. Ussery also began touching her hand while wiggling his finger on her hand at the same time or patting her on the back.

Current Employee 8 said that even in front of other people in meetings, he would sometimes discretely put his hand on her thigh under the table.

Ussery stated in his interview that, generally, while he might sometimes tap someone's knee to get their attention during a meeting, he would not have placed his hand on someone's thigh.

- Current Employee 9 stated that Ussery sometimes gave her shoulder massages at her desk, leaned down to touch her knee at her desk, and asked her about her personal life and her sex life.

  When asked by the Investigative Team, Ussery conceded that he sometimes squeezed Current Employee 9's shoulders when walking past her desk. He also stated that he sometimes had sexual conversations with Current Employee 9. Ussery contended that Current Employee 9 initiated all of those conversations by remarking that she was lonely and not "getting any."

- Former Employee 10 recalled that Ussery twice came to her desk and, while making a joke about "putting hands on people" that she could not precisely recall, placed his hand on her hand. On each occasion, she pulled her hand away in response. Former Employee 10 also stated that on another occasion, Ussery walked up to her desk and, standing behind her, sniffed her hair. She responded by asking in a deliberately loud voice, "Did you just sniff my hair?" She said that Ussery then tried to turn it into a joke, stating, "Just tell everyone the CEO smelled your hair." Several other employees confirmed that Former Employee 10 told them about the hair-sniffing incident.

  When asked at his interview, Ussery stated that he did not recognize Former Employee 10's name and that he had no idea "why I would walk up and smell someone's hair," explaining, "That's just so weird to me."

- Current Employee 10 stated that Ussery had asked her if she was dating anyone, if she was working too hard, and if there was anything "we can do to help you have a personal life." On several occasions, Ussery asked her to go to breakfast or a movie; these offers made her uncomfortable, and she declined. Current Employee 10 also noted that Ussery provided her with his cell phone number and told her that if she needed to talk about anything, she could call him. She also said he later confirmed with her that she still had his number. Current Employee 10 also recalled that after Ussery announced that he was leaving the Mavericks, he took her hand, crossed their fingers together, and said, "That looks nice, doesn't it?" He added, "I'm leaving, you know."

- Former Employee 11 stated that Ussery asked her and another female employee to take a picture with him in a "Charlie's Angels" pose and that, during the pose, he put his hand high on Former Employee 11's thigh, which she then pushed away. Former Employee 11 also recounted that, when offered a position that would require her to interact with the basketball players, Ussery told her that she should not do so because she is an "attractive female" who could get a "bad rap" for being "someone that is just trying to get with players."

- Current Employee 4 recalled that Ussery sometimes gave her extended hugs lasting about twenty seconds while saying "mmm, mmm, mmm" in her ear. Current Employee 4 stated that she grew up as a "hugger" but that these hugs were conspicuously long, and prompted a co-worker to approach her to ask what Ussery was doing and what was going on. She said that these extended hugs with verbal sounds embarrassed her because everyone knew she was married.

- Current Employee 1 recounted an occasion when she was wearing a necklace with a pendant hanging from it; Ussery reached to grab it and his knuckles brushed against her breasts, causing her to tell him to back up. She said he would also make comments like, "Gee, you look really hot; I like that skirt."

- Former Employee 30 stated that Ussery made a number of inappropriate sexual comments to her. Four current and former employees stated that Former Employee 30 contemporaneously confided in them about Ussery's comments. Former Employee 20 stated that he heard Ussery make comments "laced with innuendo" to Former Employee 30. Although we substantiate that Ussery made inappropriate sexual comments to Former Employee 30, we cannot fully substantiate one specific comment that Former Employee 30 alleges Ussery made to her in the presence of colleagues: "You're going to get gang-banged this weekend." Excluding Ussery and Former Employee 30, only two of the four employees who were present recalled hearing Ussery make an inappropriate comment at all. Those two employees had different recollections of what the comment was. Former Employee 20 recalled Ussery saying something sexual about her "being with a bunch of guys," but could not recall the term "gang bang" being used. Former Employee 13 specifically recalled the "gang bang" comment, but provided us with a demonstrably false statement about a critical fact, and thus we could not credit Former Employee 13. We credit that Ussery said something inappropriate to Former Employee 30 at that time. However, there is insufficient, credible evidence for us to find that Ussery used the term "gang-banged."

  Ussery denied making the "gang bang" comment or having any sexual conversations with Former Employee 30. He further stated that the term "gang bang" is not part of his "lexicon" and that he does not use vulgar language.

b. Investigative Findings and Analysis

The Investigative Team has determined that there is sufficient, credible evidence to support allegations made against Ussery by thirteen female employees between 2000 and 2015. A number of factors were used to evaluate the credibility of the witnesses interviewed, including whether the witness complained of the conduct within a reasonable time of its commission, whether a witness's account was consistent or inconsistent over time, the witness's demeanor during the interview, whether there was other corroborative evidence, and whether a witness's narrative was logical and sufficiently detailed that it had the "ring of truth."

After applying these credibility tests to the witness accounts, we find the foregoing witnesses to be credible for a number of reasons. First, many of these women told colleagues about Ussery's misconduct when it occurred. Second, there are common threads that run

throughout the accusations — at times between women who do not even know one another — that speak to the credibility of each individual accusation. For example, one is hard-pressed to believe that Former Employee 9, Current Employee 8, and Former Employee 31 have all manufactured the unique fact that Ussery subtly made a swirling motion with his finger when his hand was on them. Finally, most of the witnesses gave detailed descriptions about their interactions with Ussery and discussed their experiences in a credible manner.

1. Ussery's Narrative

During his interview, Ussery categorically denied ever inappropriately touching, kissing, or making sexual comments to any female employee. However, when directly asked about specific women, Ussery acknowledged complimenting women in the office and massaging one woman's shoulders. He stated, however, that he was friends with these women and that one of them was "like a little sister" to him. Ussery further claimed that his sexual conversations with Current Employee 9 were prompted by her initiating sexual discussions with him.

We note that many of Ussery's assertions during his interview corroborated the women's accounts in important ways, such as Ussery's confirmation that he touched Former Employee 8's bare back in his office (though he claimed that Former Employee 8, then an entry-level employee just out of college, was the instigator) and that he would sometimes touch a person's leg during a meeting (which he depicted as a brief tap to get their attention). Moreover, when asked about possibly problematic interactions with women, Ussery volunteered the names of Current Employee 9 and Former Employee 9, and noted that he would interact regularly with Current Employee 7. For example, although Ussery denied having kissed Former Employee 9, he admitted to making sexually suggestive comments when she told him that a pastor had asked her to dinner. He also recounted giving Former Employee 9 a CD and saying, "if this doesn't get you going, nothing will," implying that it contained music suitable for intimacy.

While Ussery acknowledged parts of certain interactions with female employees, he denied doing anything inappropriate and, more generally, minimized his conduct. We find that Ussery's blanket denial of the other conduct, including denials that he even recognized the names of some accusers, lacks credibility.

One other issue merits discussion. Ussery, through his attorney, notified the Investigative Team that Cuban had reached out to him shortly after the *Sports Illustrated* article was published. Cuban also informed the Investigative Team about his outreach, and stated that he asked Current Employee 21, whom he knows well, to contact Former Employee 6 (who has a close personal and professional relationship with Ussery) and ask her to deliver a message to Ussery. Cuban's message was that he had no intention of "throwing [Ussery] under the bus." Cuban stated that he directed this outreach to Ussery in an effort to avoid public finger-pointing between Ussery and him. Current Employee 21 said that he tried to use a social media application to contact Former Employee 6, but they instead ended up having two phone conversations in which he conveyed Cuban's message. Ussery's attorney provided the Investigative Team with Former Employee 6's notes from the two phone conversations. Former Employee 6 did not inform the Investigative Team of this outreach. Moreover, Former Employee 6's notes are somewhat unclear and difficult to reconcile. In some places, the notes imply that Cuban would do what he could to minimize the public impact of the allegations

against Ussery if the investigation "comes out OK" for Ussery and he did not make "claims or amplif[y]" the situation. And in other places, the notes suggest that the investigation was completely independent and needed to run its course. We found no indication that this communication through intermediaries affected either Ussery's or Cuban's narrative when speaking with the Investigative Team.

2. Institutional Response

a) Buddy Pittman

Notwithstanding the foregoing, Ussery's Human Resources file does not contain a single allegation of sexual harassment.

We do not find the absence of reports to be an indication that the incidents in question did not happen. Rather, we find that employees did not report the harassment, and that within the organization there was a sense of futility with respect to making complaints to Pittman, the head of Human Resources and, at the time, the only Human Resources employee. This was particularly true with Ussery, who was the highest-ranking leader in the business organization and a close personal friend of Pittman.

In one instance, we found that Pittman took steps to protect Ussery. Former Employee 31, whose allegations against Ussery we substantiated above, stated that Pittman called her to a one-on-one meeting in his office in the old arena and closed the door. Former Employee 31 recounted that Pittman said that he had received reports that she had been "coming on" to Ussery by holding his hand and being flirtatious. Pittman then said, "Well that didn't happen, did it?" He continued, "Because he's a married man. You know he's a good Christian man. He would never do that." Former Employee 31 said that she was overwhelmed that Ussery's inappropriate conduct was being turned around against her. Pittman then asked Former Employee 31, "That didn't happen, right?" Former Employee 31 believed that Pittman was protecting Ussery and that Pittman wanted her to say that nothing had happened. And so, in response to his question, she said that "nothing had happened." Former Employee 31 recounted that she cried during the meeting in Pittman's office. At the end of the meeting, Pittman hugged her and joked, "Now you're not going to report me, are you?" Former Employee 31 told us that she was "devastated" by the conversation with Pittman and "did not know what to do."

Former Employee 23 saw Former Employee 31 leave Pittman's office in tears, after which Former Employee 31 confided in her about what had happened. In our interview of Former Employee 23, she corroborated that Former Employee 31 told her what had happened during the meeting with Pittman. Former Employee 23 added that after Former Employee 31 left Pittman's office, Pittman called Former Employee 23 into his office and told her, "If you hear anything else about this rumor, shut it down." In other words, when confronted with a rumor that the CEO engaged in improper conduct with an employee, Pittman reacted by summoning the employee who was the subject of the rumor, and another employee who had heard the rumor, and directing their silence.

In his interview, Pittman was asked about Former Employee 31. While Pittman recalled that Former Employee 31 worked for the Mavericks, he denied that he ever met with her about

Ussery or that she ever left his office crying and upset. Pittman broadly stated that he never had a conversation with Former Employee 31 about improper conduct with Ussery.

We find Former Employee 31's and Former Employee 23's accounts credible. Neither has worked for the Mavericks in over a decade and we have uncovered no reason why they would fabricate a story about Pittman. Moreover, both Former Employee 23 and Former Employee 31 were reluctant to cooperate with this investigation and revisit an incident that took place many years ago, believing they had put this behind them.

b) Mark Cuban

In his interview, Cuban stated that he was not aware of Ussery's misconduct prior to the *Sports Illustrated* article. We find credible Cuban's assertion that he did not know about Ussery's misconduct. Not a single current or former employee, including all of the complainants whose accounts we substantiated above, stated that they had told Cuban about Ussery's misconduct. Nor did we uncover any documentary evidence showing that Cuban was informed about Ussery's behavior.

B. Chris Hyde

The Mavericks hired Hyde on May 22, 2000 as a full-time Account Executive in the ticket sales department. During his time with the Company, Hyde was universally considered to be one of the most successful ticket sales employees, with twice the sales of any other employee. Hyde worked for the Company until May 22, 2014, when he was terminated.

Neither Hyde nor his attorney responded to our repeated requests for an interview.

i. Misconduct

Hyde's misconduct commenced shortly after he began working for the Mavericks and continued until he was terminated in 2014. Dozens of current and former employees have alleged that Hyde made inappropriate comments of a sexual nature in the office and viewed pornographic images and videos at his office workspace. Seven current and former employees reported that Hyde made unsolicited and unwanted sexual advances towards them. Hyde's Human Resources file also contains references to more than ten violent and threatening outbursts, often directed at co-workers.

Hyde's misconduct negatively affected those who were the subject of it, and also diminished other employees' respect for management. Based on Hyde's behavior, and management's failure to hold him accountable for it, many employees came to believe that workplace complaints would not be acted upon.

a. Viewing Pornography and Sexually Graphic Content at Work

Fourteen current and former employees personally witnessed Hyde viewing sexually graphic images on his work desktop computer, laptop, or while on his phone in the office. Another *fifty* current and former employees stated that, although they had not personally witnessed Hyde viewing pornography, they had heard from others that Hyde did so.

Furthermore, nine current and former employees expressed an understanding that Hyde's desk was moved to a cubicle against a wall so that fewer people would be exposed to sexual images on his computer screen.

In early 2008, a litigation-related document request led to a search of Hyde's work computer. Through this search, the Company discovered the presence of sexually explicit images on Hyde's computer. The Mavericks' General Counsel notified Cuban of this. In March 2008, Cuban sent an email to Hyde, stating that he "just found out about this" and continued:

> If you have any offensive pictures on your PC at the Mavs Chris, I will have you fired on the spot. No questions asked. I dont [sic] give a shit what you do on your own, but when its [sic] on a work computer, that crosses the line.

The email was subsequently forwarded to Ussery and Pittman.

Notwithstanding this warning, Hyde's viewing of pornographic and sexually graphic content at work continued. For example, Ussery recalled that in 2010 or 2011, Hyde asked Ussery to come to his desk to discuss a sale Hyde had made, and while there, Hyde opened an image on his work computer of Hyde standing naked and erect with naked women lying on a bed looking at Hyde in the background. Cuban stated that neither Ussery nor anyone else alerted him that Hyde continued viewing sexual content after Cuban's 2008 warning.

b. Sexual Advances

Seven current and former employees reported to the Investigative Team that Hyde made unsolicited and unwanted sexual advances toward them. For instance, Former Employee 15 said that Hyde made her uncomfortable by discussing his sexual proclivities and that he sometimes attempted to kiss her and "dog lick [her] face." After this conduct persisted for a few weeks, Former Employee 15 reported it to George Prokos, the head of the ticket sales department, whom she described as dismissive, and to Pittman, whom she did not believe considered it to be a serious issue. Moreover, Current Employee 1 stated that Hyde would say things like, "You've been married 40 years, wouldn't it be fun to be with a woman?"

Multiple women reported Hyde's misconduct to Pittman or Prokos (and in some cases, to both). In a January 2003 email to Prokos, Former Employee 21 wrote that Hyde was "verbally abusive to me" and "sexually harassed me . . . and the bottom line is he scares me." Prokos responded by questioning whether Former Employee 21 had made "any other official complaints" and asked for copies of such complaints. Prokos also wrote, "I do think you need to separate threatened from competitive. We are in a sales office where I expect people to be competitive."

c. Threatening or Intimidating Workplace Conduct

Hyde also repeatedly engaged in violent and threatening behavior in the workplace, beginning shortly after he started working at the Mavericks. Ussery, Pittman, and Prokos were alerted to more than ten instances of threatening conduct. For example, in January 2003 and

again in February 2003, Hyde sent "threatening" and "intimidating" emails to a male ticket sales employee.

Hyde's conduct continued over the years. There are notes in Hyde's Human Resources file of four departing employees advising that Hyde's presence and intimidating attitude contributed to their decisions to leave the Company.

In December 2008, Pittman met with Prokos and another supervisor in the ticket sales department off-site for the specific purpose of discussing Hyde's intimidating behavior toward his co-workers. According to a subsequent summary that Pittman sent to Ussery, Pittman told Prokos and the supervisor that "people perceive that [Hyde] runs the department rather than them, that he is above the law, and his behavior, appropriate and inappropriate, is not only tolerated, but the perception is that he is rewarded for it." Pittman further told Prokos and the other supervisor that a "[h]ostile work environment will not be tolerated." Pittman did not advocate for probation or termination of Hyde but instead told Prokos and the supervisor that they must "demonstrate that they can manage" Hyde and "mentor him in how to get along with others, respect others, control his temper, leave non-work problems at the door when he comes into the building, etc." Pittman stated that "if any future big incidents arise" with Hyde or if another employee quits and states that Hyde "is a primary factor in their decision to leave, [Hyde] will be subject to termination, even if I have to handle it myself." Pittman noted that Prokos offered "some defense of" Hyde, arguing that other employees were jealous of Hyde's success and that sales people are naturally "competitive."

Despite this conversation, Hyde's aggressive behavior continued. Two ticket sales employees — one female and one male — stated that in the spring of 2009, while in a conversation about a recent mass shooting, Hyde told them that if he were ever going to "take someone out," the female employee would be first, the male employee would be second, and then he would move on to other departments. Both employees told the Investigative Team that they interpreted Hyde's remarks as a threat to bring a gun into the office and shoot them. The threat so concerned the female employee that she told her family that if anything bad happened to her, they should consider Hyde a suspect. She also reported the incident to Ussery, Pittman, and Prokos. Although the male employee reported to us that he did not report the incident out of fear that he would be branded as a "whistleblower" and potentially be terminated as a result, he did confirm that this incident took place when Pittman and Prokos questioned him about it.

After this threat, emails between Pittman and Prokos indicate that they collaboratively worked on an agreement for Hyde to sign that explicitly reprimanded Hyde for this threat to "take out" his co-workers. Although there was no executed copy of an agreement in Hyde's Human Resources file, there was an unsigned document in the file, dated June 2009, that contained a reprimand explicitly referencing Hyde's threat to "take out" his co-workers. The document stated that Hyde was "hereby placed on indefinite probation and subject to immediate termination should any of these issues persist or any other violation of company policy occur." In this written reprimand, Pittman noted that Hyde's conduct violated Mavericks policy and was also unlawful.

Hyde's aggressive behavior was not limited to co-workers in the office. In March 2012, a fan who had rented a suite at a playoff game the prior year sent an email to Cuban regarding an

interaction he had with Hyde. The fan called Hyde when he had an issue with retrieving his tickets, and Hyde hung up on him. Hyde called the fan back and said, "Listen you worthless prick, don't you ever text me and tell me I am no good at my job." Cuban responded to the fan's email: "i truly apologize. If you ever have an experience you arent [sic] thrilled with PLEASE contact me so i can resolve it."

In Hyde's Human Resources file, there were more than ten documented instances of violent or threatening behavior by Hyde. Hyde's actions were in contravention of the Mavericks' policies and, in at least one incident, Texas law. Although Hyde received warnings and was threatened with termination, he remained employed without any significant consequences for fourteen years.

d. Stops at Hyde's Apartment on Arena Tours

For many years, Hyde took new ticket sales employees on tours of the basketball arena. These tours often included an unauthorized visit to Hyde's apartment. An employee in ticket sales complained about this to Prokos and Pittman in 2009, but four years later, Hyde was still engaging in the same practice.

In November 2013, Pittman wrote to Hyde to chastise him for this conduct. In a subsequent email to another supervisor that same day, Pittman noted that Hyde had "acknowledge[d] taking the group" to his apartment. Pittman further wrote:

> [Hyde] said that some of these young ladies have tweeted or texted him at night or on the weekends and asked him about his plans, if he was going out to party, etc. Know we have to take what he says with a grain of salt, but if this has occurred, it makes it appear mutual and not one sided. That is where I think people have to be careful about complaining, if it appears they encouraged the actions in any way.

e. Inappropriate Emails

On several occasions between 2004 and 2011, Hyde emailed sexually explicit images to colleagues from his work email. Hyde's supervisor, Prokos, was a recipient of a number of these emails, but he never disciplined Hyde for sending them. Nor did he report Hyde to Ussery or Pittman for sending inappropriate emails in the workplace.

f. The Condom Incident

In February 2011, several employees noticed a used condom lying on the floor of the office. Pittman reviewed the security camera footage and found that a condom slipped out of Hyde's left pant leg and onto the floor. The next day, Pittman sent an email to Prokos advising of what he had seen in the security camera footage.

In an email addressing this issue with Hyde the day after the incident, Prokos focused on the length of time Hyde was out for lunch, and not on the fact that a used condom was dropped in the middle of the Mavericks' business office. Prokos's email to Hyde stated:

> As per our conversation earlier today, I suggest you limit your lunch time away from the office to no more then [sic] one hour. Clearly this is not consistent with actions deemed appropriate for the work place. I trust you understand the message.

In an email to Pittman the next day, Hyde explained that he had been with his girlfriend at his apartment during lunch and must have forgotten "to discard the item in question." Hyde added: "just my luck that it would happen in the office." Pittman responded: "What happened was an embarrassment for not only you but for this organization . . . . It appears you not only took a two hour lunch period, but brought your personal business into the office in an inappropriate manner. I don't think luck has anything to do with it. It's the choices you make, Chris. Maybe time to grow up."

Pittman emailed an account of his investigation of the condom incident to Ussery. Ussery then forwarded the video of the incident to Cuban as "a confidential heads up," writing:

> [I]t's just a matter of time before something costly goes wrong with him and that[']s gonna cost us some money. My request is that at some point you let GP [Prokos] know that he has to control this guy…completely or he has to go. He is a walking lawsuit against us.

Cuban responded to Ussery:

> Don't make a bigger issue out of it than it is. Send [H]yde a letter saying the behavior is unacceptable that he is put on probation or whatever we can do and that another incident will result in termination.

It does not appear that such a letter was ever sent to Hyde by Ussery, Pittman, Prokos, or any other member of Mavericks leadership.

g. Ticket Sales Practices

In 2011, and then again in 2013, it became evident that Hyde was working with a large ticket broker to sell Mavericks tickets and may have been engaged in receiving kickbacks.

Following an internal investigation in 2013, Cuban sent an email to Prokos, the General Counsel of the Mavericks, and another senior manager: "This bullshit with Chris Hyde is going to end . . . and for the record, If there is a reason for us to recommend a customer buying from a broker, i want to see it . . ." Cuban also emailed Hyde directly forbidding this conduct. Hyde responded and commented that he added "millions to our bottom line." Cuban then wrote: "Let me be clear again. Follow the rules i set or you will lose your job chris. The integrity of the process is more important than the money. Are we clear?"

ii. Hyde's Termination

On May 15, 2014, Hyde's direct supervisor emailed Prokos about changes in the ticket sales department, and explained that Hyde had behaved inappropriately towards a new female

account executive. Hyde's direct supervisor forwarded the email exchange to Pittman, who in turn forwarded it to Cuban. In response to Pittman's suggestion that they make "disruptive" account executives into independent contractors who work remotely, Cuban stated, "Just fire chris talk to Terdema to make sure we are all on the same page. We will make up the sales elsewhere."

Hyde was fired a week later, on May 22, 2014.

iii. Investigative Findings and Analysis

a. Credibility

We have substantiated numerous allegations against Hyde, as outlined above. Sexually explicit images were found on Hyde's computer and sexually charged emails associated with his account were recovered through our forensics efforts. Additionally, the condom incident was captured on video surveillance and, after first denying that the condom had come from him, Hyde conceded that he dropped it and attempted to offer an excuse as to why it had happened. These issues — the photographs, emails, and condom incident — also corroborate multiple witness accounts of Hyde's sexual commentary and conduct, which we found independently credible.

Further, on numerous occasions during his tenure, Hyde did not deny the allegations lodged against him, but instead offered excuses for his misconduct. For instance, Hyde did not deny a number of the threats he made against various co-workers; instead, he contended that the comments were made in jest. Even as to the ticket resale issue, Hyde did not deny his relationship with the ticket broker, but instead argued that the long-term financial benefits justified his conduct.

As discussed below, the Mavericks leadership team bears responsibility for allowing Hyde to remain employed with the organization for as long as he was, despite his inappropriate and problematic behavior. Prokos, Pittman, and Ussery knew the full scope of Hyde's problematic behavior, and Cuban, although unaware of most of Hyde's misconduct, failed to adequately address the discrete and troubling incidents that were brought to his attention.

b. Institutional Response

1. George Prokos

Prokos joined the Mavericks in 2000 as Director of New Revenue, and ultimately became Senior Vice President of Ticket Sales and Services. Prokos was Hyde's senior supervisor for the entirety of Hyde's employment with the Mavericks.

We find that Prokos took no meaningful action to discipline Hyde, and failed to initiate even a single disciplinary action against him. Remarkably, during his first interview, when

Prokos was asked about workplace misconduct and sexual harassment, Prokos did not mention Hyde's name once.[17]

Moreover, Prokos failed to address employee complaints about Hyde's conduct. On one occasion, Prokos dismissed an employee's complaint that Hyde had verbally and sexually harassed her as "extreme" and admonished her to distinguish "threatened from competitive." When questioned by the Investigative Team, Prokos was critical of the female employee and argued that he responded this way because the female employee and Hyde had a "brother-sister relationship," and would fight and then make up. Prokos's response evidences the dismissive attitude he took to complaints of misconduct by Hyde. Instead of disciplining Hyde, Prokos challenged the female employee who reported the misconduct to him.

Further, although it was common knowledge that Hyde routinely viewed pornographic material at work, during his second interview, Prokos was unable to state whether he ever saw pornography on Hyde's computer or phone. Prokos further claimed that he did not recall receiving any complaints about Hyde viewing pornography at work. Although our investigation found that Hyde's desk was moved against the wall to shield co-workers from seeing the pornography, Prokos claimed not to know the reason for the move. We find that Prokos lacked credibility on these points.

The condom incident also demonstrates Prokos's failure to address significant misconduct by Hyde. After security footage showed that Hyde was the source of the condom, Prokos sent an email to Hyde telling him to "limit your lunch time" to no more than an hour. The email ignores the gravamen of the incident: the dropping of a used condom on the office floor during work hours. Prokos said that he probably had additional conversations with Hyde, in which he expressed that Hyde's actions were inappropriate. We question this assertion; it strains credibility that Prokos would have committed only part of an oral reprimand to writing, and it makes even less sense for the part committed to writing to be the *less* severe part of the misconduct.

In his interview, Prokos also sought to minimize this incident by saying that he thought Hyde dropped the used condom unintentionally and did not mean to offend anyone. Whether or not Hyde intended to drop the condom misses the point: Hyde's behavior, regardless of his intent, was deeply inappropriate and required a severe sanction, such as termination.

In spite of Hyde's misconduct, Prokos routinely rewarded Hyde by giving him access to premium ticket inventory that was generally not available for sale. Prokos said he did this because Hyde asked him about these opportunities, while other ticket salespeople did not. Prokos argued that he was simply rewarding Hyde, an exceptional salesperson with initiative. This preferential treatment of Hyde, when seen by co-workers in concert with Hyde's misconduct, had a deleterious effect on the morale of the ticket sales department.

Prokos conceded during his second interview that he was empowered to terminate Hyde, but said that while Hyde's actions over the course of fourteen years may collectively look bad,

[17] Prokos was one of our first interviews in this investigation; at the time, we did not yet know about Hyde. When we interviewed Prokos for the second time, we asked pointed questions about Hyde.

each discrete action felt small at the time. Prokos further indicated that he was never directed to terminate Hyde by anyone senior to him at the Company, and if he had been so directed, he would have followed the order.

In making excuses for Hyde, and failing to properly supervise him, Prokos allowed Hyde's behavior to continue unabated. This negatively affected the ticket sales department and, indeed, the entire business side of the organization.

2. Terdema Ussery

As President and CEO of the Mavericks, Ussery had the responsibility of ensuring a safe workplace. To do so, he was vested with the power to hire and fire staff, and he did just that on a number of occasions. Further, in emails to Cuban, Ussery referenced his ability to discipline Hyde in particular. For instance, on two separate occasions, Ussery informed Cuban that Hyde had been placed on probation: once in 2009 for a "bullying" incident and again in 2010 for an issue with "tardiness." In the "bullying" email, Ussery asserted his authority to fire Hyde without pre-approval from Cuban, telling him that Hyde is "gone with the next incident." Nonetheless, Ussery never fired Hyde.

In his interview, Ussery stated that Hyde was protected by George Prokos, a personal friend of Cuban's, which made him "untouchable." Ussery further stated that he lacked the authority to fire Hyde and so instead advocated to Cuban for Hyde's dismissal. Ussery claimed that Cuban routinely dismissed his arguments that Hyde should be fired by telling Ussery to let Prokos "handle it." Ussery further said that he advised Cuban of Hyde's more egregious acts by emailing Cuban or attempting to speak to Cuban in person on game days. Ussery stated that he had, in total, between five to ten conversations with Cuban where he vigorously advocated for Hyde's firing. Ussery referenced his inability to fire Hyde as "embarrassing to admit as President and CEO of the organization" and something that caused him great frustration.

There is evidence that Ussery was critical of Prokos's management and handling of Hyde, particularly after the 2011 condom incident. We credit that Ussery was aware that Hyde was a problem in the office and that, from at least 2011 onward, believed Hyde should be terminated. But Ussery's claim that he was a constant and vocal advocate for Hyde's departure is undercut by the emails that we reviewed. Although Hyde's misconduct started shortly after he began working for the Mavericks in 2000, it was not until 2009 that Ussery first wrote to Cuban about an issue related to Hyde's behavior. (The allegation that Hyde had pornography on his work computer in 2008 was elevated to Cuban by the Mavericks' General Counsel, and not by Ussery.) Even then, it was only a vague statement, buried deep in a lengthy email on budgeting issues, that Pittman had been tasked to "watch . . . Chris' relationship with the other employees to ensure that nothing that can be construed as 'bullying' is going on." Ussery went on to write that Hyde had been placed on probation. As such, it was nine years into Hyde's tenure, and after numerous instances of harassing and threatening behavior, when Ussery first wrote to Cuban about Hyde.

The "bullying" noted by Ussery was actually a reference to the incident when Hyde, in discussing a recent mass shooting, identified which of his colleagues he would "take out" if he brought a gun to the office. Ussery's email dilutes Hyde's conduct to the point of being

misleading and belies Ussery's claim that he vehemently advocated for Hyde's departure years before Hyde dropped the used condom on the floor. Given Hyde's history of threatening and abusive behavior, this threat toward co-workers required a serious and immediate response, such as termination. Yet, Ussery did not fire Hyde or provide Cuban with any details of this particularly troubling incident.

Even if Ussery truly wanted Hyde to be terminated for the condom incident, we do not find credible his contention that he aggressively took steps to achieve this goal. In an email to Cuban, Ussery deflected responsibility for addressing this issue by suggesting that Prokos had to control Hyde or that Hyde should be discharged.

Furthermore, Ussery's claim that he repeatedly sought to terminate Hyde is undercut by his admission that, on one occasion in the workplace, Hyde showed Ussery a graphic sexual image of Hyde with naked women. Ussery was aware that Cuban had told Hyde he would be terminated if he had pornography again; however, Ussery did not inform Cuban of this incident, nor did he take action himself to address Hyde's misconduct.

As Ussery conceded, he never approached Cuban with the comprehensive list of Hyde's misconduct that Pittman had drafted, nor did he separately meet with Cuban to address Hyde's behavior, outside of short conversations during basketball games. Hyde's behavior was so extreme that it demanded a greater level of attention and action by Ussery. As President and CEO of the Mavericks, he was duty bound to do more.

3. Buddy Pittman

During his interview with the Investigative Team, Pittman argued that he lacked authority to terminate Hyde. However, Pittman previously claimed to have this authority on more than one occasion. For example, Pittman threatened to terminate Hyde in December 2008 when he held an out-of-office meeting with Prokos and another supervisor in ticket sales to discuss Hyde. Pittman recounted this outing to Ussery via email and related that he told Prokos he could have had Hyde fired "on the spot" when Hyde threatened Pittman. Pittman further stated that he told Prokos that if any more employees left the organization because of Hyde's behavior, Hyde "will be subject to termination even if [Pittman] had to handle it himself." Nonetheless, Hyde engaged in problematic behavior for another six years following Pittman's admonition that he would "handle [Hyde's firing] himself."

During our investigation, we found that Pittman failed to appropriately address Hyde's misconduct. Instead, Pittman alerted Ussery and/or Prokos to reports of misconduct and left it to them to determine whether to discipline Hyde. After the 2009 incident when Hyde threatened to "take out" his co-workers, Pittman worked collaboratively with Prokos to draft a contract placing Hyde on probation; yet Pittman did not recommend any sanction other than the threat of termination should Hyde re-offend. This is especially concerning in light of the fact that six months earlier, as noted above, Pittman had told Prokos that he would fire Hyde himself if there were another "big incident." Hyde's threat to "take out" two colleagues was an act that Pittman deemed unlawful, and was a significant incident that should have triggered Hyde's firing.

The Investigative Team credits that Pittman genuinely believed Hyde was a significant problem. In fact, on two occasions Pittman drafted memoranda outlining Hyde's misconduct. Pittman, however, did not exhibit the leadership required to fire Hyde, or to advocate aggressively for Hyde's termination. Further, at times, Pittman minimized Hyde's transgressions. For instance, in 2013, Pittman emailed Hyde and criticized him for flirting with new female hires and taking new hires to his apartment while on an arena tour. Hyde responded that female employees reached out to him socially. After speaking with Hyde, Pittman expressed concern to another supervisor that some of the complaints may have been based on conduct that was "mutual and not one sided" and cautioned that "people have to be careful about complaining, if it appears they encouraged the actions in any way." Pittman's response was problematic, especially in light of Hyde's history. Regardless of whether female employees reached out to Hyde socially, his conduct in bringing new employees to his apartment during the workday was inappropriate.

4. Mark Cuban

Although the majority of Hyde's misconduct was not elevated to Cuban, Ussery and Pittman brought several discrete and problematic incidents to his attention. This conduct should have prompted Cuban to engage his management team, both to seek their counsel and to learn the full scope of Hyde's behavioral issues. Cuban did not do so, and his piecemeal involvement in Hyde's discipline contributed to Hyde's lengthy tenure with the organization.

In 2008, Cuban was alerted by the Mavericks' General Counsel that a litigation-related document request had led to the discovery of pornography on Hyde's computer. Cuban stated that this was the first time he was notified of problematic behavior by Hyde. Cuban addressed the issue with Hyde directly via email. Cuban imposed a zero tolerance "sanction," writing that Hyde would be fired if he had pornography on his computer again. Prior to making this decision, Cuban should have consulted with Pittman, Ussery, or Prokos. They knew the most about Hyde's issues and were directly responsible for his supervision. Critically, had Cuban sought their input he might have learned that Hyde did not simply have sexual images on his computer but, in fact, regularly viewed them at work in front of other employees.

In 2011, Ussery forwarded a detailed account and video of the condom incident to Cuban, along with a recommendation that Prokos be held responsible for controlling Hyde or Hyde be discharged. Cuban responded, in part: "Don't make a bigger issue out of it than it is." In his interview, Cuban said that, at the time, he saw the condom incident as an isolated event and did not consider it to be a "big deal." He also stated that he believed that Hyde had listened to his warning years before, as he was never informed about Hyde viewing pornography again. Thus, Cuban said that he believed that Hyde would improve his behavior if placed on probation. He also stated that if the incidents had occurred within a matter of months rather than years, he probably would have terminated Hyde immediately.

We find that the condom incident warranted Hyde's termination, unto itself, and that Cuban's decision to retain him following this was a significant error in judgment. At the time of the condom incident, Cuban was aware of the pornography issue from three years earlier. And although Cuban states that he did not recall it at the time, Ussery had also emailed Cuban in 2009 and 2010 with vague references to "bullying" and "tardiness." Problematically, what Ussery had

simply called "bullying" by Hyde was actually a threat of violence against co-workers, and both Ussery and Pittman possessed a great deal of additional information regarding Hyde's history of misconduct that they did not share with Cuban. Cuban should not have made a sensitive personnel decision about Hyde without learning the totality of Hyde's conduct in the office; it was incumbent upon him to fully review Hyde's misconduct before rendering a decision. Cuban also acknowledged that, in retrospect, he failed to consider how other employees would feel about something like the condom incident happening at the office. In fact, given how well known the incident was within the office, it led to a further belief amongst employees that Hyde was untouchable.

In 2014, Cuban instructed Pittman to fire Hyde, after learning of additional misconduct by Hyde against a new female account executive. In his interview, Cuban stated that he gave permission to fire Hyde because he was fed up with dealing with personnel problems in the ticket sales department, and in particular with Hyde.

C. Earl Sneed

In 2009, the Mavericks hired Sneed as a writer for the team's website. Sneed, who was initially hired on a per-story basis, became a full-time employee on August 1, 2010.[18]

i. First Incident

a. Evidence

Jane Doe, who was then Sneed's fiancée, told the investigative team that Sneed physically assaulted her on January 30, 2011. Doe stated that an argument between them triggered a violent outburst by Sneed, in which he slammed her against a wall, slapped her arm, and covered her mouth so that she could not speak. Doe stated that when Sneed briefly left the apartment, she dead-bolted the door. Sneed broke down the door, according to Doe, while she was on the phone calling 9-1-1. He then took her phone and ended the call.

Doe stated that she suffered a broken wrist and bruising as a result of Sneed's actions. Doe went to the emergency room the following day and her medical records confirm that she was diagnosed with a broken wrist and a bruise on her hand.

In an interview with the Investigative Team, Sneed denied that he had assaulted Doe. He claimed that she initiated the violence that day. Sneed alleged that Doe lunged at him and clawed at his neck and face. In response, Sneed said that he slapped Doe with his open hand. Sneed told the Investigative Team that he used his left hand to slap Doe because he did not want to actually hurt her (Sneed is right-handed). Sneed also admitted that he physically broke down the door and that Doe was on the phone when he reentered the apartment. He claimed, however, that Doe was on the phone in the kitchen laughing and drinking a glass of water. Sneed claimed that he believed Doe was on the phone with her father.

[18] Sneed was offered the job after he reached out directly to Cuban and asked for the opportunity to work for the Mavericks. Cuban did not know Sneed, but decided to hire him on a trial basis, based on Cuban's belief that the organization needed to generate more online content.

Sneed stated that he never held Doe's wrist or did anything that would have caused her to break her wrist. He claimed that he heard Doe say "ouch" when a bag of his clothing that she was carrying split open, and alleged that Doe's injuries came from her dropping the bag. (Doe denied that she carried a bag of Sneed's clothes after his assault.)

After the incident, Sneed apologized to Doe via Facebook message. Doe provided the Investigative Team with this Facebook exchange, in which Sneed wrote, in part: "I am very sorry to hear about your wrist and I take responsibility for that. I have zero ego in this situation, and I know what I did. I pray that everything works out according to God's plan."

On March 21, 2011, Doe emailed Cuban and Sneed's direct supervisor at the time, to tell them that Sneed had physically assaulted her. The email detailed, among other facts, that she had been "repeatedly abused by Earl," sustained a broken wrist in her most recent encounter with him, and that a warrant had been issued for Sneed's arrest.

Pittman met with Sneed the next day. In that meeting, Sneed told Pittman that he had never physically assaulted Doe but that they often got into verbal arguments. Sneed further alleged that Doe had physically attacked him, and that she had clawed at his neck and face. Sneed told Pittman that after this he had slapped Doe with his open hand to stop her from attacking him.

Sneed emailed his supervisor and Cuban on March 22, 2011, shortly after his meeting with Pittman, and offered his "deepest apologies" that his personal life had "spilled over into the workplace." He said that he intended "to take legal action against her." Cuban replied to Sneed, copying Pittman and Sneed's supervisor, "[L]et us know if we can do anything Earl."

On March 24, 2011, Pittman sent an email to Cuban and Ussery alerting them that a police detective had asked Sneed to come to the police station. The next morning, Sneed was arrested outside of the Mavericks facility. Upon learning of the arrest, Cuban wrote, "[O]k, if earl is going to be gone, lets find out whether the guy has an anger issue or an old girl friend issue." Cuban also agreed to hire an attorney for Sneed, instructing the Mavericks' General Counsel to retain an attorney for him and send Cuban the bill.

Ussery initially advocated for Sneed with Cuban, writing that Sneed should continue with his assignments: "Earl is young and has done good work for us. Not sure what and where the real issue is yet but one of the things we might want to do is get him on a plane tomorrow and have him rejoin the team . . . . get him back up and in the saddle . . . . and away from here. Says a lot about our loyalty and will get his mind off of things."

Soon thereafter, Sneed was arraigned on criminal charges of assault and interference with an emergency telephone call. Pittman picked up Sneed after his release on bail, and Sneed later took a commercial flight to join the team at its away game, despite not receiving approval to do so. This prompted Ussery to tell Pittman to "stay close" and watch Sneed.

Sneed pleaded guilty in June 2012 to the two misdemeanors with which he had been charged. He was sentenced to a period of probation, during which time he was forbidden from having any contact with the victim and was required to undergo a domestic violence treatment program and perform community service. He was also ordered to pay a fine. Upon the completion of these court mandates, the charges that Sneed had pleaded guilty to were dismissed.

In his interview with the Investigative Team, Sneed said that he pleaded guilty because he wanted to resolve the case without a trial and avoid potential negative publicity, but that he was not guilty.

There is no indication that Ussery, Pittman, Sneed's supervisor, or Cuban followed Sneed's court case or made any effort to learn how his arrest was resolved.

b. Investigative Findings and Analysis

1. Sneed's Credibility

The Investigative Team found that Sneed was not credible when he described the incident with Jane Doe. First, Sneed pleaded guilty to the charges against him, and we credit that those pleas were both knowing and voluntary. Also, Sneed's apologetic Facebook messages to Doe in the days immediately following the incident serve as admissions of responsibility corroborating the legitimacy of his court plea. Moreover, the notion that Doe was the aggressor or that Sneed did not hurt Doe strains credulity. As her medical records show, Doe suffered serious injuries as a result of this incident.

It was obvious to the Investigative Team that Sneed downplayed the fact that he was physical with Doe. For instance, Sneed stated that he never held Doe's wrist or did anything that could have injured her. However, Sneed's description as to how Doe injured her wrist — by dropping a bag of clothing — is implausible. While Sneed conceded that he slapped Doe, he claimed that, in the middle of a heated dispute, he consciously made the decision to slap her with his left hand so as not to inflict any harm. It strains credulity that someone in such a dispute would make this calculation. The Investigative Team does not credit this assertion, but rather views Sneed as minimizing his conduct. Further, Sneed repeatedly denied causing any physical injury to Doe. He did so as per Pittman's emails and handwritten notes, during a radio interview, and in his interview with the Investigative Team. We find that Sneed's version of events is false, and as such we view his statements as showing consciousness of guilt. If Sneed had not played any role in causing Doe's wrist injury, he would not find it necessary to fabricate an excuse.

Further, Sneed admitted that he broke the door to the apartment to gain entry after Doe had locked him out. This is a particularly violent act and, in our view, corroborative of Doe's narrative that Sneed was the aggressor that day. Sneed also conceded that, upon entering the apartment, he observed Doe on the phone, but claimed that she was drinking water and laughing at the time. Again, it is simply not credible that Doe would be acting in this manner following Sneed's violent entry into the apartment after physically assaulting Doe and breaking her wrist. Sneed admitted what he could not deny and denied what he could not admit: he admitted taking Doe's phone away from her but denied knowing that she was calling 9-1-1 at the time.

During his interview, Sneed stated that he photographed some of the injuries he sustained during two separate incidents with Doe. Sneed's representative subsequently emailed four photographs to the Investigative Team. In that email, Sneed's representative stated that the photographs depicted Sneed's injuries from a 2011 altercation with Doe.[19] We have no way to

[19] The four photographs depict: a scratch and redness near Sneed's Adam's apple and a second scratch on the left side of his neck; a scratch on the right side of Sneed's neck beginning at his jaw line and extending to his upper

substantiate whether any of the injuries in the photographs were a result of the January 30, 2011 incident. Regardless, the photographs do not exonerate Sneed or change our analysis; Doe conceded that she fought back during the incident with Sneed.

Doe's version of events — that Sneed left in haste for fear of the arrival of the police — is the far more credible account and logical explanation as to why Sneed took the phone. Sneed, in fact, offered no meaningful explanation as to why he would have taken the phone if he truly believed Doe was speaking with her father, and the Investigative Team credits that Sneed believed Doe had called the police.

Overall, we conclude that Sneed is unworthy of belief on critical facts and pleaded guilty to assaulting Doe and stopping her from calling 9-1-1 because he was, in fact, guilty.

2. Institutional Response

The organization's failure to explore the underlying facts of Jane Doe's allegations, and its inclination to support Sneed despite this lack of information, is problematic. No one took responsibility for managing the Company's response to this incident. While the email exchanges between multiple managers can be viewed as a collaborative approach, the reality is that it contributed to the failure of any one person to make a potentially difficult decision: whether to discipline or fire Sneed.

On March 21, 2011, Cuban, Ussery, Pittman, and Sneed's supervisor were aware that a woman was alleging a series of serious accusations against Sneed. If the organization questioned Doe's veracity, it would not have been difficult to speak to her to learn more about her allegations. The organization had her name and email address and, as evidenced by the brief exchange she initiated with Sneed's supervisor, Doe was willing to share information about her relationship with Sneed.

Further, on the heels of Doe's email, Sneed was arrested publicly outside the Mavericks facility. Cuban, Ussery, Pittman, Sneed's supervisor, and the General Counsel of the Mavericks were involved in discussions about Sneed's arrest. However, any attention paid to the allegations against Sneed, which were quite serious in nature, dissipated shortly after the arrest. While there might be multiple reasons why this happened, the Investigative Team concludes that a lack of leadership contributed to the failing on this issue.

Moreover, we find that Cuban failed to respond appropriately when he made the consequential decision to retain Sneed without full and complete factual information. Cuban correctly acknowledges that he "didn't dig into the details." This was problematic. Indeed, Cuban has conceded that his approach to the incident was deeply flawed. For instance, Cuban told ESPN, "So we got it [the facts] mostly from Earl's perspective, and because we didn't dig in with the details -- and obviously it was a horrible mistake in hindsight -- we kind of, I don't want to say took his word for it, but we didn't see all the gruesome details until just recently."

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neck; what appears to be a bite mark on his right bicep which shows penetration through his skin and the underlying tissue; and a portion of skin that was either pulled up, or torn off, on the left side of his hand.

Had anyone in a leadership position at the Mavericks investigated Doe's allegations, either through Doe or through publicly available court records, they perhaps would have come to the same conclusion that the Investigative Team did: that Sneed is unworthy of belief on critical facts and pleaded guilty because he was guilty. The information the Company would have uncovered would have also revealed that Sneed had not been truthful with the organization, which itself could create separate grounds for discipline and termination.

ii. Second Incident

a. Evidence

Former Employee 29 told the Investigative Team that on March 23, 2014, Sneed physically assaulted her. At the time, Former Employee 29 was Sneed's girlfriend and a fellow Mavericks employee. Former Employee 29 stated that after she and Sneed got into an argument, he grabbed her and pulled her out of a car. Sneed then pinned Former Employee 29 down and pressed hard on her face. As a result of Sneed's actions, Former Employee 29 stated she suffered multiple injuries, including a knot on her chin, a knot under one of her eyes, bruises where he squeezed her head, and a series of scratches and bruises on her chest and back.

This incident came to light when Former Employee 29 tried to call out of work the next day, which was a game day. Her manager told her that, since it was too late to find a replacement, Former Employee 29 had to come in. In the office, Former Employee 29's manager, and a number of other employees, noticed bruising on her face and body. She confided in her manager that night that Sneed had physically assaulted her.

The following work day, Former Employee 29's manager reported the matter to Pittman. A follow-up meeting was held between Pittman, Former Employee 29, and her manager. The outcome of the meeting was that the matter would not be reported to law enforcement, and that Former Employee 29 would leave the Mavericks with a severance payment. Although Pittman and Former Employee 29's manager asked if she wanted Sneed fired, Former Employee 29 felt uncomfortable making this recommendation. The Company did not provide her with counseling or therapy. Instead, according to Pittman, she was provided with severance and vacation pay to help cover the cost of moving out of Dallas.

When he met with the Investigative Team, Sneed said that he and Former Employee 29 got into an argument, which turned physical. He stated that she pushed him in the chest three or four times, and he ultimately pushed her back. Sneed stated that Former Employee 29 later attacked him again when he was showering, hitting him with a strap of some kind. Sneed thought the strap might have been a purse handle, and said that the object left lash marks on his body.

Sneed denied hitting Former Employee 29 in the face and noted that although he had pushed her three or four times, she did not fall or bump into any object that could have caused any injury. He further suggested that Former Employee 29 may have been injured when he "blocked her blows," although he could not specify a particular moment when that might have happened.

According to Sneed, Pittman called him for a meeting shortly after the incident, and Sneed recounted to Pittman the same narrative that he recently told the Investigative Team.

Six weeks later, during an in-person conversation in early May 2014, Ussery informed Cuban of Sneed's assault on Former Employee 29. Cuban responded that he did not want to fire Sneed. Pittman followed up with Cuban in an email questioning Cuban's decision to retain Sneed as an employee. Pittman noted that this was Sneed's "second offense." In response, Cuban explained that he "want[s] to do the right thing" and that "throwing him on the Street could lead to problems elsewhere." Cuban suggested that Sneed could be compelled to attend counseling if he remained an employee. He also drafted a list of rules for Sneed to follow in order to maintain his employment with the Mavericks. Using Cuban's stated rules, Pittman drafted a document entitled "Office Rules Based on Recent Events With Another Employee," for Sneed to sign at Cuban's direction.[20]

Sneed accepted these conditions and signed the document, as did Pittman. Six months passed before Pittman advised Sneed that he had found a twelve-hour online counseling course for Sneed to take. Sneed promptly completed the course.

b. Investigative Findings and Analysis

1. Sneed's Credibility

Based on interviews with multiple employees, including both Sneed and Former Employee 29, and a review of documents and emails, we find that Sneed physically assaulted Former Employee 29 and was not credible or forthright with the Mavericks or with the Investigative Team regarding his conduct. First, Former Employee 29's version of events is corroborated by a number of Mavericks employees who saw her physical injuries at work, and to whom she disclosed Sneed's violence against her. Second, Former Employee 29 was consistent in her account of the events of March 23, 2014 when speaking to the Mavericks and again in 2018 when she spoke to the Investigation Team. Her version of events portrays Sneed as an abuser, and someone who attempted to dominate and control her from the beginning of the relationship. Former Employee 29's contemporaneous recounting of events in 2014 was memorialized in emails from Pittman to various members of the Mavericks organization. Third, Sneed's attempt to portray Former Employee 29 as the aggressor in the relationship is the same strategy he attempted to use to discredit Doe. Fourth, Sneed admits that he pushed Former Employee 29 three to four times but claims that Former Employee 29 had no visible injuries after the events of March 23, 2014. But, despite Former Employee 29's attempts to cover her bruises with makeup, multiple co-workers reported that she came to work with a black eye the day after the dispute, and Former Employee 29's supervisor told us that he noticed visible bruising on Former Employee 29's arm — which is what prompted him to ask what had happened. Fifth,

[20] The document stated:

1) We will require you to attend therapy/counseling with a provider of our choice for anger management/domestic violence toward women behavior issues. Counseling will be paid for by the Mavericks.

2) You are not allowed to date anyone in the Mavericks organization or who is connected by employment to the organization. Even casually.

3) If you go out with a female from the office, a third party must be there. No exceptions.

4) Violations of these requirements will result in your termination.

Sneed entered into the "Office Rules Based on Recent Events With Another Employee" agreement with the Mavericks after the incident with Former Employee 29, which required him, among other things, to seek domestic violence counseling.

Former Employee 29's version of events — that Sneed inflicted physical harm on her the night of March 23, 2014, including squeezing her head which caused visible bruising — is credible, and is supported by contemporaneous documents. The Investigative Team credits that Former Employee 29 feared for her safety and left the Mavericks to get away from Sneed.

2. Institutional Response

The effect of the decision to retain Sneed is best revealed by dozens of current and former employees who expressed surprise and frustration that Sneed could physically assault a co-worker with no apparent consequence. Many employees stated that the Company's apparent inaction on the Sneed/Former Employee 29 altercation fueled their belief that it was pointless to lodge any Human Resources complaints.

By this point, management had been alerted to two separate violent incidents. At a minimum, Former Employee 29 should have been provided with counseling and Sneed should have been immediately suspended while the Company investigated this matter and made a decision about whether to sanction him. Pittman should also have engaged the General Counsel in this matter as it touched on employee safety and criminality. However, witness interviews (and a lack of any contemporaneous emails) reflect that the General Counsel was not involved at the time.

A lack of effective management within the organization is also evidenced here. Ussery does not appear to have played any meaningful role in the decision-making process and, as noted above, the General Counsel was never advised of the incident.

Further, we find that Cuban's failure to terminate Sneed after the second domestic violence incident was a significant error in judgment. Sneed's assault of Former Employee 29 warranted termination for many reasons, including that Sneed: physically assaulted and injured a co-worker; was not truthful about either assault; was now known to have pleaded guilty to the assault in 2011; and had already been given a second chance within the organization after the 2011 incident. Cuban expressed that part of his decision to retain Sneed was predicated on a desire to stop Sneed from bringing his propensity for domestic violence elsewhere and to compel him to attend counseling. Cuban said that he believed that mandatory counseling was an appropriate resolution. Cuban also stated that he had made public comments about race and bias at the time of the Former Employee 29 incident, which made him sensitive to firing Sneed, an African American. Cuban's rationales, however, did not take into account critical employee concerns or the concerns of the Human Resources Director. Moreover, as Cuban himself acknowledged during his interview, he could have offered counseling and help to Sneed while simultaneously terminating his employment. Cuban's failure to consider the incident from Former Employee 29's perspective, or the perspective of other Mavericks employees, was deeply problematic.

Ultimately, the Mavericks failed to handle either of Sneed's domestic violence assaults appropriately. In the Jane Doe incident, they made critical decisions without having gained important information about what had happened. Gaining additional information would have alerted the Company to the fact that Sneed had lied about the Jane Doe incident in his discussion with Pittman. As to the Former Employee 29 incident, the Company failed to terminate Sneed, which would have been the appropriate disciplinary action for his assault of a co-worker.

VI. Management and Organizational Issues

In this section, we address broader questions regarding how the Mavericks leadership handled workplace misconduct issues, including harassment. Specifically, we address: Terdema Ussery, Buddy Pittman, George Prokos, and Mark Cuban.

A. Terdema Ussery

Intertwined with Ussery's inappropriate personal conduct, as discussed above, was his abdication of any meaningful responsibility for personnel issues as the CEO of the Mavericks. Ussery was the highest-ranking individual on the ground at the Mavericks' business office. He, more than anyone else on the business side, had the ability to influence the culture of the organization. Having had the opportunity to personally witness the effect that Hyde was having on his co-workers and to understand the effect that Sneed's continued presence might have on the staff, it was incumbent upon Ussery to assume a more forceful and engaged leadership role in addressing employee misconduct. Although Ussery was frequently out of the office for Mavericks events and unrelated charitable activities, there is sufficient evidence to show that he was kept informed of all significant misconduct issues.

Ussery's responsibility to lead on personnel issues was especially significant because he was aware that employees did not perceive Pittman to be an effective leader in this area. In October 2008, for example, Ussery wrote to Cuban that Pittman "needs to reestablish that he's here to work with the employees on personnel issues" and advised Cuban that many employees did not go to Pittman with such issues "because they didn't think he'd help them work through the issues to a resolution." Five years later, in 2013, Ussery similarly wrote to Cuban in a succession plan that "[w]e are going to need a stronger HR guy going forward" because employees lacked faith in Pittman and "they don't think anything is going to change when they talk to him." By his own concession, Ussery understood that employees did not trust Pittman, the Human Resources Director, to take action in response to workplace complaints. As the CEO, it was incumbent upon Ussery to take an active role in ensuring that personnel complaints were properly handled and to make certain that appropriate protocols for such complaints were in place. He failed to do either.

We find that Ussery failed to ensure the effective operation of the business side of the Mavericks. For example, the Mavericks had virtually no compliance structures or internal controls in place. Similarly, the Mavericks did not employ a full-time general counsel,[21] nor did

[21] Effective July 2018, the Company acted on this issue by hiring a full-time General Counsel, who is located in the Mavericks' office.

they have set policies on when and how Cuban should be involved in critical business and personnel decisions. Although the Mavericks had written policies and guidelines governing office conduct, the leadership did not rely on the employee handbook in dealing with personnel-related issues and routinely failed to adhere to its own written policies for dealing with workplace problems. Moreover, the operative handbook lacked direction on certain subjects.

While there is no evidence that Ussery intentionally created such a structure (or lack thereof), the absence of robust protocols and procedures benefitted Ussery, who personally engaged in misconduct. Regardless of Ussery's motive, the bottom line is the Company was an organization in which the CEO engaged in misconduct, there were no internal controls or governance structures in place, and the Human Resources Director was seen as untrustworthy. It is impossible to overstate how helpless this left employees who were subjected to unwelcome comments, advances, and touching in the workplace. Employees, most of whom had never met Cuban and had no reason to view him as someone who might take action in response to complaints, were left with nowhere to turn.

B. Buddy Pittman

i. Pittman's Human Resources Responsibilities

Even though he was the Human Resources Director, Pittman did not prioritize the handling of most personnel and disciplinary issues. The uniform reason that employees gave for not going to Pittman is that they thought it would be a waste of time or, worse, could harm their careers. Many employees shared with us more generally that while they felt that Pittman was capable of handling administrative issues such as adjustments to insurance or benefits questions, they did not trust him to respond to reports of employee misconduct.

This lack of trust in Pittman was evidenced most clearly in connection with the misconduct involving Ussery. Female employees stated that they did not report Ussery's conduct to Pittman because they believed Pittman was there to "protect" Ussery, and would not do anything to fix the problem. Moreover, as noted above, Pittman used his authority to turn the tables against a victim of sexual harassment.

In his interview, Pittman stated that he was the sole Human Resources staff member and that he was thrust into a hopeless situation in which he lacked the authority to do his job effectively. While it is true that his views were sometimes not adopted, such as when Pittman wanted to terminate Sneed while Cuban favored retaining him, Pittman's excuse ultimately falls flat for two reasons. First, as noted above, Pittman, on at least one occasion, intervened when rumors started circulating about Ussery and one of the targets of Ussery's attention. Pittman not only directed the victim not to speak about what had happened, but also gave the same instruction to a co-worker. Second, Pittman's passive response to serious personnel issues was problematic. For example, Pittman sometimes would print out an email related to a personnel incident and put it in the employee's file but take no further action. And despite advocating for Sneed's departure, it took Pittman six months to enroll Sneed in a twelve-hour online domestic violence intervention program.

ii. Pittman's Personal Misconduct

In addition to his managerial deficiencies, Pittman's own conduct further undercut his ability to be an effective Human Resources Director. Throughout his tenure with the Company, and contrary to company policies, Pittman forwarded emails to co-workers from his work email touching on "hot button" political, social, and religious issues. Moreover, we substantiated claims by four female employees that Pittman made inappropriate and suggestive comments in the workplace. Former Employee 15 recounted that Pittman was aware of a particular vacation she had taken and repeatedly inquired as to whether she sunbathed topless. Current Employee 71 stated that Pittman would approach her at her cubicle and put his hands on her shoulders or give her back massages. Former Employee 32 reported that in her first few weeks at the Mavericks, Pittman was making conversation with her in the break room and asked, "What's a pretty young thing like you doing not being married?" She recalled feeling that this was not an appropriate question for the head of Human Resources to ask her, and she recounted the story to her mother shortly after it happened. Current Employee 10 recounted that, after she had gone home to change for a Mavericks game in the evening and then returned to work, Pittman told her, "Good thing you didn't wear that dress all day or [we] wouldn't get any work done." More problematically, he made this comment while rubbing her shoulders, which he did on more than one occasion.

In response to questions about his comments to Current Employee 10, Pittman said that he might have sometimes complimented her when she looked nice, but he could not recall making this specific comment. Pittman acknowledged forwarding emails in the workplace but contended that he only sent the emails to a small group of people who worked for him, and that he stopped sending emails to one of his employees when she asked him to do so.

We find that Pittman's conduct was inappropriate and affected those involved. It also compounded Pittman's credibility problems with the staff with respect to disciplinary and personnel issues.

In sum, Pittman's failure to address misconduct by Ussery and his weak response to serious misconduct by Hyde resulted in an overall office environment in which many employees believed that complaints to Human Resources about personnel issues were unhelpful at best and potentially damaging to their careers. Pittman's own conduct compounded this lack of faith in the Human Resources department. It is impossible for a reporting system related to misconduct to function effectively if employees do not have faith in the person responsible for implementing it.

C. George Prokos

As the head of ticket sales and Hyde's senior supervisor, Prokos had the authority to address Hyde's misconduct. Despite numerous opportunities to do so, Prokos did nothing to address this misconduct. Rather, Prokos minimized the significance of Hyde's misconduct and chastised employees who brought it to his attention.

In his interview with the Investigative Team, Prokos took the position that while Hyde's collective conduct looks egregious in retrospect, it did not seem so to him at the time. He also

asserted that Hyde was a top producer in the ticket sales department and was therefore given a longer leash than other employees. Prokos's attitude toward Hyde's conduct had an enormous effect on the (lack of) discipline meted out to Hyde during his fourteen years at the Company. By failing to either stop Hyde's misbehavior or terminate Hyde during that time, Prokos effectively condoned Hyde's behavior. We therefore find it impossible to separate Hyde's behavior from Prokos's failure to manage it.

D. Mark Cuban

The *Sports Illustrated* article presented no allegations of inappropriate workplace conduct by Mark Cuban personally. Similarly, the Investigative Team has found no evidence of workplace misconduct by Cuban.

The *Sports Illustrated* article questioned how "a proudly hyperattentive owner" could not have been aware of the misconduct within the organization. Cuban is an active owner, and he has played a significant role in the business operations of the Company. Sometimes, his involvement in business decisions was triggered by Ussery, Pittman, or other employees bringing issues to his attention, typically via email. Cuban's input covered a wide range of matters, most of which were related to game days. Furthermore, Cuban regularly took initiative to email the ticket sales, corporate sponsorship, and marketing departments for information.

While there is no question that Cuban is an active owner, he was rarely physically present in the Mavericks' business office. As both Cuban and many employees expressed in their interviews, Cuban spent the majority of his time overseeing the basketball operations division, which until fall of 2017 was located three miles from the Mavericks' business office. His involvement in business operations, on the other hand, was often undertaken remotely via email.

As Cuban acknowledged in his interview, "you have to be around the culture to see the culture; I learned the hard way." Because he so often gave direction remotely and did not have scheduled in-person meetings with Ussery or other senior staff, Cuban was not "around the culture." His absence from the business office kept him from appreciating either the full scope of the misconduct at the Company or the workplace culture at the business office.

As to the specific allegations made against Ussery, we have not identified any instances in which Cuban was informed of misconduct by Ussery. Indeed, not a single victim of Ussery's harassment, or any other person, reported that he or she informed Cuban of the misconduct.

Ussery and Pittman brought some specific disciplinary issues related to Hyde and Sneed to Cuban, and Cuban engaged on those issues. As to both Hyde and Sneed, Cuban was given incomplete and sometimes inaccurate information. Cuban did not ask for, and was never given, a full picture of the allegations or the actors prior to making a decision. Moreover, as detailed above, we find that Cuban made certain decisions as to both Hyde and Sneed that constituted significant errors in judgment.

VII. Recommendations

This section sets forth our recommendations for changes to the Mavericks' organization. Since our investigation began, the Company has implemented several organizational and structural changes that overlap with our recommendations. We have noted a number of these changes and have also attached a letter sent by the current Mavericks CEO and President, Cynthia Marshall, outlining all of the changes made within the organization since February 2018.[22]

- **Recommendation 1: Increase the number of women throughout the organization, including in leadership and supervisory positions.**

  Research has shown that the single most important thing that companies can do to reduce sexual harassment and gender discrimination in the workplace is to employ, and promote, more women.[23] Having women in executive leadership positions is particularly critical.[24]

  The Company has made significant improvements in this area. When we started this investigation, the organization did not employ a single woman at the executive level. Since March 1, 2018, several women have assumed executive positions or had their roles redefined as executive positions. First, Cuban hired Cynthia Marshall, a former senior executive at AT&T with extensive experience building workplace cultures of inclusion and tolerance, to be the CEO and President of the Mavericks organization. Two other women — Cyndee Wales and Tarsha LaCour — were also hired at senior executive levels. Internally, the Company promoted four female employees to executive positions, some of which were newly created. As such, there are now a total of eighteen executive leadership positions at the Company, with eight women holding such positions.[25]

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[22] *See* Letter from Cynthia Marshall to Anne Milgram received on July 12, 2018, *available at* https://f1f64ea4c4b583b18306-3f73a7ab3eff14b4728a55d6928da99b.ssl.cf5.rackcdn.com/Letter-from-Cynt-Marshall.PDF

[23] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* 28 (2016) ("EEOC REPORT"), https://www.eeoc.gov/eeoc/task_force/harassment /upload/report.pdf.

[24] In an article on why training programs and reporting systems will not end sexual harassment, Frank Dobbin and Alexandra Kalev explain that "[w]e already know how to reduce sexual harassment at work, and the answer is actually pretty simple: Hire and promote more women." Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARVARD BUSINESS REVIEW (Nov 15, 2017), https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will. The reason, it turns out, is that having more women in the workplace addresses two core issues. *Id.* First, the authors explain that "harassment flourishes in workplaces where men dominate in management and women have little power." *Id.* And, "[s]econd, harassment flourishes in organizations where few women hold the 'core' jobs." *Id.*

[25] The eighth woman in an executive role is the same person who has held the title of Vice President of Basketball Communications since in or around the summer of 2016.

- **Recommendation 2: Improve formal harassment reporting processes and create new paths for victims to report misconduct.**

  Traditional grievance practices have not proven effective at stopping sexual harassment.[26] Studies have shown that "most victims do not speak out[]" and that one of the main reasons for this phenomenon — despite traditional human resources practices with industry-standard reporting procedures — is that "[w]omen often believe that no one will do anything about the problem."[27] Moreover, when the harassment is perpetrated by the CEO, the established reporting structures often fail. Best practices today include "providing multiple avenues of redress for those who experience harassment."[28] The Equal Employment Opportunity Commission (EEOC), in its 2016 Select Task Force Report on the Study of Harassment in the Workplace, recommended that employers "offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment."[29]

  The Company has taken steps to encourage employees to voice their concerns about the organization. For example, the organization's new Respect in the Workplace Policy designates Human Resources representatives that employees can report complaints to and mandates that supervisors report misconduct to that department, regardless of how they learned about it. There is also now an "Ethics Line" staffed by a third-party company that allows employees to call in and voice their concerns while preserving their anonymity.

- **Recommendation 3: Evaluate, and hold accountable, all executives, managers, and supervisors on their efforts to eliminate harassment and improve diversity of all kinds throughout the organization.**

  In its 2016 Task Force Report, the EEOC concluded, "Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews."[30] Further, studies have shown that frequent performance reviews (which occur at least twice a year, if not more frequently) — in addition to helping organizations stay abreast and ahead of any problems in the workplace —

[26] The Advocates for Human Rights, *Stop Violence Against Women: Sexual Harassment* (last visited Sept. 12, 2018), http://hrlibrary.umn.edu/svaw/harassment/explore/6reporting.htm.

[27] *Id.*; *see also* Noam Scheiber & Julie Creswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, NEW YORK TIMES, Dec. 12, 2017, https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html (demonstrating that traditional grievance procedures are ineffective given the authors' observation of the "recent outpouring of complaints from women about mistreatment in the workplace . . . accounts of being ignored, stymied or retaliated against by human resources units – accounts that portray [the complainants] as part of the problem, not the solution.").

[28] *See* Doblin & Kalev, *supra* note 24.

[29] *See* EEOC REPORT, *supra* note 23, at 5.

[30] *Id.*

have "a huge impact on how satisfied, motivated and productive their employees are."[31]

While more needs to be done, the Company has started down this path by implementing a plan to use data analytics to make sure that all employees are treated fairly and consistently.

Moreover, the Company has taken steps to hire and promote leaders committed to eliminating harassment and improving diversity.

- **Recommendation 4: Conduct anonymous workplace culture and sexual harassment climate surveys on a regular basis to understand the culture of the organization and whether problems exist.**

  The Mavericks should conduct regular, anonymous employee surveys that evaluate both workplace culture more generally and the climate for sexual harassment and discrimination. These anonymous surveys will provide the organization with insight into its workplace culture and whether a problematic climate for harassment exists within the organization.[32]

- **Recommendation 5: Establish clear hierarchies and lines of decision-making authority within the organization.**

  The Mavericks' culture lacked any hierarchy and consisted of blurred lines of decision-making on some issues. Numerous studies have concluded that unstructured decision-making leads to increased risk and a higher prevalence of sexual harassment in the workplace, as policies are less likely to be enforced strongly and promptly, and disciplinary consequences become less clear and uniformly applied.[33]

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[31] Geoff Fawcett, *7 REASONS WHY YOU SHOULD BE CONDUCTING PERFORMANCE APPRAISALS MORE OFTEN*, HAYS (last visited Sept. 12, 2018), https://social.hays.com/2015/08/31/7-reasons-why-you-should-be-conducting-performance-appraisals-more-often/.

[32] *See* EEOC REPORT, *supra* note 23, at 32; *see also* Linda A. Seabrook, *THE TOP 10 THINGS EMPLOYERS CAN DO RIGHT NOW TO ADDRESS SEXUAL HARASSMENT IN THE WORKPLACE*, FUTURES WITHOUT VIOLENCE (Nov. 2, 2017), https://www.futureswithoutviolence.org/employers-sexual-harassment/.

[33] Nicole T. Buchanan et al., *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military*, JOURNAL OF SOCIAL ISSUES (Dec. 9, 2014), https://spssi.onlinelibrary.wiley.com/doi/pdf/10.1111/josi.12086 (stating "a clear and consistent antiharassment message from organizational leaders is essential"); *see also* Marianne Cooper, *The 3 Things That Make Organizations More Prone to Sexual Harassment*, THE ATLANTIC, Nov. 27, 2017, https://www.theatlantic.com/business/archive/2017/11/organizations-sexual-harassment/546707/ (stating "[s]trong policies – with real teeth – and training are essential"); EEOC REPORT, *supra* note 23, at v (noting "[t]he importance of leadership cannot be overstated - effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation.")

- **Recommendation 6: Clarify what role team owner Mark Cuban will play in the business organization. If Cuban intends to hold a management role, he and the CEO should explicitly define what his role will be, along with rules for when and how Cuban engages on issues.**

  The *ad hoc* basis on which Cuban was involved in employment decisions in the business led to multiple challenges outlined in this report. The lack of clear rules for when and how to engage Cuban added to these challenges.

- **Recommendation 7: Strengthen and expand Human Resources, and implement clear protocols and processes for evaluating and adjudicating workplace misconduct issues. This should include providing clear communication to employees on the anti-harassment policy and how to report harassment.**

  An organization like the Mavericks, with over 150 full-time employees, requires more than one Human Resources professional. According to an industry study conducted in 2017, Human Resources staffing levels are now at approximately 1.4 per 100 employees.[34] Organizations must also ensure that their Human Resources departments "conduct *effective trainings*" on their policies and procedures. "Trainings must ensure that employees are aware of, and understand, the employer's policy and reporting systems."[35]

  The Company now has a fully staffed Human Resources department, which is headed by Tarsha LaCour. In addition to LaCour, the Company hired a Human Resources Director and promoted an employee to Vice President of Diversity and Inclusion.

  Moreover, the Chief Ethics and Compliance Officer, Cyndee Wales, created a new Code of Conduct for the Mavericks that is modeled, in part, on the NBA's 2018 Code of Conduct.[36] The organization's Human Resources policy has also been revised.

- **Recommendation 8: Provide "prompt and proportionate" and "consistent" discipline across the organization when harassment or misconduct has been substantiated.[37]**

  To root out misconduct, employers must ensure that discipline is imposed promptly and proportionately to the infraction. Discipline must also be applied consistently to all employees, so as to not to create the appearance of undue favor to any particular

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[34] Valerie Bolden-Barrett, *Report: HR staffing is at 1.4 per 100 employees, an all-time high*, HR DIVE, Jul. 20, 2017, https://www.hrdive.com/news/report-hr-staffing-is-at-14-per-100-employees-an-all-time-high/447480/

[35] EEOC REPORT, *supra* note 23, at 33.

[36] In 2018, the NBA issued two policies to address workplace issues such as sexual harassment: (1) 2018 NBA Model Code of Conduct for Teams (the "NBA Code of Conduct"); and (2) the 2018 NBA Model Respect in the Workplace Policy (Equal Employment Opportunity, Anti-Harassment, Reasonable Accommodation of Disabilities, Anti-Bullying & Anti-Retaliation) (the "NBA Model Policy"). The policies were distributed to all of the teams in the League for consideration.

[37] EEOC REPORT, *supra* note 23, at 4.

employee.[38] Under the new Code of Conduct, the Chief Ethics and Compliance Officer and the Senior Vice President of Human Resources are charged with investigating all claims of workplace misconduct and taking appropriate disciplinary measures.

- **Recommendation 9: Provide regular training for all employees on sexual harassment (including bystander intervention training), and special training directed at managers and supervisors. Leaders across the Company should participate in the trainings and take an active leadership role in providing trust and safety in the workplace.**

  While the efficacy of training remains open to some debate, best practices show that training within organizations — particularly when individual leaders are engaged[39] — makes a difference. Specific training for managers and supervisors on how to recognize and handle sexual harassment reports has also been found to be effective, and "bystander intervention training" or "workplace civility training" – a harassment training model that has been gaining significant traction in combatting sexual violence on school campuses – has been cited by the EEOC Select Task Force as a new and additional avenue that can be used in fighting all forms of workplace harassment.[40] Further, mandatory sexual harassment training for all organizational leadership helps convey to employees the seriousness with which senior management takes the subject matter. It also increases management's ability to articulate the specific behaviors that are expected of employees, rather than merely being able to recite the organization's values statement or prohibited conduct from an employee handbook.[41]

  The Company has begun this process by conducting workplace trainings for the leadership team about issues of diversity and inclusion in the workplace, and the standards to which organizational leadership will be held.

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[38] *Id.* at 37, 43, 67, 68.

[39] *See id.* at 52 (noting "*[t]raining should be supported at the highest levels . . .* [t]he strongest expression of support is for a senior leader to open the training session and attend the entire training session"); Neil Goodman, Ph.D., *Sexual Harassment Training: Myths and Reality,* TRAINING MAGAZINE (last visited Sept. 12, 2018), https://trainingmag.com/trgmag-article/sexual-harassment-training-myths-and-reality/ (stating "[t]here must be an unequivocal commitment by senior leadership to take responsibility . . . [w]henever possible, senior leaders should deliver the message in person"); Maya Rhodan, *Does Sexual Harassment Training Work? Here's What the Research Shows*, TIME MAGAZINE, Nov. 21, 2017, http://time.com/5032074/does-sexual-harassment-training-work-heres-what-the-research-shows/ (finding "ultimately it's not a matter of whether training or is not effective, but the factors that surround it that can make a big difference. Who attends, where the training happens and when, and company leadership's involvement matter. Research she has conducted suggests that when leaders come to the training or endorse the training, people take more away from the experience.").

[40] EEOC REPORT, *supra* note 23, at 57 (stating "[w]e believe that bystander intervention training might be effective in the workplace.")

[41] *See, e.g.*, Marcel Schwantes, *Yes, We Can Defeat Sexual Harassment in the Workplace. Here Are 6 Powerful Ways to Do It*, INC. MAGAZINE, Dec. 11, 2017, https://www.inc.com/marcel-schwantes/how-leaders-can-defeat-sexual-harrassment-in-the-workplace.html.

- **Recommendation 10: Adopt clear, transparent, office-wide processes for hiring, on-boarding, promotions, lateral transfers, performance evaluations, salary increases, and discipline within the organization. This should include centralizing key employment functions within the Human Resources department.**

  Traditionally, the Mavericks gave department vice presidents authority to hire, fire, discipline, promote, and give raises to employees. This led to individual actors applying different standards across the organization. In addition to the lack of uniformity, decentralizing these tasks provided no checks on the vice presidents' handling of sensitive employee matters, which led to distrust among employees. Indeed, the EEOC Select Task Force has noted that decentralized company operations can cause managers to be "unaccountable for their behavior" and to "act outside the bounds of workplace rules."[42] Centralizing key employment functions in the Human Resources department will ensure that all employees receive uniform treatment that reflects the Mavericks' organizational values.

- **Recommendation 11: Collect and use data to add value to the Company and to identify weaknesses.**

  The lack of employee data was a consistent theme throughout this investigation. It made understanding the organization, as well as the Company's reasons for making key employment decisions on employees, very difficult. Studies have shown that it is critical for Human Resources departments to collect and review data in making decisions, with some experts calling it "probably the greatest asset the HR team has" as data has the potential to be used to improve decisions, make employees happier, and optimize processes, all of which add value to an organization.[43]

  The Company has stated that it plans to use employee data to guide its decision-making in the future and to address any gender or racial discrepancies in its workforce.

- **Recommendation 12: Require that all leaders, managers, and supervisors engage in efforts to improve workplace culture and to ensure a diverse, inclusive workplace.**

  As part of its commitment to improving employees' workplace experience, the Company has launched several initiatives to foster a sense of employee wellbeing and participation in the organization. As the EEOC has concluded, leadership must "tak[e] a visible role in stating the importance of having a diverse and inclusive workplace that is free of harassment, articulat[e] clearly the specific behaviors that will not be acceptable in the workplace, set[] the foundation for employees throughout the organization to make

[42] EEOC REPORT, *supra* note 23, at 29.

[43] Bernard Marr, *Why Data Is HR's Most Important Asset*, FORBES, Apr. 13, 2018, https://www.forbes.com/sites/bernardmarr/2018/04/13/why-data-is-hrs-most-important-asset/#6953b6236b0f (noting that "HR teams can use data to make better HR decisions, better understand and evaluate the business impact of people, improve the leadership's decision making in people-related matters, make HR processes and operations more efficient and effective, and improve the overall wellbeing and effectiveness of the company's employees. All of this can have a huge impact on a company's ability to achieve its strategic aims, and that's what makes HR data so valuable.")

change (if change is needed), and, once an organizational culture is achieved that reflects the values of the leadership, commit to ensuring that the culture is maintained."[44] Leadership must also "back up its statement of urgency about preventing harassment with two of the most important commodities in a workplace: money and time."[45]

The Mavericks has provided trainings for organizational leadership, created employee resource groups and team building activities, and solicited feedback from employees on ideas for improving workplace culture.

- **Recommendation 13: Employ a full-time, in-house General Counsel.**

  We found the lack of a full-time General Counsel to be problematic for the organization. No current or former employees could identify the rules of engagement for when the General Counsel should be engaged on employment issues and, indeed, there was a lack of consistency within the organization regarding when he was brought into discussions on key matters.

  The Company hired a full-time General Counsel, effective July 9, 2018.

VIII. Conclusion

This investigation has substantiated numerous instances of sexual harassment and other improper workplace conduct within the Mavericks organization over a period spanning almost twenty years.

The Mavericks was an organization in which the CEO, the leader charged with safeguarding employees, was a serial harasser, and in which a deeply problematic employee, Chris Hyde, was allowed to harass, intimidate, and threaten co-workers for more than a decade with no real consequences. We also found a lack of compliance and internal controls within the organization. Moreover, Terdema Ussery, Buddy Pittman, and George Prokos failed to effectively discipline and terminate employees when warranted. Although Mark Cuban, the team owner, was not a part of the day-to-day management structure, nor was he physically present in the business office, he engaged at times in sensitive decision-making on disciplinary issues, most often without full or accurate information. For the reasons stated in this report, we find that Cuban made certain decisions as to both Hyde and Sneed that constituted significant errors in judgment.

Based on Ussery's eighteen years of inappropriate conduct toward women while serving as the CEO, and Hyde's ability to engage in myriad improper workplace activities without consequence, female employees had a valid reason to believe that curbing sexual harassment was not a priority within the organization. Many of the incidents substantiated in this report were never even reported to Pittman or to anyone else because employees thought it would, at best, be useless and, at worst, would hurt their careers. Our investigation leaves us with no question that

[44] EEOC REPORT, *supra* note 23, at 32.

[45] *Id.* at 33.

many female employees were subjected to harassment and were justifiably concerned that they might be subjected to such conduct again.

It was not an accident that the individuals discussed in this report were able to thrive for so long at the Mavericks. Rather, it was the Mavericks' organizational shortcomings that permitted the growth of an environment in which these individuals and their misconduct could flourish. Indeed, the failure to appropriately respond to harassment exacerbated the harm caused by the harassment itself.[46] In the end, what all of these actions have in common is that they hurt the ability of women to work for the Mavericks. As one commentator recently observed about the #MeToo movement in an article entitled "This Moment Isn't (Just) About Sex. It's Really About Work," "the thing that unites these varied revelations isn't necessarily sexual harm, but *professional* harm and power abuse."[47] It is important for us to note that the harm here went beyond individual touches, sexual comments, pornography, threats, and physical assault. It also included deep impairment of the ability of women to go to work and do their jobs. Indeed, we consider it significant and unsurprising that all of this took place in a workplace where women were completely absent at the executive level, shockingly underrepresented in senior management, and greatly outnumbered overall.

Since the publication of the *Sports Illustrated* article, Mark Cuban and the Mavericks have taken many positive steps in the right direction. The Mavericks organization has installed qualified, empowered, and diverse executives. Wrongdoers have been terminated or suspended. During the course of our investigation, we heard from employees of a sea change in the professional environment at the Mavericks that began almost immediately following the news reports that first publicly raised these allegations. With light shed on these problems, and with a strong leadership team now in place, we have confidence that the Mavericks organization will continue its transformation into a safe, fair, and professional workplace.

[46] *See* Jennifer J. Freyd, *When sexual assault victims speak out, their institutions often betray them*, THE CONVERSATION, Jan. 11, 2018, https://theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050.

[47] Rebecca Traister, *This Moment Isn't (Just) About Sex. It's Really About Work*, THE CUT, Dec. 10, 2017, https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html.

26 U.S.C. § 162(q): PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE

No deduction shall be allowed under this chapter for —

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) attorney's fees related to such a settlement or payment.

TAB
G

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David T. Croall

Dave has been representing employers in a wide variety of employment law matters for more than 30 years. Recently, his practice has been focused on employment discrimination, wrongful discharge and wage-hour litigation and preventive employment law counseling and training.

Over the years, he has successfully defended employers in a broad range of employment law matters; has obtained summary judgment for numerous employers in discrimination/wrongful discharge matters; and has obtained favorable verdicts from judges and juries in cases that have gone to trial.

He has also prevailed in numerous appellate cases in state and federal courts. He has represented a wide variety of employers, including hospitals, manufacturers, a major airline, a university, retailers and service providers. Dave is listed in *The Best Lawyers in America*® and is recognized by *Ohio Super Lawyers*® and *Chambers USA*.

Bar Admissions
Ohio
Kentucky
Supreme Court of the United States
U.S. Court of Appeals for the Sixth Circuit
U.S. Court of Appeals for the Seventh Circuit
Various federal trial courts on a *pro hac vice* basis

Presentations
- "Two Perspectives of HR and Employment Claims: Employee's and Employer's Lawyers" Greater Cincinnati HR Association, August 2016
- "Reasonable Accommodations: Religion and Disabilities" Greater Cincinnati HR Association, January and March 2015

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EDUCATION

Harvard Law School, J.D., 1980

College of William and Mary, B.A., Honors, 1977

PRACTICE AREAS

Labor & Employment
- Employment law compliance counseling
- NLRB and other unfair labor practices representation
- Class and collective actions
- Employment litigation
- Leave, FMLA and ADA reasonable accommodation counseling
- Trade secret protection and non-competition
- Reductions-in-force and restructuring
- Wage and hour compliance
- Recruiting, hiring and training

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- “Renovating Your Workplace: Employment Relations Best Practices for HR Professionals,” Ohio Chamber of Commerce HR Academy
- “Workplace Investigations Savoir Faire: Developing Your Know How and Reducing Your Risk,” Porter Wright Employment Relations Seminar, May 7, 2014
- “Not Everyone is Alike: A Discussion on Melting Pot Issues in the Workplace,” Ohio Management Lawyers’ Association, November 2013
- “Increasing Limitations on Pre-Employment Inquiries,” Ohio Management Lawyers’ Association, November 2012
- “Discipline, Discharge and Defense: What You Need to Know Prevent Costly Litigation and Protect Your Company,” Porter Wright Employment Relations Seminar, Oct. 14, 2008

Honors | Awards

- *The Best Lawyers in America*®, Employment Law – Management, Labor Law – Management, Litigation – Labor & Employment
- *Best Lawyers*®, Cincinnati, Ohio Labor Law – Management Lawyer of the Year, 2016
- *Ohio Super Lawyers*®, Employment Litigation: Defense
- *Chambers USA*, Labor & Employment, Ohio
- Phi Beta Kappa

Community

- United Cerebral Palsy of Greater Cincinnati, Board of Trustees, 1992-2001; President, 1998-2001; Board of Trustees, 2008-2013
- Stepping Stones, Inc., Board Member 2013-2017
- William & Mary Annual Giving Board, Chair 2016-2018, member 2012-present
- Convalescent Hospital for Children, Board Member 2009-present

PROFESSIONAL ASSOCIATIONS

- American Bar Association
- Ohio State Bar Association
- Cincinnati Bar Association
- Kentucky Bar Association
- Federal Bar Association
- Ohio Management Lawyers’ Association

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COMMON ETHICAL ISSUES FACING EMPLOYMENT LAWYERS

David T. Croall, Esq.

CONFLICTS OF INTEREST

- Intake: Can we represent this client?
- Representing Multiple Parties
- Positional/Competition Conflicts
- Imputed Disqualifications

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INVESTIGATIONS

- Attorney's Role
- Interviews
- Contacts with Adverse Party's Employees

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- Duties to the System and Court
- Conduct in Mediation/Negotiations

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- Rules 26 and 37
- Deposition Conduct
- Privacy/Confidentiality

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- Rule 3.4
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- Contingent Fees
- Referral Fees

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OTHER ISSUES

- Evidence
- Settlement
- Privileged and Purloined Documents
- Metadata Mining

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RULE 8.4(G)

- It is professional misconduct for a lawyer to do any of the following:
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability.

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COMMON THEMES AND RECENT CASES

- Neglect of Matters
- Mis-handling Money (usually the client's)
- Substance Abuse/Addiction Issues
- Mental Health Issues
- Recent Cases

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COMMON ETHICAL ISSUES FOR EMPLOYMENT LAWYERS

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Table of Contents

I. INTRODUCTION

Virtually every section of the Ohio Rules of Professional Conduct touches on some aspect of the representation of a client in the practice of employment law. The topics that follow are selected for their importance and/or evolving issues.

Infrequently do ethical issues affect the outcome of a case. However, when they do, they can be disastrous for the client and the attorney.

Ohio was one of the few states which continued under the Code of Professional Responsibility as distinguished from the Model Rules long after they were promulgated by the American Bar Association in 1983 and were adopted (in the same or modified form) in every state. Ohio then adopted the Model Rules, albeit in modified form in many instances, effective February 1, 2007. There is, of course, considerable overlap and consistency between the Model and Ohio rules. However, one should always be on the lookout for differences in key areas as between the two sets of rules and when reviewing ethics opinions and court decisions from other states.

II. CONFLICTS OF INTEREST

A. Intake: Can I Represent This Client?

1. The courts (as well as almost all professional liability insurance companies) presume and require initial screening of all potential clients before they become actual clients. Even the sharing of confidential information by a potential client to determine whether the firm will take the case can disqualify the firm from representing a prior existing client in the same or closely related litigation. *See B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986) ("beauty contest"; disqualification denied); *Hughes v. Paine, Webber, Jackson & Curtis*, 565 F. Supp. 663 (N.D. Ill. 1993) (general discussion; screening and other facts avoid disqualification). Ohio Rule 1.18 provides that "a lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter" unless either (1) "both the affected client and the prospective client have given informed consent, confirmed in writing," or (2) "the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and . . . the disqualified lawyer is timely screened for any participation in the matter and has apportioned no part of the fee therefrom" and "written notice is properly given to the prospective client." *See Cargould v. Manning*, 2009-Ohio-5853 (Franklin App. 2009) (disqualification denied where attorney did not receive and/or forgot

information that could prejudice the former prospective client and now opposing party). When receiving a telephone call from a prospective client, it is always best to ask up front who the actual or potential adversaries will be in order to clear the conflict prior to receiving any confidential information. *See* generally ABA Formal Opinion 90-358 (9/13/90).

2. In the situation where the lawyer or his firm currently represent an adverse party, whether or not in the same or a completely unrelated matter, the Rules and court decisions preclude the representation unless both expressly waive the conflict after informed consent. Ohio Prof. Cond. Rule 1.7(b); *see Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121,1125 (N.D. Ohio 1990). Although the Code did not require that any such consent be in writing, Rule 1.7(b)(2) does. Many attorneys continue to believe that if the current representation is unrelated to the other representation, and particularly where the pre-existing client is represented by another firm in the current litigation, there is no problem. However, the purpose of the conflict rule is to preserve not only confidences but also undivided loyalty. Thus, it is generally held that one may not drop a client like a "hot potato" to represent another. *See Picker Int'l., Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363 (N.D. Ohio 1987), *aff'd*. 869 F.2d 578 (Fed. Cir. 1989). And the penalty for not recognizing the conflict and proceeding in the face of adverse representation has been not only loss of both clients' business (in the usual case) but also loss of money in the form of fees and/or sanctions.

3. Where the adverse party is a former client, the current representation may proceed unless the subjects of the prior and current representations are "substantially related". As set forth in Ohio Rule 1.9, the fundamental consideration is whether the lawyer or firm received confidential information in the prior representation which might now be used adversely to the former client. In some instances, the courts have adopted a presumption that confidences were shared and barred the current representation (frequently due to "the appearance of impropriety"). *Id.* at 851; *Hughes*, *supra*, 565 F. Supp. at 671. Increasingly, however, courts have recognized the practical problems (as well as the litigation tactics) of disqualification and permitted the firm to rebut the presumption and demonstrate that no confidences related to the current representation were shared. *See Gould, Inc.*, *supra*, 738 F. Supp. at 1126; *Hughes*, *supra* at 671-73. This is also the view taken in Ohio Board Opinion 89-13 (5/30/89). Further, Ohio Rule 1.9 expressly provides for the representation if the former client gives "informed consent, confirmed in writing."

4. In analyzing conflicts where corporations are involved, a number of courts have "collapsed" the corporate "tree" or "family", thus (for example) finding a conflict when the current representation is adverse to one subsidiary of a party corporation where the prior representation was of a different subsidiary. *See Gould, Inc.*,

supra. The principal consideration is whether there is sufficient common control or oversight of the business and legal affairs of the branches of the corporate tree that a common corporate thread (such as legal strategy) can be inferred. *See Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 U.S. Dist. LEXIS 8363, 20 U.S.P.Q. 2d (BNA) 1143 (N.D. Cal. 1991). This was essentially the position adopted in ABA Formal Opinion 95-390 (1/25/95), where the Committee declined to adopt a "bright line" test and instead adopted a case-by-case analysis, including whether the work for one member of the corporate family was intended to benefit all members, whether in representing one member the lawyer reported to an officer or general counsel of the parent, and whether the existing client has "reasonable expectations" or "considers" that the lawyer is representing the entire corporate family.

5. Avoiding potential future conflicts during the course of representation can sometimes be achieved through an advance consent and waiver. ABA Formal Opinion 05-436 (5/11/05) addresses that issue in the context of Rule 1.7 of the Model Rules as amended in 2002. Ohio has now adopted that Rule, and the discussion in Comment [33] is instructive as to the analysis for seeking an advance waiver with the requisite identification of the potential conflict in order to obtain an informed consent and waiver. Whether such a waiver is upheld often hinges on the specificity of the description, a potential future conflict and the sophistication of the client involved. *See Galderma Labs L.P. v. Actavis Mid. Atl. LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013) (broad advance waiver upheld where client sophisticated all represented by in-house counsel) and *Lennar Mare Island LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100 (E.D. Cal. 2015) (broad 9 year old waiver ineffective).

B. Representing More Than One Party in the Same Litigation

1. The Ohio Rules do not prohibit simultaneous representation of more than one party in the same litigation, provided their interests are not adverse and the clients consent. Ohio Rule 1.7(b)(1), central question is whether "the lawyer will be able to provide competent and diligent representation to each affected client." *See* Comments [25-28]. Conversely, joint representation is not permissible if "there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to another client..." Rule 1.7(a)(2). Each such joint or common representation necessarily requires a case-by-case determination. *See* ABA Informal Opinion 1476 (8/11/81). Again, under Rule 1.7 informed consent must be obtained and confirmed in writing, which should cover not only agreement to the current joint representation but what will happen if the interests of the parties later become adverse (with consent, if obtainable, to continued representation of one of the parties).

2. Generally, in the foregoing analysis, the two represented parties are unrelated (except perhaps by contract). Where the parties are related, such as employer and employee, special considerations and problems can arise. Where the claim is, for example, a personal injury claim based upon negligence against a driver and employer, the parties' interests are usually sufficiently common not to create a problem. Where, however, the claim is for an intentional tort where the employer may defend on the basis of lack of respondeat superior, prudence as well as the Rules require careful up-front analysis of the actual and potential conflicts. Thus, in a sexual harassment case, joint representation of the employer and the alleged "harasser" may be possible if preliminary investigation reveals that the main defense of both parties will be that the alleged harassment did not occur. Where, however, that investigation reveals that the harassment may well have occurred, and it is in the employer's best interests to defend through avoiding imputed liability or by disciplining the employee, joint representation is rarely if ever wise or permissible. In this latter situation, the employer may still choose to pay for the separate defense of the employee and to establish a "joint defense agreement" between counsel for the parties. If joint representation is undertaken in such a case, again written consent should be obtained, particularly from the employee.

3. In establishing an effective joint representation, an engagement letter should not only cover informed consent to the joint representation from a conflicts perspective, as discussed above, but also the effect of joint representation on the attorney-client privilege and confidentiality. Thus, the letter should advise that there will be no attorney-client privilege as to communications between or from them with counsel, but only as against the opposing or third-party. See comment [26]. Likewise, the letter should state that, accordingly, any confidential information from one client will be shared with the other and that the lawyer may have to withdraw if one of the clients requests that some confidential information be kept from the other client. See comment [27].

4. As to aggregates settlements involving two or more clients, *see* IX.C.2. below.

C. Insurance Defense Litigation

1. In the "eternal triangle" of relationships in the insurance defense practice, times have changed. Historically, defense attorneys had duties to both the insured and the insurer, even in situations involving reservations of rights. Increasingly, however, the primary if not sole duty is to the insured. *See Swiss Reinsurance Am. Corp. v. Roetzel & Andress*, 163 Ohio App. 3d 336 (Summit 2005) Ohio Rule 1.8(f) permits such representation only if "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship" and requires that the insured be provided the (f)(4) Statement of

Insured Client's Rights which provides, *inter alia*, that "the lawyer cannot act on the insurance company's instructions when they are contrary to your interest." Obvious situations where the conflict problems come into play include: reservation of rights, particularly where the insurer states it is providing a defense only; demands and suits in excess of coverage limits; situations where defense counsel uncovers a possible coverage defense; or the policy permits the insurer to settle without permission of the insured (*compare Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 81 Ill. 2d 201, 407 N.E. 2d 47 (1980) *with Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988)).

2. Implicit in the foregoing is the question of when a communication from the insured is privileged vis a vis the insurer. Normally, when two parties consent to joint representation, there is no privilege as between them. However, in the context of insured/insurer, if any confidence of the insured might affect coverage and/or the basis upon which judgment might be entered on an insured versus uninsured claim, prudence requires maintaining confidentiality of that information. *See* Rule 1.8(f)(4), Statement at ¶ 4. *See also* ABA Formal Opinion 08-450 (4/8/08) for a full discussion of these issues and whether the attorney can initiate or continue representation of all parties involved in a tripartite relationship.

3. An Ohio Ethics Opinion, following similar opinions elsewhere, addressed insurance companies' litigation management guidelines and concluded that "it is improper under DR 5-107(B) for an insurance defense attorney to abide by [such] guidelines and the representation of an insured when the guidelines interfere with the professional judgment of the attorney. Attorneys must not yield professional control of their legal work to an insurer." Ohio Board Opinion 2000-3 (6/1/00). Specifically, the Board found the following to be improper interference with an attorney's professional judgment: Guidelines that "restrict or require prior approval before performing computerized or other legal research," "how work is to be allocated among defense team members," "approval before conducting discovery…or consulting with an expert witness," "approval before filing a motion or other pleading." While the Board ended by stating that "attorneys should communicate with the insurer regarding the status of the representation" and "to cooperate with insurers," the Board also stated "but attorneys must not abdicate control of their professional judgment to non-attorneys." In rendering the opinion, the Board stated that it found no reported Ohio case at that time directly on point on the issue of the degree to which an attorney represents the insurer in addition to the insured and that the Ohio Disciplinary Rules "do not specifically address the tripartite relationship that exists between an insurer and insured, and defense counsel." Ohio Rule 1.8(f) and the Statement now address that at least in terms of independence, confidentiality and requiring the lawyer to address any conflict of interest with the insured.

4. In addition, at the same time, the Board also issued an opinion addressing whether defense counsel can forward detailed legal bills to an outside audit company. Ohio Board Opinion 2000-2 (6/1/00). As stated in the conclusion:

> …[U]nder DR 4-101(B)(3) and DR 4-101(C)(1), an attorney may not submit detailed legal bills to an outside audit company hired by an insurer without first obtaining client consent after full disclosure. Full disclosure includes informing the client of the type of information required by the insurer in the billing invoice, the type of supporting documentation, if any, required by the audit, and that waiver of attorney-client privilege might be raised as a consequence. Whether submission of legal bills to an audit company waives the attorney-client privilege or work product doctrine is a question of law beyond the scope of this opinion.

Ohio Rule 1.8(f)(4), in the Statement at ¶ 5, similarly requires the client insured's written consent if the attorney believes an audit or bill review "may release confidential information in a manner that may be contrary to your interest."

D. Positional and Competition Conflicts

1. Where a lawyer represents two or more clients for whom opposite positions must be taken on the same issue, an obvious potential conflict arises. Generally speaking, the courts have not recognized a disqualifying conflict where the matters are before different courts. *See* ABA Formal Opinion 93-377 (10/16/93); Restatement of the Law Governing Lawyers, §209, comment f. (April 10, 1990), tentative draft. When they are before the same court, consent of both clients would be required. *Id.*

2. Where a client has paid for work giving the client a competitive edge, can the client then bar the lawyer from using that additional experience and expertise in representing competitors? This is one import of the Pennsylvania Supreme Court's decision in *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992). Although other factors were present, this case raises thorny issues regarding client confidences, loyalty and work product.

E. Imputed Disqualification

1. If anyone has recently joined the firm (lawyer, paralegal or even secretary), beware the problem of imputed disqualification. Under the old Code if that lawyer came from a firm representing a party adverse to the client now being represented, he/she was disqualified and therefore the entire firm would be

disqualified by operation of DR 5-105(D): "If a lawyer is required to decline employment . . . no partner, or associate of his or his firm, may accept or continue such employment". Typically, there is no problem if the lawyer did not work on the matter and has no confidences of the former client, and current Ohio Rule 1.10 makes this distinction. Thus, Rule 1.10(c) provides that a lawyer who had "substantial responsibility" in a matter disqualifies his new firm from representing "interests [that] are materially adverse to the interests of the former client," but, otherwise the new firm is not disqualified if it screens the lawyer and provides notice to the former client. *See also* Ohio Board Opinion 89-13. If that lawyer does have confidential information, however, disqualification is required absent consent of both clients.

2. Increasingly, authorities are also recognizing screening by a "Chinese wall" as an appropriate device to avoid disqualification, particularly in an era when lawyers change firms with some regularity. This is expressly recognized in Ohio Rule 1.7(d) and Comments [5A-E], except again where the lawyer had "substantial responsibility" for the matter at her former firm, provided that the new firm "timely screens" the new lawyer from any participation in the matter, that the lawyer is apportioned no part of the fee, and prompt written notice is provided to the former client. *See also* Ohio Board Opinion 89-13 (allowing rebuttal of presumption of shared confidences by showing that "specific institutional screening mechanisms have been implemented to effectively insulate against the flow of confidential information from the affected attorney" to other lawyers in the firm); *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222 (6th Cir. 1988). To be effective, such a wall must be established formally, in writing, with appropriate measures to sequester and maintain the client's file confidentially. However, even otherwise effective screening may be insufficient to rebut the presumption of shared confidences where the attorney "switches sides" during litigation. *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St. 3d 1 (1998) (recognizing Chinese Wall as potentially effective to avoid disqualification and setting standards for "effective" screening, but finding insurmountable appearance of impropriety on "egregious facts"). In February, 2009, the ABA House of Delegates adopted Resolution 109 amending Model Rule 1.10(a) to provide a "safe harbor" for an otherwise disqualified lawyer (and his new firm) if he/she is "screened from any participation in the matter [at the new firm] and is apportioned no part of the fee therefore," provided also that notice is promptly given to the affected former client to ascertain compliance with the Rule (including a description of the screening procedures employed, a statement of the firm's screened lawyers' compliance, a statement that review may be available before a court and an agreement by the firm to respond promptly to any written inquiries or objections by the former client) and provided further that certifications of compliance with the rules and the screening procedures are provided to the former client at reasonable intervals upon the former client's

written request and upon termination of the screening procedures. Several states have adopted similar provisions (including principally Illinois) or have reached a similar conclusion that screening should be permitted to resolve potential conflicts except in "side-switching" situations. *See Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 800 (2010) (thorough and extensive analysis of the issues and state of the law).

III. INVESTIGATION

A. Attorney's Role

1. Attorneys can perform a uniquely valuable role for the client in performing, directing or assisting an investigation. By interviewing the client's employees and then making a report and analysis to the cognizant manager, the lawyer will usually provide attorney/client privilege protection to that information. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). Likewise, the attorney's interviews of other (non-client) witnesses as well as other investigation and analysis will likely if not always be treated as protected work product. *Hickman v. Taylor*, 329 U.S. 495 (1947). Clients should be advised of these advantages both for pre-suit investigation (particularly following a serious accident or event) as well as after litigation has commenced. Although the U.S. Supreme Court has rejected the "control group" test for privilege protection, nonetheless, care should be taken to protect the confidentiality of the attorney's report and not reveal it, advertently or inadvertently, to anyone outside the privilege group. Note, however, that if a document (such as a witness statement) is successfully shielded from discovery, it may not be useable at trial, even for impeachment purposes.

2. When serving as an investigator/interviewer, the lawyer must be careful not to assume a role as a witness. Where a lawyer's testimony is necessary to the presentation of the client's case, the former Code provided that neither the lawyer nor the firm could ordinarily be an advocate in the same case. DR 5-101(B); DR 5-102. However, Ohio Rule 3.7 now allows such testimony generally where another lawyer in the firm presents the case. Nonetheless, your potential unavailability as an advocate for the client if you need to testify (on direct or cross) may present hardship for the client and should be carefully considered, with disclosure to the client of the potential problem before the particular interview or investigation occurs.

3. Likewise, if the attorney's report is relied on by the client in making a decision and the basis and context of the decision and/or the investigation itself is at issue (as in a sexual harassment investigation), then the report may not be protected from discovery or admission at trial under either the attorney-client privilege or work-product doctrine. *See Reitz v. City of Mt. Juliet*, 2010 WL 56081 (M.D.

Tenn. 2010) (full discussion in sexual harassment context); *Harding v. Dana Transport, Inc.*, 914 F. Supp 1084 (D.N.J. 1996); *Fultz v. Federal Sign*, 1995 WL 76874, 1995 U.S. Dist. LEXIS 1982 (N.D. Ill. 1995). *Compare Sandra T.E. v. South Berwyn School District*, 600 F.3d 612 (7th Cir. 2009) (engagement to perform "legal services" and investigation of alleged sexual abuse of students provides *Upjohn* protection of attorney-client privilege and work product doctrine). This also should be discussed with the client before undertaking the investigation.

B. Interviews of Employees

1. Just as lawyers may have conflicts in representing both employers and employees, so they also may have conflicts in interviewing employees of the client employer when the interests of the two parties may be adverse. Ohio Rules 1.13(d) and 4.3. In that situation, prudence counsels that the employee be informed at the outset that the lawyer is there representing the company (Ohio Rule 1.13(d)), that a potential conflict exists (Ohio Rule 4.3, Comment [1]) and, depending on the circumstances, that the employee has the right to obtain separate counsel. *See Brown v. Peninsula Hospital Center*, 407 N.Y.S. 2d 586 (N.Y. Sup. Ct. 1978). Otherwise, the attorney may be disqualified from representing the company and the information may be barred from use by the client. *See also United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), for a full discussion of the issues and the need for careful handling of interviews.

C. Contacts/Interviews with an Adverse Party's Employees

1. Both the courts and state ethics boards have struggled with the extent to which attorneys for one party may interview or otherwise obtain information from employees of opposing party entities. Generally, a lawyer may not contact another represented party for that purpose without prior consent of counsel for that party. Ohio Rule 4.2. However, the question is who is included in the definition of "party". In the *Upjohn* case, the U.S. Supreme Court adopted a practical transactional test, whereby those in a managerial/decision-making role as well as those whose acts or omissions may be imputed to the entity or whose statements may constitute an admission by the entity are protected from contact absent consent by counsel for that entity. This was also the position adopted by original Model Rule 4.2 and in Ohio. Ohio Board Opinion 90-20 (8/17/90). In 2002, the ABA amended comment 7 to Model Rule 4.2 to provide that: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In 2005 the Ohio Board of Commissioners issued Board

Opinion 2005-3 (2/4/05) which adopted this language to "provide more clarity to Ohio attorneys" and modified Opinion 90-20 accordingly. And that same Comment is now formally adopted in Ohio. Ohio Rule 4.2, Comment [7]. Most recently, in Ohio Board Opinion 2016-5 (8/5/16), the Board reaffirmed the same principles but also added:

> Extreme caution should be observed by adverse employers when interviewing current employees, even those employees who do not satisfy the categories set forth in Prof. Cond. R. 4.2, cmt. [7]. When an adverse lawyer interviews current employees, he or she may inadvertently violate Prof. Cond. R. 4.2 because the lawyer typically is not privy to which employees of the corporation regularly consult with the corporation's lawyer or have the authority to bond the organization. In close cases, it may be appropriate to notify the corporation's lawyer before making contact with currently employees. If a legitimate basis for denying contact is given by the corporate lawyer, the adverse lawyer may need to conduct further investigation through other means or engage in limited discovery before initial contact with a current employee is made.

2. Most if not all authorities have recognized the distinction between current and former employees. The latter are generally "fair game", again so long as the attorney identifies whom he represents. *See* ABA Formal Opinions 95-396 (7/28/95) and 91-359 (3/22/91). In Ohio, exceptions were originally recognized where the former employee's conduct gives rise to the claim or where employees are privy to privileged communications with the employer's counsel regarding the case. Ohio Board Opinion 90-20 (8/17/90). Subsequently, however, the Board of Commissioners reconsidered this Opinion and concluded that the former exception does not apply and that contacts may proceed, subject to the following: a lawyer may not communicate *ex parte* with a former employee if he is represented by either independent counsel or his former employer's counsel, without counsel's consent; he must obtain the consent of the former employee to the interview and inform him not to divulge any communication that may have occurred with corporate or other counsel; and he must fully explain that he represents a client adverse to his former employer. Ohio Board Opinion 96-1(2/2/96). Again, in Opinion 2016-5 the Board reaffirmed the same principles but added that contacts may be made with "constituents" of an organization even if their "act or omission [while employed] may be imputed to the organization." The Board also addressed the assertion of representation of current and former employees by a corporation's counsel as follows:

> A corporate lawyer's blanket assertion of representation of the corporation and all of its current and former employees is unsupported by the Rules of Professional Conduct. Such a declaration by a corporation's lawyer does not, by itself, establish legal representation of all employees and is fraught with potential and inherent conflicts of interest for the corporate lawyer.
>
> A lawyer representing a corporation may not prohibit contact with all current and former employees. A similar view was expressed by the ABA: "[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization." ABA, Formal Op. 95-396 (1995).

In other states, contact has been prohibited where the former employee was extensively exposed to confidential client information during his employment. *Camden v. State of Maryland*, 910 F. Supp. 1115 (N.D. MD. 1996). An exception has also been carved out where a former employee has an ongoing agent or fiduciary relationship with the opposing party. *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987). One court also adopted a per se rule, which has not been followed elsewhere, that since contacts with former employees were for the purpose of developing incriminating evidence, no contact should be permitted. *Public Service Electric & Gas Co. v. Aegis*, 745 F.Supp. 1037 (D.N.J. 1990).

3. As stated above, contacts even with protected party employees can occur with the consent of that party's counsel. In addition, leave is sometimes obtained from court where opposing counsel is overly protective or the ethical situation is ambiguous. *See Morrison v. Brandeis University*, 125 F.R.D. 14 (D. Mass. 1989).

4. Where the attorney is barred from making the contact, he or she may not do so indirectly through an agent. Ohio Rule 4.2, Comment [4]; *see Schantz v. Eyman*, 418 F.2d 11, 13 (9th Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). However, the same prohibition does not apply to clients themselves. Although early ethics opinions called for the attorney to dissuade the client from such ex parte communications (see ABA Formal Opinion Nos. 75 and 524), more recent authority permits such contact without opposing counsel's consent, at least where the attorney is not using the client to procure information. *See* Ohio Rule 4.2, Comment [4] (parties to a matter may communicate directly with each other and a

lawyer is "not prohibited from advising a client concerning a communication that the client is legally entitled to make").

5. Although infrequently used in employment cases (as compared to fair housing cases), investigators posing as customers and sometimes surreptitiously recording conversations and videotaping interactions have met with mixed ethical rulings. Where the contacts have been limited and on the same basis as the general public, such interactions and accompanying surveillance videos have been held generally not to involve ethical violations. *See Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876 (N.D. Ill. 2002). However, where investigators "trick protected employees into doing things or saying things they otherwise would not do or say" and/or interrogate and seek specific admissions by their actions, the use of investigators by counsel can involve ethical violations, resulting in disqualification and/or suppression of evidence. *Id.* at 880; *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F. 3d 693, 698 (8th Cir. 2003) (since "an attorney is responsible for the misconduct of his non-lawyer employer or associate if the lawyer orders or ratifies the conduct…Arctic Cat's attorneys are ethically responsible for Mohr's conduct in communicating with Becker as if they had made the contact themselves," citing Model Rule 5.3).

IV. PLEADINGS AND LITIGATION CONDUCT

A. Rule 11

1. At one point, there was wide disparity between the Federal and Ohio versions of Civil Procedure Rule 11. From a footnote in *Border City Savings & Loan Ass'n. v. Moan*, 15 Ohio St. 3d 65, 67 n.1 (1984), it was initially thought that lawyers could only be disciplined for violating Ohio Rule 11, not subjected to monetary sanctions. Federal Rule 11, on the other hand, particularly after the 1983 amendments, imposed what were considered to be "mandatory" sanctions on attorneys (and potentially their clients) for violation of the Rule. Subsequent decisions in Ohio and amendments of both Ohio and Federal Rule 11 resulted in monetary sanctions being expressly available under the Ohio rule but more the exception than the rule (including a "free" opportunity for the other side to withdraw the offending pleading) in federal proceedings. That sanctions still do occur, however, is exemplified by the Sixth Circuit decision in *Rentz v. Dynasty Apparel Industries, Inc.*, 556 F.3d 389 (6th Cir. 2009), where the court reinstated sanctions against both a partner and an associate for "unwarranted legal contentions" since the district court's reduced awards were insufficient to "meet Rule 11's requirement that sanctions be sufficient 'to deter repetition of the conduct or comparable conduct' by others similarly situated" and, as to the

associate, "all attorneys, regardless of experience level or position, are equally subject to Rule 11's obligation to conduct a reasonable inquiry into the law and facts before signing papers filed with the court".

2. Ohio Rule 11, as amended effective July 1, 1994, provides in part:

> The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney or *pro se* party, upon motion of a party or upon the Court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.

As noted in the staff note to the amendment, the adding of the "award" language followed a number of Court of Appeals decisions authorizing such sanctions under Rule 11. *See, e.g.*, *Kemp, Schaeffer & Rowe Co., L.P.A. v. Frecker*, 70 Ohio App. 3d 493 (Franklin 1990). In addition, the amendment expanded the earlier Rule to cover motions and other papers (not just pleadings) filed by any party (not just plaintiffs). Note also, however, that sanctions continue to be imposed only for "willful" violations, sometimes construed as requiring "bad faith", and that a hearing is generally required. *Id.*; *See also First Federal Bank of Ohio v. Angelini*, 2012-Ohio-2136, 2012 Ohio App. LEXIS 1891, 2012 WL 1664191 (Crawford 2012); *McCutchen v. Brooks*, 37 Ohio App. 3d 110 (Franklin 1988).

B. Statutory Sanctions

1. Ohio Revised Code, Section 2323.51, adopted as part of the 1986 Tort Reform Act, seeks to discourage and provide a potential remedy for "frivolous conduct". Under the statute, "conduct" includes filing of a civil action, asserting a claim or defense or taking a position or any other action in connection therewith. The "frivolous" element relates to conduct which (1) obviously serves merely to harass or maliciously injure another party to the action or (2) is not warranted under existing law and cannot be supported by good faith argument for an extension, modification or reversal of existing law. The latter standard awaits full clarification but does not appear to require knowing or willful conduct. On the other hand, the only remedy is attorneys fees and they are discretionary ("court may award"). Section 2323.51(B)(1). Unlike Ohio Rule 11, however, these

sanctions may be awarded against the party, the lawyer, or both. Section 2323.51(B)(4). A hearing is required (Section 2323.51(B)(2)), and various factors affect the granting of the award. *See, e.g.*, *Cooper v. Commercial Savings Bank*, 2015-Ohio-4131, 2015 Ohio app. LEXIS 3979 2015 WL 5782124 (Wyandot 2015) (frivolous conduct sanction awarded), *appeal not allowed*, 145 Ohio St.3d 1408, 2016-Ohio-899; *Giusti v. Felten*, 2014-Ohio-3115, 2014 Ohio App. LEXIS 3048, 2014 WL 3530978 (Summit 2014) (sanction denied).

2. As to federal cases, 28 U.S.C. Section 1927 provides that "any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This section "does not require a finding of bad faith . . . so any conduct that, 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court,' is sanctionable." *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008). Further, "sanctions under Section 1927 . . . are levied to compensate the victims of dilatory practices, not as a means of punishment." *Id.* at 1203 (affirming an award of almost $8,000.00 where the plaintiff misrepresented the defendant's position regarding settlement in a motion seeking enforcement of the settlement).

C. Duties to the System and the Court

Under Ohio Rule 3.3(a),

> A lawyer shall not knowingly do any of the following:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy this situation, including, if necessary, disclosure to the tribunal.

In Rule 1.0, knowingly or knows "denotes actual knowledge of the fact in question" although "[a] person's knowledge may be inferred from circumstances." Further,

Rule 3.3(b) provides that "[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal." And under Rule 3.3(c), the duties under both (a) and (b) "continue until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [confidentiality of information under the attorney-client privilege]." The Model Rules contain a privilege exception, but this was not adopted in Ohio. Thus, the Ohio Rules call for disclosure (as a last resort) in circumstances not required in most other jurisdictions.

D. Conduct in Mediation and Negotiation of Settlement

1. Recognizing the different types and nature of communications made during mediation and settlement negotiations, ABA Formal Opinion 06-439 (4/12/06) differentiated between knowing or affirmative "false statements of material fact or law" and statements which can be considered "puffing." As the Committee stated:

> Affirmative misrepresentations by lawyers in negotiation . . . have been the basis for the imposition of litigation sanctions, and the setting aside of settlement agreements, as well as civil lawsuits against the lawyers themselves.
>
> In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's 'bottom line' position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.

Considering the argument that statements during mediation should be held to higher standards, the Committee concluded that "the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation" as well, as defined by Model Rule 4.1(a) and the Committee's construction of that Rule in the negotiation context. The Committee also

cautioned, that, in either context, care must be taken to avoid even inadvertent factual misstatements regarding such matters as the extent of one's authority to settle as compared to whether the client wishes (or not) to settle for a stated amount or terms.

2. As to mediations in the court–annexed context, particularly where a judge participates, the ABA Opinion states in Footnote 2:

> Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because the mediator is not a "tribunal" as defined in Model Rule 1.00(m).
>
> * * *
>
> Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates.

Then regarding candor in negotiations if the court is involved, the Opinion quotes from earlier Formal Opinion 93-370 regarding whether a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyers settlement authority in a civil matter, as follows:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

3. Further, the ABA Opinion also offers the following counsel in Footnote 22:

> There may . . . be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." . . . Thus, in extreme cases, a failure to be forthcoming even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

And finally, the Opinion states in its penultimate paragraph:

> We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50.00. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50.00, when authority had in fact been granted to settle for a higher sum.

V. PRETRIAL DISCOVERY

A. Rules 26 and 37

1. Rule 26 establishes the general framework for the conduct of pretrial discovery, including both rights and obligations. Since discovery is essentially a party rather than a court process (indeed, both the Ohio and federal rules require extra-judicial exhaustion of efforts to resolve disputes before filing any discovery motion), the manner in which the attorneys conduct and control depositions, interrogatories, production of documents, etc. is key to the process. The Advisory Committee notes to Federal Civil Rule 26(g) state that "Rule 26(g) imposes an affirmative

duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26-37" and "provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto or an objection . . ." Further, "the Rule aspires to eliminate one of the most prevalent of all discovery abuses: knee jerk discovery requests served without consideration of cost or burden to the responding party." *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 358 (D. Md. 2008). Thus, "the requirement of discovery being proportional to what is at issue is clearly stated at Rule 26(g)(1)(B)(iii) (lawyer's signature on a discovery request certifies that it is 'neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action' . . ."). *Id.* However, "Similar[y, Rule 26(g) also was enacted over 25 years ago to bring an end to the equally abusive practice of objecting to discovery requests reflexively – but not reflectively – and without a factual basis." *Id* (holding that boilerplate objections to discovery requests can waive the right to object).

Effective December 1, 2015, the Federal Rules of Civil Procedure were amended specifically to reemphasize the importance of "proportionality" and cooperation in dealing with discovery matters. Thus, Rule 26(b)(1) now provides that:

> *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

As stated by Chief Justice Roberts in his 2015 Year-End Report on the Federal Judiciary, Rule 1 was amended to "make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation," including discovery; that Rule 16 was amended to require an earlier case management conference with the judge regarding plans for discovery; that "Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of [electronically stored information] in their case management plan and discovery conferences;" and that:

> "Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common sense concept of proportionality:
>
> * * *
>
> The Amended Rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter – the federal judge – to guide decisions respecting the scope of discovery.

And finally, Chief Justice Roberts also stated in conclusion that "the test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results." (p.11)

2. Ohio Rule 3.4(a) (a lawyer shall not "unlawfully . . . conceal a document or other material having potential evidentiary value"), lawyers are obligated to cooperate in the discovery process. Further, under Ohio Rule 3.4(d) a lawyer shall not "intentionally or habitually make a frivolous . . . discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . ." That same duty falls upon the client, as provided in Rule 26 and enforced by sanctions under Rule 37. Where the client is "difficult", the dilemma for the attorney is particularly acute. Further, although the duty of "zealous" representation under DR 7-101(A) has been replaced by the duty of "competent" and "diligent" representation under new Ohio Rules 1.1 and 1.3, a strong sense of advocacy combined with the attorney/client privilege and work product doctrine often steer the attorney in the direction of not disclosing a fact or document unless specifically requested. However, the obligations under Rule 26, sanctions under Rule 37 and the increasing number of decisions barring evidence if not revealed pursuant to a "reasonable" request, caution, if not require, the attorney to counsel the client that appropriate compliance in discovery is not only required but in the client's best interest.

B. Depositions

1. Ohio Rule 4.4(a) provides that "a lawyer shall not use means that have no substantial purpose other than to embarrass, harass, delay or burden a third person. . . ." For this and other reasons, the Federal Rules were amended to prohibit most objections during depositions, including specifically "speaking objections." The latter has already been the subject of decisional law in Ohio. *See, e.g.*, *Smith v. Klein*, 23 Ohio App. 3d 146, 151 (Cuyahoga 1985) ("It is not the function of counsel to act as a puppet master, offering his client's proffered answer in lieu of the deponent's answers. The purpose of a deposition is to probe the mind of the deponent, not to elicit self-serving answers from counsel.") Likewise, the practice of instructing a deponent not to answer questions, without a claim of privilege, has also been criticized and sanctioned. *See e.g.*, *Gravill v. Parkhurst*, 27 Ohio App. 3d 100 (Cuyahoga 1985); *Smith v. Klein*, *supra* at 150-51. The same applies to unilaterally terminating the deposition, absent seeking an immediate protective order under Rule 30(D). *See, e.g.*, *E.I. DuPont de Nemours & Company, Inc. v. Thompson*, 29 Ohio App. 3d 272 (Cuyahoga 1986) (attorneys sanctioned); *Gravill v. Parkhurst*, *supra* at 104 (complaint dismissed). In *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008), the court addressed these principles and the applicable procedure and ethics rules in sanctioning the lawyer as well as the deponent for the deponent's egregious conduct during the deposition, finding that the lawyer "sat idly by as a mere spectator to [the deponent's] abusive, obstructive, and evasive behavior; and when he did speak, he either incorrectly directed the witness not to answer, dared opposing counsel to file a motion to compel or even joined in [the deponent's] offensive conduct."

2. What if the client commits perjury during a deposition or in responding to interrogatories? Can you simply withdraw? Ohio Rule 3.3 calls for remedial action as opposed to or in addition to withdrawal. *See* Comment [10]. In ABA Formal Opinion 93-376 (8/6/93) the conclusion was reached that not only must the lawyer attempt to convince the client to take remedial action but, if the client refuses, in most circumstances the lawyer will be required to take remedial action even if the deposition testimony has not yet been formally submitted to the Court. While not binding, this Opinion counsels careful consideration and implementation of a plan of action best calculated to extricate the client from their precarious position as well as the lawyer from the ethical dilemma imposed. *See also* New York State Bar Ethics Op. 837 (3/16/10) for a full discussion of the issues and handling of the client perjury situation.

3. In a situation where a deposition must be taken of a non-party deponent, and the deponent is a client (or employed by a client) of the firm, remember that the usual conflict rules apply. Ordinarily, prudence will dictate either that consent and

waiver be obtained or that other counsel (either already in the case or specially retained) conduct the deposition. *See* ABA Formal Opinion 92-367 (10/16/92).

4. *See also* Section II.C. below regarding preparation of witnesses.

C. Computerized Information ("ESI")

1. In the computer age, sometimes difficult questions can arise as to whether computer information is protected by the attorney/client privilege, the work product doctrine, or duties of confidentiality/privacy. Although it has been said that "discovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information", *Dunn v. Midwestern Indemnity*, 88 F.R.D. 191 (S.D. Ohio, 1980), the answer is not always that simple. Thus, assuming the client has computer information responsive to a proper request, ascertaining the existence of such data (in backup or archives?), determining when, how, and for what purpose it was created and even determining how far one should go in searching for such information (given the "undue burden and expense" qualification in Rule 26) are all problems to be addressed and resolved. Once located, there are still some discoverability questions. Thus, for example, whether an electronic mail ("e-mail") communication is subject to the attorney/client privilege requires consideration not only of its content but its dissemination within the organization. *See IBM v. Comdisco, Inc.*, 1992 Del. Super. LEXIS 67 (Del. Super. Ct, Mar. 1, 1992).

2. Frequently, the question is whether the information is subject to work product protection. Where the computer information has been created by or at the direction of counsel, such as where in-house counsel keeps tabs on claims in litigation, the information should be protected. *See Shipes v. BIC Corp.* 154 F.R.D. 301 (M.D. Ga. 1994). Where, on the other hand, the information is more in the nature of compilations of non-privileged information, discovery will likely be granted. *See Williams v. E.I. DuPont de Nemours & Co.*, 119 F.R.D. 648 (W.D. Ky. 1987). Like other information, care must be taken to maintain the data confidentially, so that no waiver of the protection occurs. *See In Re Chrysler Motors Corp.* 860 F.2d 844 (8th Cir. 1988) (computerized data base held discoverable where disclosed to class action plaintiffs' counsel during settlement negotiations, notwithstanding agreement to the contrary). *See also Victor Stanley Inc. v. Creative Pipe, Inc.*, 2008 U.S. Dist. LEXIS 42025 (D. Md. 2008) (in lengthy and thorough decision, the court finds that defendants did not take adequate measures to prevent inadvertent disclosure of privileged e-mails, had requested and then abandoned a "claw back" agreement and had not taken other measures to prevent disclosure).

3. Finally, one should note two conflicting client temptations. One is to wipe out data bases upon learning that such information is or may be sought in discovery. Such conduct is sanctionable. *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987). The opposite client tendency which can also be problematical is the desire to read all e-mails of its employees, particularly in a situation where an employee is terminated and then sues the organization. However, those e-mails may be subject to a confidentiality/privacy protection, particularly if they are of a personal nature, unless the employer has adopted and distributed a policy otherwise. *See* "The Employer's Right to Read Employee E-mail: Protecting Property or Personal Prying?", 8 The Labor Lawyer, 923 (ABA 1992).

4. Due to increased controversy over discovery of electronic evidence, prudence calls for careful consultation with a client immediately upon filing of a lawsuit to ascertain the nature and existence of computer information and the regular destruction schedule (if any). *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (full discussion of counsel's duties); 80 Apr. ABA J. 115. Courts addressing the issues of spoliation in this context (either advertent or inadvertent) have placed an increasing duty on the litigation attorney not only to ensure that the client has taken appropriate action to save e-mails and documents in electronic form but also (as necessary and appropriate) to learn the client's systems and potentially sit down with each and every material witness to determine whether they have in fact retained all e-mail and documents (or whether they can be "retrieved" before they are written over or "erased"). *See Zubulake*, *supra*. *See also Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010), amended by 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (*Zubulake* revisited: once "a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence"). Also, a thorough effort meeting these standards may require accessing all possible electronic devices, personal as well as business, including iPhones and BlackBerrys. *See Southeastern Mechanical Services, Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. 2009) (adverse inference instruction imposed as sanction for "wiping" BlackBerry). Similarly, counsel are also expected to take appropriate corrective action if they learn that an e-mail or electronic document has been altered. *See McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149 (D. Mass. 1997) (no sanction imposed for alterations by human resources manager of key e-mail on the day after plaintiff filed charges for sexual harassment where alteration discovered, full e-mail provided during deposition and other appropriate steps taken).

5. The federal rules were amended in 2006 and again in 2015 to address parties' rights and obligations with respect to electronically stored information. Thus, the

amendments to Rules 16 and 26 provide for the parties and the Court to address issues relating to such discovery in the pretrial/case management conference stage and the protection of any privileges. Further, amended Rule 26(b)(5)(B) provides a process by which the producing party may claim privilege as to already-produced information, have the receiving party "return, sequester or destroy the specified information and any copies" or present it to the court under seal, and have the privilege issues resolved. The amendment to Rule 33 provides that an answer to an interrogatory involving production of business records should include electronically stored information. The amendment to Rule 34 defines electronically stored information for production purposes and addresses the form in which it must be produced absent agreement. And the amendment to Civil Rule 37(e), relating to discovery orders and sanctions, provides that:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> 1. upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> 2. only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> - (A) presume that the lost information was unfavorable to the party;
>
> - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> - (C) dismiss the action or enter a default judgment.

These rules, their comments and cases construing and applying the rules further define the duty of lawyers toward their clients, opposing parties and the court regarding the conduct of electronic discovery.

6. In September, 2008 Federal Evidence Rule 502 was enacted by Congress to establish "limitations on waiver" of the attorney-client privilege or work product

protection by inadvertent disclosure, with a standard similar to Rule 26(b)(5)(B) and application in both federal and state proceedings. *See* IX.D.1. below.

D. Privacy and Confidentiality Issues

Often a lawyer will obtain medical or psychiatric records in the course of employment litigation, relating to mental distress, a possible disability or otherwise. In addition to the obligations imposed by the federal Health Information Portability and Accountability Act of 1996 ("HIPAA"), the Ohio Supreme Court has now held that, even if the medical records are relevant and properly obtained, either by implicit waiver or express authorization, the use of such information is "limited to that case" and that "an attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information." *Hageman v. Southwest General Health Center*, 119 Ohio St. 3d 185, 2008-Ohio-3343, syllabus (2008). Similarly, a protective order restricting the use of discovered information to the particular case may result in sanctions (including suspension of the attorney's authority to practice in that jurisdiction) if the attorney proceeds to dismiss and refile the case in another jurisdiction. *In re: Peters*, 748 F.3d 456 (2d Cir. 2014) (seven-year suspension affirmed), *cert. denied*, 2014 U.S. LEXIS 7313 (Nov. 3, 2014).

VI. WITNESSES

A. Contact

1. Under Ohio Rule 3.4(a), a lawyer is enjoined not to "unlawfully obstruct another party's access to evidence." In addition, the lawyer cannot "advise or cause a person to hide or leave the jurisdiction" to make that person unavailable as a witness. Rule 3.4(g).

2. Generally, unless prohibited by local rule, an opposing party's expert witness may be contacted. In those jurisdictions, however, where Federal Rule 26(b)(4)(A) or similar rule applies, *ex parte* contact would likely be improper. *See* ABA Formal Opinion 93-378 (1993). Also, where an expert has been consulted but not retained by one party, and then is in fact retained by the other party after confidential information was already communicated by the first party, counsel for the second party may be disqualified (having become "tainted"). *See Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067 (1994).

B. Compensation

1. Under Ohio Rule 3.4(b), a lawyer shall not "offer an inducement to a witness that is prohibited by law." Comment [3] then states that "it is not improper to pay a witness's expenses."

C. Preparation

1. In preparing a witness (particularly including a client) for deposition or trial, lawyers may not "coach" witnesses to the extent of providing (in writing or otherwise) suggested answers to anticipated questions. *See State ex rel. Abner v. Elliott*, 85 Ohio St. 3d 11 (1999). Where such coaching occurs, the witness preparation materials may be subject to discovery and sanctions imposed. *Id.*

VII. CONDUCT AT TRIAL

A. Extraneous and/or Degrading Matters

1. Ohio Rule 3.4(e) provides that a lawyer shall not in trial "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . ."

2. Previously under subpart (2) of DR 7-106(C), the lawyer was also enjoined from asking "any question . . . that is intended to degrade a witness or other person." There is no Rule counterpart.

B. Lawyer's Knowledge or Opinion

1. During a trial, a lawyer may only present and argue the facts of record and may not "assert personal knowledge of facts in issue, except when testifying as a witness." Ohio Rule 3.4(e).

2. Likewise, a lawyer may not "state a personal opinion" with respect to "the justness of a cause," or the "credibility of a witness," or the "culpability of a civil litigant." Ohio Rule 3.4(e). Previously, the Code also provided that "he may argue, on his analysis of the evidence, for any position or conclusion with respect to [these] matters," DR 7-106(C)(4), but no such provision or comment exists under the new Rules.

C. Jurors

1. Under Ohio Rule 3.5(a)(3), a lawyer shall not "communicate *ex parte* with . . . a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order." In addition, under subparagraph (4), a lawyer shall not communicate with a "juror or prospective juror after discharge of the jury if any of the following applies: (i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment."

VIII. FEES AND EXPENSES

A. Conflict Issues

1. As discussed earlier, there is a potential conflict problem both in the insurance defense situation and in the employer/employee joint defense situation in representing a party while being paid by another. Accordingly, Ohio Rule 1.8(f) provides that a lawyer may not "accept compensation . . . from someone other than the client," except with the informed written consent of the client. Rarely in practice has this requirement been implemented (at least in writing). In an appropriate case, however, the consent should be memorialized.

2. *See also* the discussion below regarding potential conflicts in settlement negotiations and arrangements.

B. Contingent Fees

1. Most states require that contingent fee arrangements be reduced to writing. Ohio Rule 1.5(c) expressly requires a writing signed by the client explaining the method for determining the fee and handling of expenses as well as a closing statement describing and memorializing the application of the method and handling of expenses, also signed by the client.

2. The content of the arrangement/agreement should be as clear as possible. Under Ohio's former "publicity" rule, DR 2-101(E)(1)(c), a lawyer could publicize contingent fee rates "provided that the statement discloses whether percentages are computed before or after deduction of costs and expenses and advises the public that, in the event of an adverse verdict or decision, the contingent fee litigant could be liable for payment of courts costs, expenses of investigation, expenses of medical examinations, and costs incurred in obtaining and presenting evidence". There is no counterpart to this rule under the new Ohio Rules.

3. Where a lawyer retains an outside firm to provide healthcare lien or other services, Ohio Ethics Opinion 2009-9 (12/4/09) states that the lawyer may use professional judgment as to whether to charge the client as part of the contingent fee or as an expense of litigation, provided that the client's consent to outsourcing is obtained in advance, the fees and expenses incurred are reasonable, and the nature and basis of the fee is communicated in writing.

C. Referral Fees

1. After much discussion regarding the difficulties of enforcing the old "referral fee" rule, former DR 2-107 was amended in 1990 to provide that the division of fees among lawyers not in the same firm may occur if (a) the terms of the division and identity of lawyers sharing in the fees are "disclosed in writing" to the client, (b) the division is "in proportion to the service performed by each lawyer" or "all lawyers assume responsibility for the representation" in a "written agreement with the client", (c) the client consents, and (d) the total fee is reasonable (frequently interpreted to mean no increase beyond what one lawyer or firm would have charged). Ohio Rule 1.5(e) provides similarly (as well as for mandatory mediation or arbitration of any fee dispute between counsel by a local or state bar committee in subpart (f)). *See also* ABA Formal Opinion 16-474 (4/21/16) regarding the different formulations of Rule 1.5 among the states and potential related conflicts issues (with hypotheticals).

D. Expenses

1. To avoid champerty and the acquisition of a personal interest in litigation, litigation, Rule 1.8(i) states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client," except to establish a lien to secure the lawyer's fee or enter into a reasonable contingent fee agreement. And subpart (e) of that Rule provides that "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," except that a lawyer may "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," and a lawyer may pay court costs and expenses of litigation on behalf of an indigent client. The degree of expectation of reimbursement for advanced expenses had been the subject of debate, as well as whether the prohibition against reimbursement of non-litigation expenses should be reexamined. *Toledo Bar Ass'n v. McGill*, 64 Ohio St.3d 669 (1992). In 2001 the latter question was answered in the negative, at least as to the advancement of living expenses to a personal injury plaintiff. *Cleveland Bar Ass'n. v. Nusbaum*, 93 Ohio St. 3d 150 (2001), which conclusion was recently reaffirmed in *Geauga County Bar Ass'n. v. Bond*, 146 Ohio St.3d 97, 2016-Ohio-1587 (2016).

2. As to loans and other financing by third parties, there have been two sets of authority addressing what is permissible and what is not.

    a. In 1999 the Ohio Board issued an opinion allowing attorneys to refer clients to companies who would then purchase a minority interest in a judgment on appeal but disallowing attorneys from receiving financial assistance in exchange for a company receiving an interest in the attorneys' anticipated

proceeds from the judgment. Ohio Board Opinion 99-6 (12/2/99). Then in 2001, a further opinion issued authorizing attorneys to obtain loans to advance expenses of litigation in a contingent fee personal injury case and to deduct the interest fees and costs of the loan from the client's settlement judgment. Ohio Board Opinion 2001-3 (6/7/01). However, the attorney may not secure the loan with the settlement or judgment, the loan terms must be reasonable, the client must be informed and consent to the loan agreement, the agreement must also say whether repayment of litigation expenses is contingent on the outcome of the matter, and a signed closing statement must be provided to the client. *Id.*

b. In connection with alternative litigation finance (ALF), the Ohio Supreme Court held in 2003 that, under the common law doctrines of champerty and maintenance, an ALF provider could not provide non-recourse advances secured by the pending suit. However, Ohio was alone in so concluding, and the Ohio legislature then adopted R.C. § 1349.55 in 2008 to provide for the terms and conditions for a permissible "non-recourse civil litigation advance" contract. And in December, 2012, the Ohio Board issued Opinion 2012-3 regarding the ethical considerations for such transactions. As noted in the Opinion, the statute sets forth several requirements, including disclosure of the amount of the advance, fees, annual rate of return, a five-day cancellation period, statement that the ALF provider agrees it does not have decision-making authority in the underlying case, and verification that the attorney is being paid on a contingent fee basis. The Opinion then addresses "four of a lawyer's . . . duties . . . of particular importance": Candid advice and communication, independent professional judgment, competence, and confidentiality. The first requires a candid discussion with the client regarding terms of any advance contract, whether it is in the client's best interest and possible alternatives. The second requires that the lawyer make sure that the ALF provider does not in fact interfere with the lawyer's professional judgment. The third requires that, before giving advice to the client regarding an ALF arrangement,, the lawyer must study and learn about ALF or associate with another lawyer who does have this competence. And finally the lawyer must keep all client confidential information confidential and not disclose any facts or evaluations to the ALF provider without the client's informed consent (including considerations of possible waiver of the attorney-client privilege). Both the statute and Opinion are must reading for any lawyer intending to represent clients who may need or benefit from an ALF arrangement.

3. Not all "advances" are prohibited or subject to the foregoing statute and opinions. Also in December 2012, the Ohio Supreme Court issued an opinion holding that a lawyer who made up half of a settlement due to the lawyer's mistake in handling

litigation was not in violation of Rule 1.8(e) prohibiting lawyers from providing financial assistance to clients in connection with pending or contemplated litigation. *Lorain County Bar Ass'n. v. Stuart*, 135 Ohio St.3d 117, 2012-Ohio-5687 (2012).

4. Note generally ABA Formal Opinion 93-379 (12/6/93) regarding the proper parameters for charging for internal expenses such as copies, telephone charges, fax transmissions, etc. and external expenses such as deposition costs.

IX. SPECIAL ISSUES

A. Non-Destruction of Evidence

1. In addition to the ethical duty not to conceal evidence or witnesses under Ohio Rule 3.4, Ohio Revised Code §2921.12 (a criminal code statute) prohibits the alteration, destruction, concealment, removal of any record, document or thing with the purpose of impairing its value or availability as evidence in an official proceeding or ongoing investigation.

2. Where evidence has been lost, destroyed or altered, the courts have found various ways for dealing with the problem, including raising inferences or making findings in favor of the opposing party. *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. at 437 (multiple sanctions, including paying for re-depositions, restoring and producing documents from backup tapes and imposition of an adverse inference instruction at trial); *Travelers Ins. Co. v. Knight Electric Co.*, 1992 Ohio App. LEXIS 6664 (Stark 1992) (summary judgment for defendant where plaintiff lost or destroyed critical evidence); *Bright v. Ford Motor Co.*, 63 Ohio App. 3d 256 (Montgomery 1990) (rebuttable presumption that defendant was prejudiced when plaintiff cleaned suspect auto parts in violation of a protective order).

B. Threatened Action

1. In former Code states, including Ohio, the message as to threatening criminal prosecution was clear: "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." DR 7-105. *See Disciplinary Counsel v. King*, 67 Ohio St. 3d 236 (1993). In some instances, the word "solely" permitted some leeway where the facts warranted. *See* OSBA Informal Opinion 87-9 (7/16/87) (Ohio statute required notice of violation). In most Model Rule states, a different conclusion was reached, and a lawyer in those jurisdictions has not been prohibited from threatening criminal prosecution if both the civil and criminal charges are warranted by the law and the facts. *See* ABA Formal Opinion 92-363 (1992).

However, Ohio has continued the same prohibition as before in specially adopting Rule 1.2(e).

2. The question of whether threatening to file a disciplinary complaint against opposing counsel is unethical is also now answered by Ohio Rule 1.2(e), which contains the same prohibition as for threatening criminal charges. Previously, this question was addressed by the ABA Standing Committee on Ethics and Professional Responsibility. In Formal Opinion 94-383 (7/5/94), the Committee concluded (interpreting the Model Rules, particularly Rules 8.3 and 8.4) that such a threat, in order to gain advantage in a civil case, could be an ethical violation principally because the threat seeks an advantage by not reporting an observed ethical violation (*i.e.*, using it as a bargaining chip). The Opinion then goes on to state that any such violation should be reported after the conclusion of the case and not used as "leverage" during its pendency. In a related Opinion on the same date, the Committee also concluded that if a disciplinary grievance is filed by opposing counsel, the lawyer charged is generally not required to withdraw, nor is withdrawal ordinarily permitted without the client's consent if the client would be adversely affected by the withdrawal. Formal Opinion 94-384 (7/5/94).

C. Certain Settlement Issues

1. In litigation where there may be a right to recover attorneys' fees, potential or actual conflicts can arise when settlement offers are made which either provide a lump sum for settlement of all the claims (including attorneys' fees) or the offer is conditioned on waiver of any attorneys' fees. In the former situation, it has been concluded that it is not unethical for the defendant's counsel to offer or the plaintiff's counsel to consider a lump sum settlement. *See* Georgia Opinion 39 (7/20/84). In the latter situation, the United States Supreme Court likewise concluded in *Evans v. Jeff D.*, 475 U.S. 717 (1986), that a settlement offer contingent upon waiver of attorneys' fees by plaintiff's counsel did not present an ethical dilemma since the counsel's duty was to the client and not him or herself. However, the opinion centered around construction of the Federal attorneys' fees statute, 42 U.S.C. §1988, and various jurisdictions have reached a different conclusion under their codes or rules (including the District of Columbia, Maine and New York City).

2. Where a lawyer represents two or more clients, Ohio Rule 1.8(g) provides that the lawyer shall not participate in making an aggregate settlement of claims by or against the clients unless "each client" consents. (As Comment [13] notes, Rule 23 governs settlements in class action cases.) The Rule states that each client must give "informed consent, in a writing signed by the client" and a lawyer must disclose "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement . . ." In February, 2006, the ABA

issued Formal Opinion 06-438 (2/10/06) which construes the Model Rule to require a lawyer also to inform each client of the total fees and costs to be paid to the lawyer, how they will be paid and the method by which costs are to be apportioned among the clients. As to other related issues, based on the foregoing principles and otherwise, most courts have held that an advance agreement to be bound by a majority vote of the clients is not enforceable. *See Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975); *Abbott v. Kidder Peabody & Co., Inc.*, 42 F. Supp. 2d 1046 (D. Colo. 1999). More recently, the Bar of the City of New York Ethics Committee issued its Opinion 2009-06 deciding the same and that the clients cannot agree in advance to waive the right to approve the specific terms of an aggregate settlement proposal. Also, since the aggregate settlement rules are in addition to the normal principles governing multiple representation, if the clients cannot agree and the conflict is not resolvable, the attorney may have to withdraw altogether. *See* In Re: *Corn Derivatives Antitrust Litigation*, 748 F.2d 157 (3rd Cir. 1984). While not addressing these issues directly, the ABA Opinion curiously states that "in representations where the possibility of an aggregate settlement or aggregated agreement exists, clients should be advised of the risk that if the offer or demand requires the consent of all commonly-represented litigants, the failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand."

3. Some settlements have also attempted to include a requirement that counsel (usually plaintiff's counsel) agree not to represent other parties against the settling party (usually the defendant). However, such an agreement is expressly prohibited by Ohio Rule 5.6(b). *See* ABA Formal Opinions 93-371 (4/16/93) and 95-394 (7/24/95). *See also In re Hager*, 812 A.2d 904, 908, 918-20 (D.C. 2002) (lawyers agreement "never to represent anyone with related claims against the opposing party" and to keep confidential and never disclose all information learned in connection with the lawyer's investigations violates rules); *In re Conduct of Brandt*, 331 Ore. 113, 10 P.3d 906, 918 (2000) (retainer agreement with opposing party having same effect also improper). Similarly, agreements not to "use" information gained during the representation in later representations against the opposing party have also been found unethical and unenforceable. *See* ABA Formal Opinion 00-417 (4/7/00). However, a provision restricting plaintiff's counsel from soliciting or encouraging any other parties or attorneys to commence proceedings against defendants with respect to the same subject matter of the suit has been held permissible. *See Feldman v. Minars*, 230 A.D. 2d 356, 359-60, 658 N.Y.S. 2d 614, 616-17 (N.Y. 1997).

D. Receipt of Privileged or Purloined Documents

1. Not infrequently, privileged documents are accidentally included in a group of documents produced pursuant to a production request. That raises issues as to

whether the attorney/client privilege has been waived not only as to the document itself but as to the entire subject matter discussed or reflected in the document. *See Van Hull v. Marriott Courtyard*, 63 F. Supp. 2d 840 (N.D. Ohio 1999) (no waiver as to documents or subject matter where plaintiff's notes of statements to him by his lawyer were inadvertently disclosed; opposing counsel required to return the notes without using or disseminating them). *But see Inhalation Plastics v. Medex Cardio-Pulmonary, Inc.*, 2012 U.S. Dist. LEXIS 121830, 2012 WL 3731483 (S.D. Ohio Aug. 28, 2012), *aff'd.* 638 Fed App'x. 489 (6th Cir. 2016), where the court held that because the defendant had not adequately reviewed the production for privileged documents, had allowed a relatively large number of privileged documents through (347 out of 7,500), had not provided a privilege log and had not even identified the documents and basis for the privilege claim with particularity, the privilege was waived under the five-factor analysis followed by most courts.

In addition, there is the question of what rights or obligations the receiving lawyer has with respect to reviewing, using and/or disposing of the document. On the one hand, the receiving lawyer has a duty to the client, favoring retention and use. On the other hand, there are countervailing "administration of justice" issues underlying the privilege which also come into play. In ABA Formal Opinion 92-368 (10/16/92), the Committee concluded that, upon receipt of apparently privileged material that has obviously been inadvertently transmitted (in production, by fax, etc.), the receiving lawyer should avoid reviewing the material and contact sending counsel for instructions on handling or disposition. However, in ABA Formal Opinion 05-437 (2005) the earlier opinion was withdrawn, based on revisions to Model Rule 4.4(b) (now adopted in Ohio) which provides only that "a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender," with an accompanying Comment that "whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." Then in 2011 the ABA issued a further opinion, 11-460, addressing the situation where employer's counsel receives the contents of the plaintiff employee's workplace computer (or other device) which includes privileged e-mails to that employee's counsel. Again, the ABA stated that this issue is largely determined by law of the jurisdiction and that "the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt" of such e-mails. However, the ABA noted that courts may require such disclosure in litigation and that some states may also require at least notification of such receipt. On the other hand, if there is no clear law (one way or the other), then "the decision whether to give notice must be made by the employer-client." In that situation, "it often will be in the employer-client's best interest to give notice

and obtain a judicial ruling as to the admissibility of the employee's attorney-client communication before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible." Finally, the Opinion states that the employer's counsel must discuss "these and other implications of disclosure" and other alternatives to enable the client to make an informed decision. Also, *see* Ohio Opinion 93-11 (1993), which, in the context of discovery of privileged documents in a public records search, declined to follow the original ABA Opinion regarding review or use of the documents but similarly required notification of opposing counsel. And see the discussion of amended Federal Court Rule 26(b)(5)(B) in section I.C.5. above, which essentially tracks the original ABA Opinion regarding handling of disclosures.

In September, 2008, Congress passed and the President signed a law adopting new Federal Evidence Rule 502 relating to waiver of the privilege for substantive evidentiary purposes, again tracking the original ABA Opinion. 502(a) provides that "when the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Then, under the heading "Inadvertent Disclosure", 502(b) provides that "when made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." Further, the Rule states that if the disclosure occurred in a state proceeding, the disclosure "does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this Rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred." Also, the Rule can have application in a non-discovery context, such as the inadvertent addressing of a privileged e-mail to the wrong person. *See Multiquip, Inc. v. Water Management Systems*, 2009 U.S. Dist. LEXIS 109148, 2009 WL 4261214 (D. Idaho Nov. 23, 2009).

2. What is the result, however, if the documents are received not from the opposing party but from another source (such as a current or former employee) who took them without authorization?

In a 1994 Opinion, the ABA Committee noted that one decision had prohibited the receiving lawyer's use of the adverse party's confidential documents provided by a current employee of that party, *In re Shell Oil Refinery*, 143 F.R.D. 105, *amended*, 144 F.R.D. 73 (E.D. La. 1992), but that three jurisdictions (Maryland, Virginia and Michigan) had concluded that the receiving lawyer has no obligation to disclose to a court or the adverse party that he possesses the adverse party's privileged or confidential information and that the receiving lawyer may use such materials. ABA Formal Opinion 94-382 (7/5/94). Following its earlier Opinion 92-368, discussed above, the Committee concluded that the receiving lawyer should avoid reviewing the material and contact sending counsel for instructions on handling or disposition. Again, however, the Committee withdrew the Opinion (Formal Opinion 06-440 (3/16/06)) but this time on the basis that the Model Rules (including 4.4(b)) have no application in this situation. *See also* Philadelphia Bar Ass'n Professional Guidance Committee, Op. 2008-2 (3/08) (duties of lawyer to system and client where client obtains opposing party's e-mails surreptitiously); District of Columbia Bar Opinion No. 242 (9/21/93) (addressing the problem of receiving documents from a client (or prospective client) that appear to be the property of the client's former employer and the duty to return the documents to that employer if they were improperly removed unless to do so would reveal confidences protected by the attorney/client privilege); *Lipin v. Bender*, 84 N.Y.2d 562, 644 N.E.2d 1300 (N.Y. Ct. App. 1994) (dismissal of action for improper evidence-gathering affirmed where employee surreptitiously read and purloined several privileged documents from employer's attorney, since the taint was incurable); *but see Kempcke v. Monsanto Co.*, 132 F.3d 442, (8th Cir. 1998) (summary judgment for employer reversed where termination resulted from employee finding and refusing to return internal computerized information regarding "organizational upgrade plan" showing employee on a "probably will not make it" list).

In 2011 the Nevada Supreme Court addressed receipt of a disk of "Highly Confidential" documents by a New York company with a note to forward the disk to Las Vegas Counsel. Counsel disclosed receipt in pretrial documents and used them in depositions. The court held that while Rule 4.4(b) was not directly applicable, nonetheless prompt notice to opposing counsel should be given, describing how the documents came into counsel's hands, failing which the attorney could be in violation of their ethical duties and/or risk disqualification.

3. Finally, if a lawyer receives privileged documents through inadvertent disclosure or otherwise, should disqualification occur? Where the disclosure did not result in waiver of the privilege and future proceedings are substantially tainted by opposing counsel's knowledge of privileged matter, courts have granted disqualification (and sometimes dismissal of claims, particularly where they are based on and the result of improper disclosure). *See Richards v. Jain*, 168 F.

Supp. 2d 1195, 2000 (W.D. Wash. 2001) (review by paralegal in plaintiff's counsel's office of hundreds of documents marked as privileged from a disk downloaded from plaintiff's harddrive at work requires disqualification of plaintiff's counsel months after commencement of suit, particularly where they never notified opposing counsel and made no attempt to return materials or cease review of them). *See also Ackerman v. National Property Analysts, Inc. v. Talansky*, 887 F. Supp. 510 (S.D.N.Y. 1993) (plaintiff's counsel who deliberately and knowingly affiliated themselves with former counsel for defendants and thereby obtained privileged information were disqualified, and claims based on disclosures were dismissed).

However, where counsel receiving the privileged documents takes appropriate measures to secure the documents from widespread disclosure and seeks a ruling from the court regarding their privileged nature and/or the effect of the disclosure, courts have denied disqualification, particularly where the opposing party has not been substantially prejudiced. *See Milford Power Ltd. Partnership v. New England Power Co.*, 896 F. Supp. 53, 58-59 (D. Mass. 1995) (although defendant's counsel had a clear obligation to return the documents marked privileged, they would not be disqualified where they submitted the documents to the court, did not act in bad faith and plaintiff would not be substantially prejudiced; court also ordered that all copies be destroyed and not used in litigation). *See also In re Nitla SA De C.V.*, 92 S.W. 3d 419 (Tex. Sup. Ct. 2002) (where first judge held documents were not privileged and handed them to plaintiff's counsel who reviewed them notwithstanding defendant's caution that it would seek relief through mandamus, and second judge then held documents were privileged, court denied disqualification since plaintiff's counsel did not act unprofessionally or obtain the documents wrongfully, and there was no evidence that plaintiff's counsel had developed its trial strategy based on the reviewed documents). Also, disqualification has been denied where receiving counsel immediately sought an independent ethics opinion. *See Burt Hill, Inc. v. Hassan*, 2010 U.S. Dist. LEXIS 7492, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010) (anonymously-left documents including privileged material were reviewed only after outside ethics counsel's opinion was obtained; disqualification denied even though the opposing party was not notified under Rule 4.4 which the court held was not literally applicable, since this was an intentional disclosure by an unknown person, but should have been followed nonetheless).

E. Metadata Mining

An increasing problem in this era of e-discovery as well as rapid exchange of documents electronically is the transmission of "metadata" which often contain confidential and/or privileged information regarding the history of the document, deleted changes, dates of

changes, etc. Whether "mining" this metadata information is or is not ethical has been the subject of continued and recent debate.

Most authorities agree that Model Rule 1.6 regarding maintaining client confidences imposes a duty upon lawyers sending documents that may contain confidential/privilege metadata to take precautions to avoid disclosure of such information. ABA Formal Opinion 06-442 (8/5/06). To avoid the problem, many firms have purchased software that removes or "scrubs" metadata from documents before they are sent. However, that is not yet required, and the problem may equally be avoided by sending a different version of a document by hard copy, PDF or scanning or faxing a final version. *Id.*

There is far less agreement among the authorities regarding the duties of a receiving lawyer. In 2001 the New York State Bar Association Committee on Professional Ethics adopted the position that "a lawyer may not make use of computer software application to surreptitiously 'get behind' visible documents . . . ." NYSBA-Committee on Professional Ethics Opinion 749 (12/14/01). Since then, ethics authorities in Alabama, Arizona, Florida, Maine, New Hampshire and New York County have also reached the same or similar conclusion.[1] The basis for their conclusion derives primarily from the view that metadata mining would damage the attorney-client relationship because clients would be less willing to communicate with counsel out of fear that their communications could not be adequately safeguarded and that in transmitting an electronic document counsel generally does not intend to convey the "hidden" material or information and thus the disclosure is "inadvertent." In that situation a lawyer reviewing the metadata knowing that it was inadvertently disclosed may violate Rule 8.4(c), as also found by the West Virginia Ethics authority. West Virginia Bar L.E. Opinion 2009-01. In 2012 the Washington State Bar issued Informal Opinion 2216 stating that the lawyer only has a duty to notify the sender if the document contains "readily accessible" metadata, and may read it without returning the documents, but may not use high tech tools to extract metadata attempted to be "scrubbed," finding such efforts would constitute improper evidence-gathering in violation of Rule 4.4(a) and conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

However, a different view was taken by the American Bar Association in Opinion 06-442 and by the Maryland State Bar Association in Ethics Docket No. 2007-09. Both concluded that metadata mining should be handled in the same way as inadvertent disclosures generally, that Rule 4.4(b) only requires notice to the sending lawyer of any inadvertent disclosure and that that Rule gives a lawyer discretion to review misdirected documents, so a lawyer should have the same discretion to review documents for metadata.

[1] Alabama State Bar Office of General Counsel Formal Opinion 2007-02 (limiting its conclusion to the non-litigation context); State Bar of Arizona Ethics Committee Ethics Opinion 07-03; The Florida Bar Ethics Department Ethics Opinion 06-02; Maine Board of Overseers of the Bar Professional Ethics Commission Opinion #196; Mississippi Bar Ethics Committee Opinion 259 (November 29, 2012); New Hampshire Bar Association – Ethics Committee Opinion 2008-2009/4 (excluding from its analysis "electronic materials subject to discovery"); NYCLA Committee on Professional Ethics Opinion 738 (March 24, 2008) (same).

Four other bar associations have also concluded that metadata "mining" should be permissible under some circumstances. Thus, the District of Columbia found that a "receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent." D.C. Opinion 341. Similarly, Colorado permits metadata mining unless the receiving attorney is notified by the sender prior to the recipient's review of the metadata that the metadata contains confidential information. Colorado Bar Ethics Opinion 119. The Pennsylvania Bar Association adopted a case-by-case inquiry and consideration of several factors, including whether the lawyer could use the metadata as a matter of substantive law, the potential effect on the client's matter if the lawyer reviews the metadata, and the client's views about metadata mining. Pennsylvania Bar Association Formal Opinion 2009-100. Finally, West Virginia adopted a somewhat more restrictive view that "if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences." West Virginia Bar L.E. Opinion 2009-01. As that opinion also advises, if the receiving lawyer is not certain whether the disclosure of metadata was inadvertent, the lawyer should (but is not required?) to seek clarification from the sending lawyer before reviewing the metadata.

Thus, determining whether "mining" is permitted requires analysis of the ethics rules and opinions particular to the jurisdiction, as well as consideration of choice of law rules if the transmission occurs from a state barring "mining" to one that permits it (or vice versa).