

# Employment & Labor Relations Law



AMERICAN BAR ASSOCIATION

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## What I Learned at the Movies

By Alan L. Rupe

Employment cases: high emotion, high stakes, high drama, and always a few rough-and-tumble skirmishes along the way. I've always thought a movie screenwriter could not dream up some of the characters and situations we employment lawyers deal with every day. And nothing is more fun than trying an employment law case. I've represented employers in employment and class action lawsuits for 35 years in jurisdictions across the country, and in each case, I've learned an important lesson. Some of those lessons have been painful. Defending employers from charges of harassment,

discrimination, and illegal employment practices has given me the "scar tissue" I now carry with me into each one of my employment cases.

For a less painful (but equally enjoyable) method of learning about employee-plaintiffs, their lawyers, and how to try a lawsuit, go to the movies. You'll get the same high emotion, drama, and important lawyer lessons—and the popcorn is pretty good, too. My favorite films are those that convey some useful and important lessons about the practice of law. Here are just a few of the lessons I've learned from some of my favorite law movies.

### The Cause

There are a couple of workplace-oriented movies that remind defense lawyers about the zeal of plaintiffs and their attorneys and the willingness to fight for a "cause." *North Country*,<sup>1</sup> a 2005 movie based on a real-life class action filed by Lois E. Jenson, the representative plaintiff in *Jenson v. Eveleth Taconite Company*,<sup>2</sup> is a Hollywood-stained account of women's efforts to be treated equally. Lead character Josey Aimes, a mother of two fleeing her abusive husband, begins working at a local taconite mine, a predominantly male

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## Increased Funding, Revamped SEC Procedures, and Disgruntled Workforce Create Perfect Storm

By Fred Rivera & Javier Garcia

Without question, 2008 and 2009 will go down as two of the more remarkable years in the history of the country's economy—Wall Street powerhouses shuttered or sold-off, the collapse of the subprime and real estate markets, federal bailouts, mass layoffs, and the discovery of a Ponzi scheme that bilked trusting investors out of \$65 billion. Less than a decade after Enron and the passage of the Sarbanes-Oxley Act of 2002, the public's trust in corporate accountability

and the government's ability to regulate financial systems is at an all-time low. Employees, investors, the media, and the general public now take a jaundiced view of many normal and customary business practices, such as executive bonuses, employee reward programs, and business-development events. It is therefore no surprise that the government and individuals have reacted with increased vigilance over our financial system. One concrete consequence, which is noticeable in new

legislation, government spending, and federal agency enforcement priorities, is an increased emphasis on the importance of whistleblowers in the corporate and government compliance environment.

On the whistleblower menu for 2009 and beyond: new whistleblower protection laws included in the Stimulus Bill of 2009; revamped SEC procedures following the agency's failure to detect Bernard Madoff's \$65 billion fraud scheme; a new "Office of

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# Chairs' Column



**Arley Harrell**



**Jeremy Sosna**



**Kimberly Stith**

The Employment and Labor Relations Committee is excited about the opportunities that the 2009–2010 year brings for the Section of Litigation and the committee. The landscape for employment litigation has changed dramatically since last November for attorneys that represent both employers and employees and we expect that the coming year will continue to bring new challenges for lawyers. The cochairs of the committee look forward to the opportunity to provide valuable and timely programming and materials in traditional written as well as web-based formats. We want to ensure that members remain well informed about any changes in our practice and up-to-date about new issues that may affect their clients in the courtroom. The cochairs want to make sure the committee membership is well served and we hope that you will not hesitate to reach out if there are ways that we can improve and enhance the benefits you receive as a member of the committee.

The committee is thrilled to have Kimberly Gee Stith returning as cochair. Kim's dedication to the committee and vision for increasing membership and improving the committee's mission has been critical to our continued success. Kim has practiced employment law for over 18 years and is senior employment counsel at Waste Management's corporate office

in Houston, Texas. Kim is responsible for employment law matters for the corporate and Midwest groups. Kim advises her internal clients on a broad range of employment matters, and she also manages the company's employment litigation and outside counsel relationships. Kim is a skilled trainer and trains corporate and field-based employees on employment topics. Before joining Waste Management, Kim was a partner with Littler Mendelson in Houston, Texas. Prior to law school, Kim worked as an economist at the Department of Labor in Washington, D.C. Kim received her law degree from the University of Virginia School of Law and her bachelor's degree from the University of Texas at Austin.

Joining Kim as cochairs of the committee are P. Arley Harrell and Jeremy Sosna. Arley is a member of Williams Kastner in Seattle, Washington. He is a civil trial lawyer and also counsels clients in business and real estate matters. Arley's numerous trials have included trade secret, employment agreement, and other employment-related issues. Arley is extremely active in the American Bar Association. He has been appointed to a three-year term as a member of the Standing Committee on Paralegals for 2008–2011. Arley has also been involved in many leadership roles with the Section of Litigation and served a three-year term on the Council, its governing body. In addition to his work as a cochair of the committee, Arley is currently a member of the Task Force on the Independence of the Judiciary (2007–2009) of the Section, and has twice served as cochair of the Products Liability Committee, most recently from 2004–2005. Arley was also a member of the Continuing Legal Education Committee of the Council in 2002, and cochaired the Section's 2000 annual conference in Seattle. Arley received his law degree from the University of Washington and his Bachelor of Science degree from Washington State University. The committee will

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## Message from the Editors



**William C. Martucci**



**Brian Koji**

As we welcome in a new ABA bar year, we are excited to bring you an issue of interesting and useful articles. In our initial article, Alan Rupe vividly recounts the lessons that labor and employment practitioners can take from Hollywood.

In his article, "What I Learned at the Movies," Rupe takes readers through lessons gleaned from a myriad of movies ranging from *Norma Rae* and *Philadelphia* to *Office Space* and *My Cousin Vinny*.

In "Increased Funding, Revamped SEC Procedures and Disgruntled Workforce Create Perfect Storm," Fred Rivera and Javier Garcia detail the ever-increasing importance of whistleblower actions to today's employment law practice. Reviewing the recently enacted whistleblower provision set forth in the American Recovery and Reinvestment Act of 2009 against the backdrop of recent regulatory failures and today's economic climate, Rivera and Garcia aptly demonstrate the expected rise in the number, complexity, and sensitivity of whistleblower litigation.

In their article "Can Opposing Counsel Talk to My Client's Former Employees and What Can I Do about It?" authors Jeffrey Grant Pierce and Lindsay Thomas walk readers through the rules, authorities, and potential risks associated with ex parte communications with a party's former employees.

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## What I Learned at the Movies

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industry. Angry that women, like Aimes, are taking valuable positions from other men, the male employees make the environment as unbearable as possible for the female employees. The pervasive discriminatory treatment of women escalates from sexually explicit comments to battery.

In the face of this intolerable treatment, Aimes quits her job and hires an attorney to file a class action against her former employer. After 90 minutes or so, the women win the case. Defense lawyers should never forget the plaintiff's attorney's zeal when recruiting class members: "What are you supposed to do when the ones with all the power are hurting those with none? Well, for starters, you stand up. Stand up and tell the truth. You stand up for your friends. You stand up even when you're all alone. You stand up."

*Norma Rae*<sup>3</sup> is to labor law what *North Country* is to class actions. The story is based on the early union activity of Crystal Lee Sutton, a union organizer in North Carolina.<sup>4</sup> Norma Rae Webster, a single mother employed at a cotton mill as a textile worker, meets New York union organizer Reuben Warshowsky and joins the effort to unionize Webster's hometown cotton mill. Again a struggle, again ultimate success. Like *North Country*, this movie is filled with workplace emotion and passion. Both movies depict employees willing to fight to change their work conditions, no matter how tough the resistance.

Here's the lesson I learned from these two movies: Be passionate, play to win, and be enthusiastic about your cause. The practice of law should be more than just a job. And you should have fun doing it.

The award-winning movie *Philadelphia*<sup>5</sup> has a terrific example of a lawyer who takes on the system for a cause, even though he doesn't particularly like his client. Loosely

based on the case of Geoffrey Bowers, an attorney who died of AIDS in 1987, the film features Tom Hanks as Andrew Beckett, a rising attorney at a large Philadelphia corporate law firm.<sup>6</sup> The firm fires Beckett for what it claims is incompetence, but Beckett is convinced that the reasons given for his termination are pretextual and that he was fired because he is homosexual and dying of AIDS.

Beckett tries to find an attorney to represent him in his wrongful termination lawsuit against the firm. His search to find representation is daunting, but he finally gets the reluctant help of a homophobic personal injury lawyer played by Denzel Washington. Despite the personal injury lawyer's initial dislike of his client, the two work together to prove the allegations and in the process, the personal injury lawyer remembers what he loves most about the law: "It's that every now and again—not often, but occasionally—you get to be a part of justice being done. That really is quite a thrill when that happens."<sup>7</sup>

Two lessons from this movie: You may not always like your client, but remember the cause. Second lesson, and this single rule is important in almost every case I've ever tried: Employment lawyers live in a world in which a court or jury must determine whether an adverse job action was motivated by discrimination or a legitimate, non-discriminatory reason. There are hardly ever any direct-evidence cases. *Philadelphia* is a good example of the hard work necessary to piece together the "footprints in the snow" indirect evidence needed to prove discriminatory motive.

Another lesson I've learned from defending employers over the years is that it is *always* personal. Without exception, I have never defended a case in which someone in the employer's organization was not personally and negatively emotionally affected by a discrimination lawsuit. The movie *Disclosure*<sup>8</sup> brings the lesson home. Movie character Tom Sanders is passed over for a job promotion and almost immediately, his new supervisor, a woman, becomes sexually aggressive with Sanders. When Sanders cuts off the supervisor's advances, the female supervisor is outraged and files sexual harassment charges against Sanders. Sanders counter-sues for sexual

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harassment, and the case goes to arbitration.

*Disclosure* is also a reminder that the matters we attorneys often view in terms of case citations and war stories have an enormous impact on our clients' lives. Tom Sanders nearly loses his job and his wife because of the lawsuit. Our clients are no less vulnerable. These cases involve real people and real emotions. Our job, as attorneys, is to communicate the potential of hard times and heartbreak to our clients, and to persuasively communicate the effects of that reality to the court and jury.

## The practice of law should be more than just a job.

*Disclosure* also depicts the narrow line between truth and fiction. In the movie, as in real life, evidence in a sexual harassment case often boils down to "he said/she said." We have to be able to distill truth from fiction. In every lawsuit, intent and credibility are—as in *Disclosure*—at center stage.

No inventory of workplace films would be complete without mention of *Office Space*.<sup>9</sup> *Office Space* is the workplace story of Peter Gibbons, a bored computer programmer who embraces a work style of laziness and ambivalence as a result of a misplaced post-hypnotic suggestion. He is rewarded with a promotion while his hardworking friends, on the other hand, are fired. The memorable scenes from this movie? Three disgruntled employees destroying the office's recalcitrant computer printer. And the scheme to embezzle corporate money, a penny at a time. Although the movie is a comedy, the lessons are real: Work permeates every aspect of every employee's life, and sometimes truth is stranger than fiction. I'm betting each of us can point to workplace situations like those portrayed in *Office Space*, and I'm also betting that at some point during your legal career, you will defend someone in very similar circumstances. Good luck with that case and let me know how it turns out.

### The Witness

Now for some law movies not about the workplace, which teach employment lawyers courtroom lessons. There's only one lesson from the movie *A Few Good Men*.<sup>10</sup> In this film, actor Tom Cruise plays criminal defense attorney Lieutenant Daniel Kaffee, who defends two clients on a murder charge. Kaffee conducts a grueling cross-examination of Colonel Nathan Jessep (famously played by Jack Nicholson). Kaffee's incisive cross-examination leads to Jessep's witness-stand confession that Kaffee's clients were acting on his orders. The jury finds the two defendants not guilty, and Jessep is arrested and led from the courtroom. I've tried cases for 35 years, and I've only seen one defendant confess. Unfortunately, it was my client who, during my courtroom examination of him, said, "I did it." The one lesson: It almost never happens like that, so don't count on your brilliant cross-examination to lead to confessions in front of a jury. Great movie, but not so realistic.

Contrast Lt. Kaffee's cross-examination of Col. Jessep with the cross-examination of an apparently unimportant fact witness in the movie *The Verdict*.<sup>11</sup> Plaintiff's lawyer Frank Galvin (played by Paul Newman) has reached the end of a failing career. He has one lawsuit left, referred to him as a gift from his former mentor. Galvin sues the hospital, the surgeon, and the anesthesiologist on behalf of his client, a young woman who remains in an irreversible coma following a botched surgery. Galvin's case flounders until finally, near the end of the trial, he is able to locate the admitting nurse and convinces her to testify at trial. Galvin puts the young nurse on the witness stand and with just a couple of open-ended questions, lets the nurse tell her story. The nurse convincingly explains to the jury that she wrote a 1 on the hospital admittance form, indicating the patient had eaten one hour before surgery. Galvin sits down and the acclaimed defense attorney (played by James Mason) rises to cross-examine the young woman. "And how is it you can recall this so clearly after all these years?" The nurse pulls a document from her handbag and says, "because I kept a copy." She tells the jury the doctor told her she would be fired if she didn't change the number on the form from a 1 to a 9. The

testimony obviously remaining in the jury's mind, when voting to award more money damages than the plaintiff asked for, was the nurse's cry "He told me that if I didn't change the form, I would be fired. Who were these men? I wanted to be a nurse!" Galvin didn't make himself the center of attention with a great cross-examination; he let the witness and the facts be the star.

So take some time to watch and compare *A Few Good Men* with *The Verdict*. Watch the two scenes described above and you will come to the same conclusion I have: The most powerful persuasion does not come from lawyers who conduct flamboyant cross-examinations, but rather from the right witness testifying to the right facts that allow the jury to come to the right conclusion.

### The Jury

My mother-in-law always says, "Every tub sits on its own bottom." I think she means that every person looks at a situation from his or her own point of view. From my experience, I believe this is certainly true in the jury box. Jurors view unfolding testimony from their own set of circumstances and interests; then they apply those individual points of view to what they believe the outcome of the case should be. From the movies, I've learned several persuasive techniques that seem to work.

Three movies, *My Cousin Vinny*,<sup>12</sup> *How to Murder Your Wife*,<sup>13</sup> and *Midnight in the Garden of Good and Evil*,<sup>14</sup> illustrate these techniques. Think about Mona Lisa Vito, the "automotive mechanic expert witness" in *My Cousin Vinny*, who explains to a diverse group of jurors the difference between a "regular differential" and a differential with "positraction."<sup>15</sup> She looks and speaks to each individual juror. She is excited about her subject. And the jurors nod. They understand Mona Lisa's point that "anyone who's been stuck in the mud in Alabama" understands how the car wheels spin. Mona Lisa makes the point, and the jurors get it. In my personal award book, I give Mona Lisa Vito the lifetime achievement award for "Best Testimony by Any Witness to a Jury." Don't tell opposing counsel, but I frequently show this movie clip to witnesses before I put them on the witness stand. Talk to the jury. Relate to the jurors. Be enthused. Know your subject.

The 1964 comedy *How to Murder Your Wife* could surely not be filmed today because of sheer offensiveness, but is, however, a great example of the self-centered jury. Accused of murdering his wife and on trial for his life, the lead character Stanley Ford (played by Jack Lemmon) realizes he is going to be convicted of murder (although we know he didn't do it—his wife is alive and well) if he doesn't come up with a new defense. In closing argument, Ford's attorney appeals to the all-male jury and invites each juror to push an imaginary button on the jury rail to forever eliminate their spouse and their personal conflicts. Each of the 12 male "tubs" sits on his own "bottom" and votes to acquit Stanley Ford. What did the defense attorney do? He appealed to the juror's individual points of view and sense of fair play.

The closing argument made by the defense attorney in the true-life-based movie *Midnight in the Garden of Good and Evil* is one of the best silver screen trial scenes ever. The defense lawyer pleads with the jury to put themselves in the shoes of the defendant, accused of murder. Again, the defense uses an argument tailored to each juror's personal experience and interests. And the defendant is found not guilty.

### The Trial Lawyer

The most important courtroom lesson learned in 35 years of practice is to be the guide the jury can trust. Think about Scott Turow's courtroom drama *Presumed Innocent*.<sup>16</sup> Actor Raul Julia's role as defense attorney Sandy Sterns is spectacular; his cross-examination of the county coroner, the state's key witness in a murder trial against his client, is a "must see" road-map for all attorneys. Raul Julia is calm, confident, deliberate, and thoughtful. He begins his cross-examination of the evasive coroner at counsel table, moves confidently to the front of the jury box, and moving in slowly and deliberately toward the witness box, thoughtfully and deliberately guides the jury to the conclusion that the coroner was mistaken in the results of his autopsy. As the coup de grace, Julia gently touches the witness box and hits the mark: "We have had enough unsupported allegations, Dr. Kumagai." (Incidentally, I'm not the only one impressed by the late Mr. Julia's

performance. *Presumed Innocent* was filmed in a federal courtroom in Cleveland, Ohio, and a former assistant district attorney, William Fordes, offered technical assistance to the film director, Alan J. Pakula. Fordes was so impressed, however, by Mr. Julia's "courtroom" presence that he wanted to use Julia's performance as a training film for attorneys in the district attorney's office).<sup>17</sup> Julia's performance taught me to use the very powerful courtroom tools of movement, demeanor, deliberation, and intensity. Attorneys, be the guide the jury can trust.

An associate in my office recently conducted her first cross-examination at a hearing. I told her that once she thought she was completely prepared, the best thing she could do the night before the hearing was to watch the scene from *Star Wars*<sup>18</sup> in which Obi-Wan Kenobi trains Luke Skywalker to use the lightsaber. Skywalker is challenged to deflect lasers from a small orbiting ball while blindfolded. He must rely completely on his instincts. After further reflection, I suggested she also watch *Legally Blonde*<sup>19</sup> to see how law student Elle Woods suddenly plugs her own experience with hair permanents into a pre-scripted cross-examination. Woods stops and thinks. And she wins the case.

### Real Life

Our office hallways are lined with posters from movies about lawyers and trials, including *Chicago*,<sup>20</sup> *Amistad*,<sup>21</sup> *Primal Fear*,<sup>22</sup> *Kramer vs. Kramer*,<sup>23</sup> *Adam's Rib*,<sup>24</sup> and, of course, all the John Grisham movies. Visiting clients frequently ask, "What is the most authentic movie about lawyers?" Let me set the bookends: *The Verdict* is Rocky<sup>25</sup> for plaintiff's lawyers. The courtroom scenes are realistic, and I've personally sparred with (or represented) each character type over the years. (Don't get me started about the movie judge and his exclusion of evidence.) *A Civil Action*<sup>26</sup> is the best depiction of the worst a civil action can be: horrendous damages, years of litigation, and a very poor outcome for everyone involved. The one lesson from *A Civil Action* (based on a true story involving groundwater contamination in Massachusetts): Bad things can happen at trial.<sup>27</sup> I keep the posters of my two personal picks for authenticity, *The Verdict* and *My Cousin Vinny*, in my office.

### Conclusion

Had you dropped by a courtroom in Montgomery County, Maryland, recently, you might have caught me approaching the witness box, slightly tapping my fingers on the jury box and quietly mentioning the problem with "unsupported allegations." You might have thought it was theater. It was. I've learned a lot at the movies.

### Endnotes

1. NORTH COUNTRY (Warner Bros. Pictures 2005).
2. 130 F.3d 1287 (8th Cir. 1997).
3. NORMA RAE (Twentieth Century Fox Film Corp. 1979).
4. ROBERT NEIMI, HISTORY IN THE MEDIA: FILM AND TELEVISION, at 331 (2006).
5. PHILADELPHIA (Clinica Estetico 1993).
6. See PAUL BERGMAN & MICHAEL ASIMOV, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES, at 136 (1996).
7. PHILADELPHIA (Clinica Estetico 1993).
8. DISCLOSURE (Warner Bros. Pictures 1994).
9. OFFICE SPACE (Twentieth Century Fox Film Corp. 1999).
10. A FEW GOOD MEN (Castle Rock Entm't 1992).
11. THE VERDICT (Twentieth Century Fox Film Corp. 1982).
12. MY COUSIN VINNY (Palo Vista Prods. 1992).
13. HOW TO MURDER YOUR WIFE (Murder Inc. 1965).
14. MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Malpasos Prods. 1997).
15. Paul Bergman & Michael Asimov, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES, at 111 (2006).
16. PRESUMED INNOCENT (Mirage 1990).
17. Rochelle Siegel, *Presumed Accurate*, ABA J., Aug. 1990, at 42-47.
18. STAR WARS (Lucasfilm 1977).
19. LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).
20. CHICAGO, (Miramax Films 2002).
21. AMISTAD (DreamWorks SKG 1997).
22. PRIMAL FEAR (Paramount Pictures 1996).
23. KRAMER VS. KRAMER (Columbia Pictures 1979).
24. ADAM'S RIB (Loew's 1949).
25. ROCKY (Chartoff-Winkler Productions 1976).
26. A CIVIL ACTION (Touchstone Pictures 1998).
27. For a recitation of the facts surrounding the actual case, see *Anderson v. Cryovac*, 96 F.R.D. 431 (D. Mass. 1983) and *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986).

# Can Opposing Counsel Talk to My Client's Former Employees, and What Can I Do about It?

By Jeffrey Grant Pierce & Lindsay Thomas

With a questionable economy and a high unemployment rate that is continuing to rise, litigators will be faced with a challenging question: Can opposing counsel talk to my client's former employees, and what can I do about it? This article discusses the applicable rules, some case law, and some effective (and not so effective) tools for dealing with the inevitable ex parte communications opposing counsel has with those former employees.

More than likely, this article will not answer all of your questions. It is merely intended to whet the appetite of the reader encountering this dilemma. The reader is advised to fully research those rules and cases applicable in your own jurisdiction. This article will direct your path in that respect. Thus, the reader should take from this article that it is a mere compass but not the legs to reach that ultimate destination.

The controlling authorities are not immediately apparent. And once found, they seem to offer little guidance, unless of course, your jurisdiction has a plethora of case law on this issue. Assuming that your jurisdiction is like most, there is not much available.

The starting place: the Rules of Professional Conduct. The American Bar Association's Model Rules of Professional Conduct contain the rules that direct attorneys' professional conduct in most, if not all, of the jurisdictions across the country. Model Rule 4.2 deals with attorneys' contact with other individuals who are represented by counsel. Rule 4.2 also serves as a starting point for the inquiry into ex parte communication with former employees. Specifically, Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The Rule 4.2 prohibition does not apply specifically to former employees, but rather only to parties, including current employees, whose conduct may be imputed to their party-employer.<sup>1</sup> To gain this understanding, we have to look to the Rule's comment, which provides this explanation:

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. *Consent of the organization's lawyer is not required for communication with a former constituent.* If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4. (Emphasis added.)

Although insightful, such a comment provides no mention, and more specifically no guidance, when dealing with our main issue, other than to inform the practitioner, that consent of the "organization's lawyer" is unnecessary for "communication" with the former employee. This rule and its comment are void of any definitive guidance. Nonetheless, the case law discussing this issue invariably begins with a discussion of Rule 4.2.

The next recommended step: Look to the ABA's Standing Committee on Ethics and Professional Responsibility Formal Opinion 91-359.<sup>2</sup> Formal Opinion 91-359 provides that ex parte contacts with former employees of a party are permissible under certain circumstances. The committee notes that "the potentially-communicating adverse attorney must be careful not to seek to induce the former employee to violate the privilege attaching to the attorney-client communications . . ." as such an attempt would violate ABA Model Rule 4.4 compelling respect for the rights of a third person. Additionally, the committee states that the attorney must "punctiliously comply with the requirements of [ABA Model] Rule 4.3," which requires the lawyer make clear his or her role in initiating the contact, "including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party." Accordingly, Formal Opinion 91-359 makes it plain that ". . . a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee . . ." as long as (1) the lawyer does not encourage the former employee to discuss privileged information and (2) the lawyer expressly states that he or she is not disinterested and clearly explains his or her role in the litigation and the contact.

Notably, both ABA Model Rule 4.2

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and the ABA Professional Responsibility Committee in Formal Opinion 91-359 decline to expand the application of Rule 4.2 to prohibit ex parte contact with all former employees. The committee noted:

[T]he fact remains that the text of the rules does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the rule is to inhibit the acquisition of information about one's case, the committee is loathe, given the text of Model Rule 4.2 and its comments, to expand its coverage to former employees by means of liberal interpretation.

Although ex parte communications are not prohibited with former employees, there are some preliminary measures that we recommend that attorneys consider before engaging in such activity.<sup>3</sup> First, you should check the local court rules and standing orders that may address ex parte communication with former employees. Second, if the local rules do not address the issue, the contacting lawyer should always identify himself or herself and the party that he or she represents, as well as the matter that he or she plans to discuss with the former employer upon initiation of the communication. Third, always inquire whether the former employee is represented by counsel. If the former employee is represented, you should ask the identity of counsel so that you may communicate with them before going forward. Fourth, if the employee is not represented, an attorney should still advise the former employee that he or she does not have to talk if he or she does not so desire. If the former employee does not wish to speak with you, then you should courteously respect his or her wishes and end the conversation. Fifth, if he or she is willing to engage in communication with you, then you should always expressly direct him or her (a) not to divulge any privileged or confidential information, or information that could be a part of the former employer's legal strategy and (b) if asked a question that would require revealing such information, that he or she should not

answer. Additionally, if he or she held an executive or a senior level position, it is wise to inquire whether the employee may be subject to a confidentiality agreement. Finally, you should inquire and have the former employee confirm both that he or she is not required to speak and that he or she fully understands all warnings that were given regarding the communication. Only after engaging in all six of these preliminary steps should you conduct an ex parte interview with a former employee of an adverse party.

#### Preliminary Measures—Practical Measures to Consider

So then, we know that the ex parte contact is allowable and the ABA has defined the parameters of allowable contact in Formal Opinion 91-359. You may be wondering, "What can I do about an improper contact that violates these parameters?" Although not always successful for counsel, the measures discussed below may be appropriate in an individual case, especially if you are challenging an inappropriate contact, rather than attempting to exclude the contact altogether. Before launching into the case law addressing this issue, the reader should become familiar with some preliminary and practical measures. If there is an adequate basis to challenge the contact, then the practitioner will have to exercise his or her judgment in selecting the most applicable and case-appropriate method. To varying degrees of success, attorneys try different legal maneuvers, including motions in limine, motions to strike, motions to disqualify counsel, motions for sanctions, motions to conduct an ex parte interview, and motions for a protective order.

Courts generally do not allow litigants to wholly exclude information gathered by ex parte contact with former employees by way of a motion in limine.<sup>4</sup> In *Barron Builders*, the court explained three primary reasons for this result:

- (1) Rule 4.2's policies don't justify "wholesale exclusion of former employees from discovery," and the flow of information, even if harmful, should only be stopped to reserve the attorney-client privilege;

- (2) former employees are probably not included in the rule;
- (3) since former employees do not qualify as agents of the corporation, they do not fall within the imputation language of Rule 4.2.

While most courts agree that ex parte communication with former employees should not be wholly excluded, other courts disagree over whether such conduct may violate the applicable state rules of professional conduct.<sup>5</sup>

## Rule 4.2 is a starting point for the inquiry into ex parte communication with former employees.

In *White*, the court disagreed with the conclusion reached in *Garrett v. International Railroad Passenger Corp.*,<sup>6</sup> that Rule 4.2 is rendered void by 45 U.S.C. § 60.<sup>7</sup> The *White* court explained that the protections afforded by 45 U.S.C. § 60 are "not meant to be an excuse for attorneys representing railroad workers to sidestep their ethical responsibilities." The court further determined that, while the ex parte contact was indeed improper, it held that totally prohibiting the witness's testimony was "too drastic," and that "the proper sanction would be to prohibit the use of the statement for impeachment purposes." *Paris*, however, called *White* into question. *Paris* also involved employee claims against a railroad pursuant to the Federal Employers' Liability Act (FELA), in which the railroad raised a motion in limine to exclude the testimony of railroad employees. The *Paris* court held that the "statements of the railroad employees were not obtained in violation of Arkansas Rules of Professional Conduct."

Courts are also reluctant to grant

a motion to strike where the information was obtained by way of an ex parte interview with a former employee of the adversary.<sup>8</sup> For example, in *Driggs*, the district court denied a motion to suppress information from the former general counsel and vice president of the debtor's corporation, holding (1) that counsel for the bankruptcy plan "did not act improperly" by engaging in ex parte communication with former employees of the debtor's corporation, and (2) "even if counsel for the plan committee committed [an] ethical violation, [the] proper remedy would be disciplinary action, not dismissal of adversary proceedings, suppression of evidence, or disqualification of counsel."

As with motions to strike, courts are disinclined to disqualify counsel on the grounds that the attorney engaged in ex parte communication with a former employee of an adverse party.<sup>9</sup> For example, in *Sherrod*, the court denied the motions holding "counsel's ex parte contact with former employee of corporate defendant did not violate rule prohibiting ex parte contact with represented parties, in that defendant was not bound by former employee's statements." The court explained,

Former corporate employees have no authority under the law to bind the corporation by their current deeds and statements. Only certain current employees can speak for the corporation. Therefore, DR-7-104(A)(1) does not apply to former employees and the plaintiff counsel's ex parte contact with defendant's former employee is not in violation of DR 7-104(A)(1).

The district court for the District of Connecticut also denied the plaintiff's motion to disqualify defense counsel on the grounds that he had violated a rule of professional conduct when he represented a former employee of the plaintiff in the matter.<sup>10</sup> In that case, the defendant persuasively argued that Rule 4.2 did not apply to former employees, and the court agreed that it was not grounds for disqualification.

Additionally, *Marinnie* involved an employment discrimination action in which defendant Nabisco Brands, Inc. moved

to disqualify the plaintiff's attorney. The plaintiff's attorney had previously represented the plaintiff's former supervisor in an age discrimination suit against the same employer/defendant. The defendant alleged that the plaintiff's attorney was privy to "privileged or confidential information regarding the present case" because he had previously represented the supervisor. The *Marinnie* court likened the dual representation of both employees to a situation where an attorney has contact with an employee of an adverse party. The court found that Rule 4.2 only prohibits ex parte contacts with employees of a corporate party, but does not extend the bar to former employees. Ultimately, the court found

[e]ven if the communication did occur and was privileged, disqualification would not necessarily be warranted. There is no showing that [the supervisor] discussed Marinnie's case with his and Marinnie's attorney. Disqualification would be a drastic resort in these circumstances. Potentially, this case could at some point present a clash between attorney-client privilege and one's right to have an attorney of one's choosing.

The court further explained that, were the plaintiff to attempt to use the defendant's privileged communications or confidential information, then the defendant could move to suppress the evidence (presumably by way of a motion in limine). At this juncture in the case, however, the reasons alleged by the defendant were insufficient to justify disqualification.

Comparing *Muriel Siebert & Co., Inc. v. Intuit Inc.*,<sup>11</sup> with *Postorivo v. AG Paintball Holdings, Inc.*,<sup>12</sup> demonstrates the consequences of failing to engage in all of the preliminary measures discussed above. In *Muriel*, the New York Court of Appeals held that disqualification of the "defendant's attorneys was not warranted merely because a former executive was at one time privy to the plaintiff's privileged and confidential information." The court explained, however, that the ex parte interview "is not a license for

adversary counsel to elicit privileged and confidential information from an opponent's former employee." Additionally, counsel must adhere to all ethical standards in conducting the interview. The court explained that the defense attorney "properly advised the [former employee] of their representation and interest in the litigation, and directed the [former employee] to avoid disclosing privileged or confidential information," and the defense attorney refrained from inquiring into any matters that could lead to the disclosure of such information. Moreover, the former employee "stated that he understood the admonitions and, on the record, no such information was disclosed."

On the other hand, in *Postorivo v. AG Paintball Holdings, Inc.*, the Delaware Court of Chancery found that dismissal was proper, although no privileged or confidential information had been divulged because the defense attorneys failed to counsel the former employees not to reveal such information.

Whether sanctions are appropriate appears to be a more muddled issue, with some courts allowing sanctions for ex parte communications with former employees, whereas other courts find sanctions inappropriate. As noted above, while courts have conflicted over the impositions of sanctions in the FELA context, the Northern District of Illinois held that it was inappropriate in a patent infringement case.<sup>13</sup>

In *Oak Industries*, the defense attorney contacted a former employee of the plaintiff to obtain non-privileged information that the former employee had regarding one of the patents involved in the case. Discussing Rule 4.2, the court stated, "[i]n cases such as this, where employees of a party are involved, the task of identifying the opposing 'party' can be very difficult." Ultimately, the court found that the attorney's ex parte contact was not an ethical violation. The Court explained:

The plain meaning of the word "party," as used in DR 7-104 and Model Rule 4.2, does not include persons who are no longer associated with the employer at the time of the litigation. The fact that the

former employees may have information damaging to the employer has nothing to do with the question of whether the employee should be considered an alter ego of the employer. We believe that expanding the definition of “party” under either DR 7-104 or Model Rule 4.2 to include former employees would unduly hinder attorneys’ ability to conduct informal discovery in cases with employer party-opponents.

### Motions to Conduct Ex Parte Interview and Motions for Protective Order

While permission to conduct ex parte communications with a former employee is almost always granted, courts draw the line where issues subject to the attorney-client privilege are concerned or when current employees are involved.<sup>14</sup>

*DANA Corp.* demonstrates the ease with which ex parte interviews are granted. In that case, the Equal Employment Opportunity Commission (EEOC) brought a Title VII class action against an employer. Both parties moved to conduct ex parte interviews. The district court held that such communication was not a violation of the state professionalism rules, and that the employer could engage in ex parte interviews with class members who had not established attorney-client privilege. Additionally, the court also permitted the EEOC to conduct ex parte interviews with former employees of the defendant, even though one had held managerial responsibilities. The court allowed the communication as the defendant failed to argue that “any potential confidential, classified or privileged information could possibly be disclosed as a result of the EEOC’s contact with the [former employee].”

In *Rogosin*, however, the court explicitly stated that sanctions would be appropriate where an attorney journeys into the realm of confidential or privileged information in an ex parte communication with a former employee. Additionally, in *Breedlove*, the court explained the purpose of Rule 4.2 “is not intended to prevent a party from discovering potentially prejudicial facts; rather, it is intended to protect the attorney-client relationship of counsel

with a corporate client.”

Several courts draw a bright-line distinction between former and current employees in determining whether the ex parte interviews will be granted. For example, in *Terra International*, the defendant moved for guidance concerning its desire to engage in ex parte interviews with various current and former employees of the plaintiff. The court allowed the interviews with the former employees, but denied the motion as to the “current managerial employee who had settled his claim with the defendant,” as well as with “current employees who could impute liability directly to plaintiff for their own wrongful acts.”

In *Breedlove*, the court explained that unlike current employees, former employees are not within the scope of Rule 4.2 because they cannot be construed as parties or agents of a party. The *Breedlove* court further explained its rationale, stating, “[t]he Comment to Rule 4.2 limits the use of the term party to three types of agents: (1) managerial employees, (2) employees whose acts in the matter can be imputed to the organization, and (3) employees whose admission at trial would be binding on the organization.”

While most courts allow ex parte communication with former employees, other courts grant protective orders for current employees, and one court recently prohibited such contact altogether.<sup>15</sup>

In *Bryant*, the district court denied the defendant-employer’s motion for a protective order to prohibit additional ex parte communications between the plaintiff’s counsel and former employees of the defendant and to cure previous ex parte communications. The court held that the communications merely concerned facts of the case and were ethically proper. Explaining its rationale, the court noted that both Virginia Rule 4.2 and Virginia Legal Ethics Opinion 1670 clearly state that the prohibition against ex parte communications does not extend to former employees, even if the employee was a member of the corporation’s “control group.” The *Bryant* court drew the line, however, and noted that the prohibition should be enforced where the communications concern privileged or confidential information.

Other courts distinguish between former and current employees, when determining

the propriety of a protective order prohibiting ex parte communications. For example, in *Pruett*, the court granted the motion for protective order regarding current employees, and explained that contact with currently employed nurses and members of the hospital’s “control group” “creates a significant potential for disrupting the current operation of the defendant’s facility.” In both *Patriarcia* and *H.B.A. Management*, the courts denied access to current employees, while denying motions for protective orders as they related to ex parte contact with former employees of the adverse party.

**A lawyer who threatens to file a complaint with no intent to carry it through violates Rule 4.1.**

Despite the trend allowing ex parte communication with former employees, recently one court denied a motion for reconsideration concerning a protective order that it had issued prohibiting such contact.<sup>16</sup> In this case, the court denied the motion for reconsideration and maintained its order on the grounds that the precedent presented by the moving party was not controlling, and had, in fact, been considered in the original motion. One should keep in mind, however, that this motion was one for reconsideration, and that the weight of the precedent balances in favor of allowing ex parte contact with former employees, provided that the information is not privileged or confidential.

### Seeking Disciplinary Action

Prior to seeking disciplinary action against an attorney based on the attorney’s ex parte communications with former employees, the attorney should consider the application of ethical constraints prohibiting attorneys from threatening

sanctions to gain an advantage in a civil action. While a lawyer's threat to file a disciplinary complaint against opposing counsel to obtain advantage in a civil case is not expressly prohibited under the Model Rules, it is restricted by ABA Formal Opinion 94-383, in which the ABA states:

Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to the opposing counsel's honesty, trustworthiness, or fitness as a lawyer, because in those circumstances, the lawyer is ethically required to report such misconduct. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

Notwithstanding, Rule 8.3 requires "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial questions regarding that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority." The rule, however, does not require reporting of every violation, but only those that are "substantial." The rule cuts both ways in that if a lawyer is obligated to report and fails to do so, then that failure to report violates Rule 8.4. Moreover, an agreement *not* to file such a complaint would also violate Rule 8.4 where the disclosure was required under Rule 8.3. The ABA explains,

[b]ecause an agreement not to file a complaint if satisfactory settlement is made is the logical corollary of a threat to file a complaint in the absence of such a settlement, we conclude that the threat to file disciplinary charges is unethical in any circumstance where a lawyer would

be required to file such charges by Rule 8.3(a).

There may, however, be situations in which Rule 8.3(a) would not obligate a lawyer to report misconduct. The ABA warns that while a threat in this situation may not be unethical, "[i]f a lawyer threatens to file disciplinary charges concerning such a matter, . . . the lawyer must avoid making an extortionate, fraudulent, or otherwise abusive threat which would violate the criminal law of the governing jurisdiction or restrictions contained in the Model Rules." In other words, the offense should either be reported because it is substantial or it should not be; and by no means should a potential complaint be used as leverage.

Additionally, the ABA explained that such threats to file a disciplinary action against opposing counsel may violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4, and 8.4(d). Rule 8.4(b) defines professional misconduct for a lawyer, and provides that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Accordingly, a threat by a lawyer to file disciplinary charges against his adversary to coerce settlement in a civil matter may fall under the Model Penal Code's definition of extortion, "unless it concerns the lawyer's conduct in the very case in which the threat is made, or conduct which is the subject of the case in which the threat is made."

Knowledge of whether the *ex parte* communication was appropriate is therefore a must before venturing down this path. As discussed previously, there are preliminary measures that the contacting attorney absolutely should comply with. Failure to do so may result in disciplinary action sought by the offended party. However, the offended party is encouraged to first build a strong case to the extent there is a good-faith belief that an ethical rule has been violated, as the offended lawyer may also violate ethical rules for filing a complaint that is not "well founded in fact and law." The Model Rules provide that a poorly supported complaint may violate Rule 3.1. Moreover, other

profession rules are implicated as well. A lawyer who threatens to file a complaint without any intent to actually carry it through violates Rule 4.1. Rule 4.4 bars a lawyer from using means that "have no substantial purpose other than to embarrass, delay or burden a third person . . ." and "Rule 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice."

#### Obtaining Statements Through Federal Rule of Civil Procedure 26(b)(3)(C)

If the statement of a former employee has been taken, obtain a copy. Most likely opposing counsel will not turn this over in discovery, claiming it as work product. Federal Rule of Civil Procedure 26(b)(3)(C) provides an avenue through which a lawyer may acquire the statement. The Rule provides:

Any party or *other person* may, on request and without the required showing, obtain the person's own previous statement about the action or the subject matter. If the request is refused the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

Under this Rule, if opposing counsel takes a witness statement of a former employee, he or she may not refuse to provide the statement to the witness "on request." Accordingly, an attorney may suggest that the witness request the statement (or ghostwrite the request for them), and then have the witness provide the statement to them upon receipt. If opposing counsel refuses to honor the witness's request for their statement, on behalf of the witness, the lawyer may move to compel production of the statement and seek expenses related to this exercise.

In conclusion, based on the authority

discussed above, courts generally allow ex parte communication with former employees of an opposing party provided that certain limitations are met. While there are limitations to this practice, those limitations are by no means exclusive and universally accepted. The prudent and skillful litigator will explore the extent of the ex parte communication and the circumstances surrounding the contact. This investigation should include an analysis to ensure opposing counsel has fully complied with the tenets of professional conduct in making the ex parte contact with the former employee. If a violation has occurred, different legal responses may be available, including motions in limine, motions to strike, motions to disqualify counsel, motions for sanctions, motions to conduct an ex parte interview, and motions for a protective order. Regardless of which response is appropriate to a given case, it is advisable that, at a minimum, effort is made to obtain a copy of any statement taken of a former employee.

### Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991).
2. Also check with your state bar association to identify and obtain any ethics opinions that may pertain to your situation.
3. Douglas R. Richmond, *Let's Talk: Critical Aspects of the Anti-Contact Rule for Lawyers*, 76 DEF. COUNS. 40, 44-47 (2009).
4. See *Paris v. Union Pac. R.R. Co.*, 450 F. Supp.2d 913, 915 (E.D. Ark. 2006); *Barron Builders & Mgmt Co. v. J & A Air Cond'g & Refrig., Inc.*, 1997 WL 685352 (E.D. La. Oct. 31, 1997); *White v. Ill. Cent. R.R. Co.*, 162 F.R.D. 118 (S.D. Miss 1995); *Stabilus v. Haynsworth, et al.*, 144 F.R.D. 258 (E.D. Pa. 1992); *Sharp v. Leonard Stulman Enters. Ltd. P'ship*, 12 F. Supp. 502 (D. Md. 1998).
5. *White v. Ill. Cent. R.R. Co.*, 162 F.R.D. 118 (S.D. Miss. 1995); *Contra*, *Paris v. Union Pac. R.R. Co.*, 450 F. Supp. 913, 915 (E.D. Ark. 2006).
6. 1990 WL 122911 (E.D. Pa. Aug. 6, 1990).
7. 45 U.S.C § 60 relates to railroad employees and provides a penalty of not more than \$1,000 or not more than a year of imprisonment for suppressing information related to accidents.
8. *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ind. App. 2002); *Plan Comm. in Driggs Reorg. Case v. Driggs*, 217 B.R. 67 (D.Md. 1998).
9. See *Data Capture Solutions, Repair & Remktg. v. Symbol Techs., Inc.*, 2008 WL 4681676 (D. Conn. Oct. 17, 2008); *ACE Am. Ins. Co. v. Columbia Bas. Co.*, 2001 WL 3189365 (Pa. Comm. Pl. Nov. 26, 2006); *Marinnie v. Nabisco Brands, Inc.*, 1993 WL 267453 (E.D. Pa. July 12, 1993); *Sherrod v. The Furniture Center*, 769 F. Supp. 1021 (W.D. Tenn 1991).
10. *Symbol Techs., Inc.* 2008 WL 4681676, at \*1.
11. 8 N.Y. 3d 506, 868 N.E.2d 208, 836 N.Y.S.2d 527 (N.Y. 2007).
12. 2008 WL 3876199 (Del. Ch. 2008).
13. *Oak Indus. v. Zenith Indus.*, No. 86-C-4302, 1988 WL 70614 (N.D. Ill. July 25, 1988).
14. *EEOC v. Joslin Dry Goods Co.*, 2006 WL 1215386 (D. Colo. May 5, 2006); *EEOC v. Dana Corp.*, 202 F.Supp.2d 827 (N.D. Ind. 2002); *Rogovin v. Mayor and City of Balt.*, 164 F. Supp.2d 864 (D. Md. 2001); *Jenkins v. Wal-Mart Stores, Inc.*, 956 F.Supp. 695 (W.D. La. 1997); *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 913 F.Supp. 1306 (N.D. Iowa 1996); *Sullivan v. Medco Containment Servs., Inc.*, 607 A.2d 1386 (N.J. Super. Ct. 1992); *Breedlove v. Tele-Trip Co., Inc.*, 1992 WL 202147 (N.D. Ill. Aug 14, 1992); *Dubois v. Gradco Sys., Inc.*, 136 F.R.D. 341 (D. Conn. 1991).
15. *Bryant v. Yorktown Cabinetry, Inc.*, 538 F. Supp.2d 948 (W.D. Va. 2008); *Contra*, *Pruett v. Va. Health Servs., Inc.*, 2005 WL 2386030 (Va. Cir. Ct. Aug. 31, 2005); *Patriarca v. Ctr. for Living and Working, Inc.*, 778 N.E.2d 877 (Mass. 2002); *H.B.A. Mgmt., Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997); *United States v. Beiersdorf-Jobst, Inc.*, 980 F. Supp. 257 (N.D. Ohio 1997); *and Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 4200601 (S.D.N.Y. Sept. 12, 2008).
16. *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 4200601 (S.D.N.Y. 2008).

## Chairs' Column

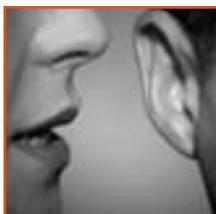
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benefit greatly from Arley's valuable experience and contributions to the Section and the committee.

Jeremy Sosna is a partner with Ford & Harrison in its Minneapolis, Minnesota, office. Jeremy has extensive experience defending *Fortune 100* corporations and small companies in age, race, and gender discrimination claims, sexual harassment litigation, disability and workers' compensation retaliation matters, age discrimination lawsuits, wrongful discharge actions, and class action wage and hour overtime litigation. Jeremy also represents clients in unfair competition matters as both a plaintiff and a defendant, including restrictive covenant enforcement actions, trade secret misappropriation cases, and shareholder disputes. Jeremy has litigated cases in state and federal courts in numerous jurisdictions in more than 20 states. Additionally, Jeremy has argued a number of cases before the U.S. Court of Appeals for the Eighth Circuit and the Minnesota Court of Appeals. Jeremy received both his law degree and bachelor's degree from the University of Iowa. Jeremy is excited to have the opportunity to serve the committee as a cochair.

Again, the cochairs welcome you to the 2009-2010 year and are hopeful for the continued success of the committee. Please take a look at our committee webpage (available at [www.abanet.org/litigation/committees/employment](http://www.abanet.org/litigation/committees/employment)) and thank you for your membership and commitment to the Section and the committee. If there is ever anything we can do to enhance the benefits you receive from the committee, please do not hesitate to contact any one of us. Welcome!

**Arley Harrel, Jeremy Sosna,  
and Kimberly Stith**



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# Mediating Disputes of the Highly Paid Executive

By Richard D. Fincher

Numerous variables affect the successful mediation of litigation involving the highly paid executive (HPE). This article highlights the nature of disputes involving high-level executives and explores unique aspects of mediating those disputes. Increasingly, mediators in HPE litigation are expected to possess subject-matter expertise in executive compensation, benefit design, and taxation, in addition to case and statutory law concerning duties of executive employment.

## Who is the HPE?

For purposes of employment mediation, a highly paid executive refers to a person at a senior level of management in an employment dispute with his or her employer. The executive may be a corporate officer at the level of director or vice president, or an insider as designated by the Securities and Exchange Commission (SEC). Typical job titles include CEO, COO, corporate vice president, and division president.

Five types of claims are generally asserted in executive litigation: breach of contract, breach of the common law duty of loyalty, statutory claims alleging employment discrimination, Employee Retirement Income Security Act (ERISA) violations, and business torts. Each dispute is appropriate for mediation. Many executives have signed complex employment agreements with their employers, and they may be plaintiffs as commonly as defendants.

## Disputes Alleging Breach of Contract

Claims of breach of contract typically involve an employment agreement or a separation agreement. The executive sues as a plaintiff if the employer breaches the contract by refusing to perform some commitment, which generally means failing to pay compensation or discharging him or her without cause. Under different

facts, the executive responds as a defendant if the employer alleges the executive has breached a promise in the employment agreement, such as starting a competitive business while self-dealing. Two of the most common forms of contractual disputes are discussed below.

The HPE employment agreement is a complex legal document. It is commonly an adhesion contract (drafted solely by the employer without executive input), and the executive rarely retains counsel

to negotiate its terms. The employment agreement has three objectives: to define the terms and conditions of covered employment, to identify certain covenants obligating one or both of the parties, and to broadly anticipate the terms of potential termination. Although the agreement may intend to maintain the “at-will” status of the executive, it creates the potential of certain obligations upon termination. One key element of the employment agreement can be the proverbial “golden parachute,” defined by the Internal Revenue Service as separation pay of three or more times the executive’s annual compensation.<sup>1</sup>

The employment agreement has two categories of terms: business issues and legal issues. Business issues involve job title, short-term and long-term compensation, office location, insurance benefits, separation pay, and benefits upon termination. Legal issues involve contract renewal or extension, grounds for termination, change of control, and commitments such as a covenant “not to compete” or a covenant of non-disparagement. These agreements are interpreted either according to state law in which the executive resides, or under a choice-of-law provision in which the employer is headquartered.

Complex employment agreements define several types of executive termination.<sup>2</sup> Each is highly fact-specific. The importance of the designation is that each provides different levels of compensation and benefits to the departing executive. The first type of termination is “executive resignation.” In this case, the executive, who has not openly violated any covenants, forfeits all additional compensation, retains his or her accrued benefits for a time, and is free to go his or her way without penalty. This type of termination is rarely disputed. The second type of termination is “not for cause.” In this case, the employer has initiated the termination without executive wrongdoing. The employer wants the executive gone for some reason, perhaps due to a reduction

## Typical Scenario of a Departing Executive

John Petersen is vice president of sales of a publicly traded real estate business. Three years ago, he signed a (12-page) employment agreement that included terms of any future separation and a covenant of noncompetition for two years after termination. He retained counsel to negotiate the employment agreement.

Currently, John has 60,000 vested stock options, with a present unexercised value of \$150,000. His salary (with annual bonus) is \$350,000. He is vested in the third year of a long-term incentive (LTI) compensation plan worth \$94,000. Each of the compensation plans is documented in a summary plan description (SPD). In the past year, he became openly disenchanted with the new company president.

Last week, John resigned, to work for a direct competitor. The board has stripped him of all accrued equity benefits and is threatening to file suit seeking a restraining order preventing him from starting work at the new firm. Mr. Peterson has countersued for breach of contract. You are the mediator.

Richard D. Fincher is the managing partner of Workplace Resolutions LLC in Phoenix, Arizona.

in workforce, a personality conflict, or a change of company direction. This often occurs when a new CEO has been hired and desires to reshape the executive team. These claims are commonly disputed.

The third type of termination (initiated by the executive) is “for good cause.” In this case, the employer forces a constructive termination in some way—by demoting the executive to a smaller role or diminished office, relocating the office to another state, or breaching the employment agreement. Further examples include changing the job title, reducing salary, or terminating vested stock options. This type of termination is commonly disputed. The fourth type of termination is “for cause.” Here, the CEO has committed some improper act and can potentially be denied separation payments.

In addition to employment agreements, many employers also utilize separation agreements to set forth the terms once termination of the employee is contemplated. Most employers have a company policy outlining minimal termination benefits for all employees, for which the executive is eligible. A separation agreement provides benefits beyond the generic company policy. While an employment agreement is typically negotiated and signed when the executive is hired, a separation agreement is usually negotiated concurrent with the executive’s termination. Separation agreements are generally contracts of adhesion for lower-level employees, but can be freely negotiated with senior executives regardless of whether the executive has an employment agreement. Such agreements often include terms specifying the formal termination date, the amount and delivery of separation payments, any continuing employee benefits, and cessation of company perquisites. The agreement generally includes mutual or one-party covenants, an arbitration clause, and a general release by the executive promising not to pursue litigation in exchange for the benefits within the agreement. These agreements are interpreted either according to state law in which the executive resides, or under a choice-of-law provision in which the employer is headquartered.

### Common Disputes Involving HPEs

At common law, executives generally owe a duty of loyalty not to compete with their employer or take actions that are contrary to the employer’s interest. In these disputes, the executive becomes a defendant. Recognized as a principle of agency, an employee’s breach of the duty of loyalty is an actionable tort in many states. The traditional law of agency defines the executive’s duties, including obedience, confidentiality, and loyalty.<sup>3</sup>

Loyalty disputes arise when executives contemplate leaving to compete with their employer. Mere preparation to set up a competing business while still employed (such as incorporating or leasing space) is acceptable, but there are actions that exceed the boundaries of allowable conduct. An executive may not solicit customers to join him or her while still employed at his or her former company, divert corporate opportunity or engage in self-dealing, or engage in hiring away current employees while still employed. An executive may not use confidential information, such as customer lists or pricing sheets, and may not disparage the employer or its products, absent a public policy exception. Any of these actions may be a subject of mediation.

Claims involving gender or race discrimination may be filed under the Civil Rights Act of 1964.<sup>4</sup> Age and handicap claims fall under other federal laws. Here, the executive is a plaintiff alleging some form of disparate treatment in employment. Several remedies are available, including back pay, front pay, and compensatory damages such as compensation for pain and suffering, loss of consortium, and reimbursement of medical bills and expenses associated with a job search.

Organizations competing for top executive talent offer an array of short- and long-term compensation arrangements, such as stock options, stock grants, stock appreciation rights, split-dollar life insurance, deferred bonus plans, and supplemental 401(k) plans. Typically, these benefits are fully described by the employer’s SPD. Disputes arise when the employer is alleged to have breached the SPD. As a plaintiff, the executive can sue under ERISA, requesting the standard range of damages.<sup>5</sup>

Claims asserting business torts are

generally litigated against the employer, so the executive is the plaintiff.<sup>6</sup> In the past, the most common business tort involved “defamation,” wherein the employer allegedly makes a public statement defaming the executive’s reputation, the statement is disseminated to a third party, and the executive’s reputation and future employability are damaged. An increasing number of jurisdictions recognize “compelled self-publication,” which occurs when the executive discloses the defamatory statements when asked by a prospective employer. Other torts include harassment, emotional distress, and assault and battery. More creative business torts involve fraudulent inducement and fraudulent termination.

Many employers require executives to sign restrictive covenants. Some require the covenants to be agreed at time of hire, while others apply the covenants in a more selective manner, negotiating them after hire and only for senior-level executives. In either case, the covenants restrict executives from certain conduct during and after their employment. The four most common covenants are non-competition, non-solicitation, non-disparagement, and confidentiality of business information. Litigation can arise from alleged violation of any of these covenants, but three are more problematic and commonly addressed in mediation.

The first of these—a covenant “not to compete”—intends to restrict the executive from entering the same or similar business as the current employer. The covenant focuses on “protectable interests,” which include pricing information, business strategy, trade secrets, and direct customer relationships. Non-competition clauses are strictly construed against the employer and may serve only to safeguard the employer’s protectable interest. A covenant not to compete has three essential terms: geographic scope, category or scope of employment, and duration of time. A restrictive covenant will not be enforced if it prohibits the former executive’s future work too broadly.<sup>7</sup> In mediation, executives will often seek to reduce the duration and the geographic scope of the restrictive covenant. Some settlements carve out an exception for the executive to work for a particular employer.

The second frequently disputed covenant is a promise not to solicit or recruit the former employer's employees. Non-solicitation covenants are designed to prevent the departing executive from luring away coworkers. These covenants are less restrictive than non-compete covenants, because they do not limit the executive from engaging in his or her traditional profession. A less common dispute involves nondisclosure covenants, which prohibit the executive from disclosing the

## The egos and personalities of the executive litigants make mediating these claims a challenge.

employer's trade secrets and confidential information. A trade secret is information that derives independent economic value from its current or potential use. Such a disclosure may occur simply from memory of the executive. Unlike non-compete covenants, nondisclosure covenants may be enforced indefinitely, as long as the business information is proprietary. However, this covenant cannot be used to prevent an executive from using his skill and intelligence, as enhanced by his prior employment, in a new position.

Employers have found traditional non-compete clauses unpredictable to enforce in court. A recent alternative (imported from England) is a "garden leave clause," in which the executive is required to provide lengthy advanced notice of their intent to resign (for example, 90 days). During the notice period, the executive is held to certain non-compete restrictions and is placed on paid leave with continuing compensation. In Arizona, these covenants are increasingly found in physician agreements. During the notice period, the

executive remains an employee owing a duty of loyalty, loses access to company data, and may not solicit future clients.<sup>8</sup>

In some HPE disputes, the employer is the plaintiff, often seeking injunctive relief against a departing executive and sometimes against the executive's new employer. The relief sought is normally an injunctive order for the HPE to cease working for the new employer, to return trade secrets or confidential documents in his or her possession, or to cease soliciting coworkers to resign and join the new employer. Mediations can occur throughout this process.<sup>9</sup>

Prompted by recent scandals involving inflated stock-option incentive practices ("pump and dump" schemes), employers are increasingly inserting clawback provisions in employment agreements that are triggered when the company issues a financial restatement. A clawback provision allows the employer to recover the value of exercised stock options or bonus payments if the company has engaged in financial fraud or error, even if the executive has not personally perpetuated the accounting misconduct.<sup>10</sup> Some clawbacks are starting to focus on performance-based contributions to executive pensions. A recent study of employment agreements noted in SEC filings found that about 18 percent of such filings have pay-recovery provisions.<sup>11</sup> The 2008 federal Capital Purchase Program requires clawback clauses for the three most highly paid executives, in addition to the CEO and CFO.<sup>12</sup> However, there is no legal process to force recovery of pay payments, which is money typically already spent or commingled by the executive.

### Unique Challenges in Mediating with the HPE

During mediation, highly paid executives can be challenging personalities. Typically, they are highly educated, often having an MBA or a doctorate. They are strongly opinionated about their right to work elsewhere and have significant financial resources to litigate the matter. They are not used to deferring to others; as a result, presidents and CEOs are often poor listeners. Of course, there is typically a significant amount of money at stake in their litigation,

and the proceedings are highly personal.

Contrary to most mediation, the HPE has knowledge of the terms and dollar value of prior executive settlements. For example, the COO would know that just last year, the company settled with the vice president of engineering for a lump-sum payment of \$150,000, plus three years of continued stock option vesting, and a 50 percent estimated pro-rata payment for his five-year long-term incentive plan. The typical HPE also has a long-standing relationship with the decision-makers and may have access to the board of directors. Often, the HPE is impressed with mediators of stature, such as former judges, and prefers confident mediators who use the evaluative model.

Disputes involving the HPE have other nuances. One is the desire of both sides to manage publicity. Neither side generally wants its "dirty laundry" aired in the press. A second is the interest of the third-party company that has hired the departing executive. Often the hiring employer is a direct competitor of the current employer, so the senior executive of the current employer knows a lot about the hiring employer and has competitive instincts that encourage disputes. In some litigation, the hiring company can be named in the litigation and can be targeted in the temporary restraining order for business torts. Of course, the hiring employer wants to hire an executive with no limitations on his or her ability to perform its work.

### What the Effective HPE Mediator Needs to Know

An effective mediator in HPE disputes must understand basic employment tax law. The label placed on a payment in the settlement agreement, such as compensation or damages, is not controlling. The form of payment can determine whether or not the financial payment is taxable. Damages from breach-of-contract litigation, for example, are taxable, but not as wages. Most payments from mediation are distributed as IRS 1099 forms of compensatory payment, with the express acknowledgement that the employee has the duty to declare the income and pay taxes on it.<sup>13</sup>

Mediators should have a passing familiarity with section 409A of the IRS Code

(unfunded deferred compensation) and how it may affect cash and equity compensation arrangements and separation pay.<sup>14</sup> Following the Enron accounting scandal, this law (the American Jobs Creation Act of 2004) was enacted to prevent executives from cashing out deferred benefits while their company is “sinking.” Significant financial settlements can also trigger additional tax liability under the Alternative Minimum Tax (AMT).

One way to find relief from potential tax implications is a structured settlement or a periodic payment plan funded by the employer. One example of a structured settlement could involve the purchase of a 10-year annuity. A structured settlement consultant versed in taxable damage modeling can be very helpful to a mediator who is trying to close the deal.<sup>15</sup>

### Summary

In this volatile economy, disputes involving HPEs are increasing yearly. The scenario described in the beginning of this article illustrates the competing interests in executive employment. The egos and personalities of the executive litigants make mediating these claims a challenge. In addition, these mediations are one of the few occasions when the room can be full of actual corporate line clients, not just the attorneys who represent them. These disputes clearly require mediators with subject-matter expertise, as well as significant experience and savvy with executive personalities.

### Endnotes

1. Gretchen Morgenson, *See We'll Rescue You on Four Conditions*, N.Y. TIMES, (Sunday Business), Oct. 19, 2008, p. 1, describing the restrictions on executive compensation found in the 2008 federal Capital Purchase Program and

referencing golden parachute clauses.

2. See 2007 Annual Corporate Proxy of Cardinal Health Systems, under Compensation Discussion, 77, referencing implications of a) involuntary termination without cause, b) termination due to retirement, c) termination for reason of disability, d) termination by death, and e) termination due to change of control.

3. Restatement (Second) of Agency § 387 (1958). Also see Lisa Cassilly and Sara Partin, *Impermissible Acts: When an Employee Violates the Duty of Loyalty Owed an Employer*, EMPLOYMENT AND LABOR RELATIONS LAW, ABA Section of Litigation, Winter 2008, Volume 6, No. 2.

4. Civil Rights Act of 1964, as amended, 42 USC 2000e (most recently amended in 1991 to allow jury trials, punitive damages, and monetary caps on damages).

5. Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406 (1974).

6. Michael Leech, *Back to The Future: Tort Claims in Employment Cases*, THE EMPLOYEE ADVOCATE, Summer 2005, p. 109. Also see *Dot-Com Employees Get Mad*, CORPORATE COUNSEL MAGAZINE, Feb. 2001, p. 13, describing fraudulent inducement litigation in a variety of factual settings.

7. BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY (6th Edition, BNA, 2008). Also see David Wirtz, *Tip the Scale on Non-Compete Agreements*, HR MAGAZINE, November 2002, p. 107.

8. Gretchen Morgenson, *Pay it Back If You Did Not Earn It*, N.Y. TIMES, (Sunday Business Section), May 2008, discussing enforcement of controversial clawback compensation clauses in executive employment agreements at several corporations. Also see 2007 Annual Corporate Proxy of Cardinal Health Systems, under Compensation Discussion (page 68) referencing “under our benefit plans, we have the authority to require repayment . . . in instances of executive misconduct. Under our long term cash incentive program and MIP, we are authorized to seek and recover cash incentive compensation paid to executive officers

when the payment was based on achievement of certain financial results that were subsequently restated if the executive caused or contributed to the need for the financial restatement.”

9. See N.Y. Times Money Section, March 27, 2007, describing that Equilar Inc, an executive compensation research firm in San Mateo, Calif., searched for pay-recovery provisions (clawback clauses) at the 100 largest companies in the United States. It found that about 18 percent of them had disclosed such policies for the previous year. Also see N.Y. Times, Dec. 18, 2008, p. 1, referencing that Morgan Stanley has implemented a clawback policy affecting 7,000 employees. The policy provides pay can be retracted from workers who engage in “conduct detrimental to the firm” or who cause “a restatement of results, a significant financial loss or other reputational harm.”

10. See Gretchen Morgenson, *See We'll Rescue You on Four Conditions*, N.Y. TIMES, (Sunday Business), Oct. 19, 2008, p. 2.

11. See Christopher Stief, *Stay in Your Own Backyard, “Garden Leave” Employment Agreements Start to Bloom in the United States*, CORPORATE COUNSEL MAGAZINE, November 2008, pp. 75–76.

12. See “Covenants Not To Compete: Obtaining TROs and Preliminary Injunctive Relief”, Lorman Education Services, presented by Eric Johnson, Robert Jones, Craig O’Laughlin, and Luis Ramirez, Program materials, June 15, 2007, p. 80.

13. See William Kluwin, *Arizona Wages or ERISA Benefits: Treatment of Retention Bonuses and Severance Payments*, ARIZ. ATTORNEY, March 1999, p. 32.

14. W. Lazar, *Representing Executives and Employees after 409A: The Final Chapter on Deferred Compensation and Separation Pay*, THE EMPLOYEE ADVOCATE, National Employment Lawyers Association, Summer/Fall 2007, p. 87.

15. J. Lazarus, *What every Employment Lawyer Should Know about Structured Settlements*, THE EMPLOYEE ADVOCATE, National Employment Lawyers Association, Spring 2003, p. 68.

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# Supreme Court Upholds CBA Provision Requiring Union Members to Arbitrate ADEA Claims

By Joseph M. Gagliardo & Heather R.M. Becker

On April 1, 2009, the U.S. Supreme Court issued a 5–4 decision in *14 Penn Plaza LLC et al. v. Pyett*,<sup>1</sup> buttressing the use of alternative dispute resolution by giving employers the right to negotiate provisions in a collective bargaining agreement (CBA) that require the arbitration of statutory discrimination claims. Specifically, the Supreme Court reversed the Second Circuit in holding that a provision of a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act (ADEA) claims is enforceable as a matter of federal law.

Ultimately, *Pyett* makes clear that individual union members subject to a collective bargaining agreement that mandates arbitration of specific individual claims, such as statutory civil rights disputes, may be prohibited from seeking redress through the courts. Accordingly, this decision may lead to less discrimination litigation. This decision may also result in increased pressure on labor unions to avoid duty of fair representation claims, or other similar claims from their members. A closer look at *Pyett* provides insight into the Court's rationale, the decision's implications, and the actions already taken to limit or overturn the decision.

Respondents were members of the Service Employees International Union, Local 32BJ, which was the exclusive bargaining representative of New York City employees within the building-services industry. The union had exclusive authority to bargain on behalf of its members with respect to their rates of pay, wages, hours of employment, or other conditions of employment. The union engaged in industry-

wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), which is a multiemployer bargaining association for the New York City real estate industry. The union and RAB maintained a collective bargaining agreement that requires all members to submit all claims of employment discrimination to binding arbitration under the collective bargaining agreement's grievance and dispute resolution procedures.

Petitioner 14 Penn Plaza LLC was an RAB member and owned and operated the office building where respondents worked as night lobby watchmen and in similar positions. The respondents were employed by petitioner Temco Services Industries, Inc., a maintenance service and cleaning contractor. In August 2003, with the union's consent, 14 Penn Plaza LLC engaged licensed security guards to protect the building. As a result, it reassigned respondents to other positions, such as porters and cleaners.

The respondents claimed that the new positions were less desirable than their former positions and that the assignment resulted in lost income and emotional distress. The respondents asked the union to file grievances alleging, among other things, that the reassignments violated their rights under the ADEA. Initially, after being unable to resolve these issues through the grievance process, the union requested arbitration under the terms of the collective bargaining agreement. The union later withdrew the age discrimination claims because it had previously consented to the contract for the new security personnel at 14 Penn Plaza. The respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that the reassignments were in violation of the ADEA. After the EEOC issued a right-to-sue notice, the respondents filed an ADEA action against the petitioners in the U.S. District Court for the Southern District of New York.

Based on the language of the collective bargaining agreement and sections 3 and 4 of the Federal Arbitration Act, the petitioners filed a motion to compel arbitration on the respondents' age discrimination claims.<sup>2</sup> The district court denied the motion to compel arbitration because it found that, under Second Circuit precedent, "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."<sup>3</sup>

The Second Circuit affirmed the district court's decision to deny the motion to compel arbitration. In doing so, the Second Circuit relied on its prior ruling in *Rogers v. New York University*<sup>4</sup> and reaffirmed that "mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent they waive the rights of covered workers to a judicial forum for federal statutory causes of action."<sup>5</sup>

Writing for the Supreme Court in its decision to reverse the Second Circuit, Justice Thomas explained that:

Examination of the two federal statutes at issue in the case . . . yields a straightforward answer to the question presented: The [National Labor Relations Act] provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration claim in this [collective bargaining agreement], which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has

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chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.<sup>6</sup>

The Court further rejected the respondents' contention that enforcing the arbitration provision contradicts the Supreme Court's *Gardner-Denver*<sup>7</sup> line of cases, explaining that the "holding of *Gardner-Denver* is not as broad as respondents suggest"<sup>8</sup> and no case since *Gardner-Denver* has broadened its holding.<sup>9</sup> In *Gardner-Denver*, the employee was covered by a collective bargaining agreement that prohibited discrimination against any employee based on a number of protected characteristics and guaranteed that no employee would be discharged except for just cause. The collective bargaining agreement also included a multi-step grievance procedure that culminated in compulsory arbitration as to differences in the meaning and application of the contract provisions. After the employee was discharged and claimed that the employer violated the just-cause provision and terminated his employment because of his race, an arbitrator ruled that the employee had been discharged for just cause, but failed to rule on the race discrimination claim. The employee then filed an action in federal court, alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964. The district court issued a decision, which the court of appeals affirmed, granting summary judgment in favor of the employer because the employee had already submitted his race discrimination claim to arbitration and lost. The Supreme Court, however, reversed, holding that the arbitration was not preclusive because the collective bargaining agreement did not cover statutory claims.<sup>10</sup> In other words, because the collective bargaining agreement gave the arbitrator authority to resolve only questions of contractual rights, not statutory rights, the arbitration of the employee's race discrimination claim did not preclude the employee from seeking redress through the courts.

The Court in *Pyett* also noted that it had made clear in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>11</sup> that "the *Gardner-Denver* line of cases 'did not involve the

issue of enforceability of an agreement to arbitrate statutory claims."<sup>12</sup> Instead those cases,

involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.

The Court also dismissed the "dicta" contained in the *Gardner-Denver* line of cases that was "highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights."<sup>13</sup> Specifically, it dismissed the assumption in *Gardner-Denver* that submitting "statutory discrimination claims to arbitration was tantamount to a waiver" of those claims. The Court emphasized that mandatory arbitration does not waive an employee's right to be free from workplace discrimination; rather, it waives only the right to seek redress through the courts. Second, the Court in *Pyett* dismissed any suggestion that arbitral tribunals and/or arbitrators are not capable of handling statutory claims. Third, the Court rejected the notion that the union's control over the manner and extent to which the individual's grievance is presented should yield a different result and noted that the Court "cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text."<sup>14</sup> The Court concluded that, in the event there exists a conflict of interest, Congress has accounted for this problem in several ways, such as providing individuals the right to bring duty of fair representation cases against labor unions.

Finally, the Court refused to consider whether the collective bargaining agreement at issue "clearly and unmistakably" required union members to arbitrate their ADEA claims and whether the collective bargaining agreement allowed the union

to prevent the respondents from vindicating their statutory rights in the arbitral forum because these arguments had not been appropriately preserved and briefed.

Justice Souter's dissenting opinion, which was joined by Justices Stevens, Ginsburg, and Breyer, focuses on stare decisis and the Court's departure from its holding in *Gardner-Denver*. Justice Souter noted that in *Gardner-Denver* the

## Labor unions may be less enthusiastic about opening the floodgates to statutory claims.

Court concluded that the rights conferred by Title VII, similar to those under the ADEA, cannot be waived as part of the collective bargaining process. According to Justice Souter, the Court in *Gardner-Denver* distinguished between collective rights and individual rights, and the dissent found no argument for abandoning such precedent in this case.<sup>15</sup> In addition to joining Justice Souter's dissenting opinion, Justice Stevens wrote separately to amplify his concern over the majority's "subversion of precedent to the policy favoring arbitration."<sup>16</sup>

At this juncture, the impact of the decision is unclear. Some predict that it may result in a drop in employment discrimination lawsuits;<sup>17</sup> however, a narrow reading of the Court's opinion may limit that effect. For example, in *Kravar v. Triangle Services, Inc.*,<sup>18</sup> the plaintiff sued her former employer, alleging, among other things, disability discrimination after she was refused a position at the defendant's new headquarters. The defendant moved to compel arbitration in light of the Court's ruling in *Pyett*.<sup>19</sup> The district court denied the defendant's motion to compel arbitration and held that the case fell

within an exception to the enforceability of an arbitration agreement contained within a collective bargaining agreement. Specifically, the plaintiff had submitted a sworn declaration stating that her union declined to prosecute her claims for disability discrimination. As a result, if enforced, the arbitration agreement in the collective bargaining agreement would operate to preclude the plaintiff from raising her disability discrimination claim in any forum. In light of the circumstances, the district court held that *Pyett* did not apply to individuals covered by a collective bargaining agreement mandating arbitration of statutory claims, such as her disability discrimination claim, if the union refused to arbitrate on the employee's behalf.

The impact on the number of employment discrimination claims also depends on the standard that courts apply to determine whether the arbitration provision of the collective bargaining agreement "clearly and unmistakably" requires union members to arbitrate statutory claims. The Supreme Court specifically left that issue for another day.

*Pyett's* influence on collective bargaining and the arbitration process, however, may come to a halt if the Senate version of the Arbitration Fairness Act of 2009<sup>20</sup> becomes law. Introduced on April 29, 2009, the Senate's version of the bill specifically provides,

Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such

arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.<sup>21</sup>

This bill is currently pending before the Senate Judiciary Committee.

### Conclusion

While some employers are likely to embrace this decision for the prompt resolution of statutory employment discrimination claims in a cost-effective, streamlined manner, labor unions may be less enthusiastic about opening the arbitration floodgates to statutory claims. In particular, labor unions may have concerns that there will be an increased volume of cases to be arbitrated and whether they have the ability to represent effectively the interests of their individual members (particularly if a labor union typically relies on union representatives, instead of lawyers, to handle its arbitrations). Further, this decision may raise concerns for labor unions that, if they are selective about which cases they arbitrate, they will be subject to litigation in the form of duty of fair representation claims. Those issues may lead labor unions to refuse to agree to such provisions, to negotiate any existing arbitration provisions out of their collective bargaining agreements, or simply to refuse to arbitrate all statutory claims, such as the union did in *Kravar*.

### Endnotes

1. 129 S. Ct. 1456 (2009).
2. 9 U.S.C. §§3, 4.
3. *Pyett v. Pa. Bldg. Co.*, 2006 WL 1520517, \*3 (S.D.N.Y. June 1, 2006).
4. 220 F.3d 73 (2d Cir. 2000).
5. *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).
6. *Pyett*, 129 S. Ct. at 1466.
7. 415 U.S. 36 (1974).
8. *Pyett*, 129 S. Ct. at 1466.
9. *Id.* at 1467–69.
10. *Gardner-Denver Co.*, 415 U.S. at 1467.
11. 500 U.S. 20 (1991).
12. *Pyett*, 129 S. Ct. at 1468 (quoting *Gilmer*, 500 U.S. at 35).
13. *Id.* at 1469.
14. *Id.* at 1472.
15. *Id.* at 1477–78.
16. *Id.* at 1475.
17. *See, e.g., Mathews v. Denver Newspaper Agency LLP*, 2009 WL 1231776 (D. Colo. May 4, 2009) (plaintiff waived his right to seek a judicial remedy for his employment discrimination claims by voluntarily pursuing arbitration under the collective bargaining agreement).
18. 2009 WL 1392595 (S.D.N.Y. May 19, 2009).
19. 2009 WL 1392595, \*1.
20. S. 931 (111th Congress). The House version of the bill, H.R. 1020, was introduced on February 12, 2009, before the Court's decision in *Pyett*, and thus, does not address the enforceability of a collective bargaining agreement's arbitration provision that mandates the arbitration of statutory employment discrimination claims.
21. S. 931, Sec. 402(b)(2).



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## Perfect Storm

*continued from front cover*

the Whistleblower” at the Financial Industry Regulatory Authority (FINRA); and increased funding for federal government investigations of Sarbanes-Oxley whistleblower complaints and other fraud matters under the recently passed Fraud Enforcement and Recovery Act of 2009.<sup>1</sup> These efforts, in addition to near record levels of unemployment and a general uneasiness among regulators about the strength of the financial services sector, will undoubtedly lead to an increase in government investigations and enforcement activity triggered by whistleblower complaints. Now, more than ever, corporations must implement strong whistleblower programs and prepare for the coming onslaught of complaints and investigations.

### New Whistleblower Protections in the Stimulus Bill

The American Recovery and Reinvestment Act of 2009<sup>2</sup> (Recovery Act) has an important provision aimed at encouraging whistleblower activity. The Recovery Act’s McCaskill Amendment, Title XV, § 1553, contains a broad provision that provides whistleblower protections to employees of private contractors and state and local governments who report mismanagement, fraud, or any violation of law linked to stimulus funds:

**Prohibition of Reprisals:** An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee’s duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal Regulatory or

law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of [misuse of stimulus funds].<sup>3</sup>

It doesn’t take much “reading between the lines” to identify the goal of the McCaskill Amendment: to generate as many whistleblower tips as possible, which will lead to an increase in government investigations and enforcement actions.

The McCaskill Amendment includes provisions that protect whistleblowers who report fraud or waste and are employed by nonfederal employers that receive funds from the Recovery Act, and potentially by private employers who contract with entities receiving federal stimulus funds. Much like the whistleblower protections contained in Sarbanes-Oxley, covered employers are prohibited from discharging, demoting, or discriminating against an employee who raises concerns of improper spending of stimulus funds.

Also similar to other whistleblower protection statutes, under the Recovery Act, the whistleblower raising a concern does not have to be “right” about his or her belief that a company has engaged in fraud or waste of stimulus funds. Rather, the new law protects employees who report matters that he or she “reasonably believes” evidence:

- gross mismanagement of stimulus funds
- gross waste of stimulus funds
- a substantial and specific danger to public health or safety related to the implementation or use of stimulus funds
- an abuse of authority related to the implementation or use of stimulus funds
- a violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds

All employers receiving stimulus funds are required to post the rights and remedies provided to employees under the McCaskill Amendment.<sup>4</sup> Whistleblowers who believe they have been retaliated against must file a complaint with the appropriate inspector general. Unless the inspector general determines that the complaint is frivolous, does not relate to stimulus funds, or another federal or state judicial or administrative agency is addressing the complaint, the inspector general must investigate the complaint and submit a report of the findings to the complainant, employer, and the appropriate agency within 180 days of receiving the complaint.<sup>5</sup> Within 30 days of receiving an inspector general’s investigative findings, the head of the agency shall determine whether there has been a violation.<sup>6</sup> As practitioners who regularly appear before the Securities and Exchange Commission (SEC) and U.S. Department of Justice know full well, such findings frequently lead to more serious criminal investigations and prosecutions.

The McCaskill Amendment will play a significant role in ensuring transparency and accountability in stimulus fund spending. President Barack Obama has specifically stated that a crucial objective for his administration will be ensuring that stimulus “funds are used for authorized purposes and every step is taken to prevent instances of fraud, waste, error, and abuse.”<sup>7</sup> Indeed, look for the McCaskill Amendment to provide an avenue of enforcement for the Obama administration, as well as another avenue of relief for employees. Ultimately, the broad protections of the McCaskill Amendment, coupled with the wide distribution of stimulus funds, will undoubtedly lead to more federal enforcement activity based on whistleblower complaints and tips.

### SEC, FINRA Move to Aggressively Investigate Whistleblower Complaints

The SEC’s involvement in the Bernard Madoff tale—and its failure to timely respond to early tips about Madoff’s fraud scheme—is now well documented. Harry Markopolos, a researcher at an investment firm competing with Bernard L. Madoff Securities Investments, repeatedly warned

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the SEC's Boston office about Madoff and his questionable investments.<sup>8</sup> Between 2000 and 2005, Mr. Markopolos filed five complaints with the SEC concerning Madoff. In one complaint, he tried to garner the SEC's attention by entitling it "The World's Largest Hedge Fund Is A Fraud."<sup>9</sup> Mr. Markopolos's complaints to the SEC included a report containing 29 specific "red flags" associated with Madoff's business, and in a Nostradamus-like manner,

**The cost of defending a whistleblower investigation or lawsuit can be devastating to a company.**

"he feared Mr. Madoff was running a giant Ponzi scheme."<sup>10</sup> And he was not alone: SEC records show that Mr. Markopolos's complaints were among 12 similar tips the agency received from 2003 to 2006, including a 2005 email from a "concerned investor" stating that "Madoff is running a very sophisticated fraudulent pyramid scheme."<sup>11</sup> The SEC took no public action until 2008, and only after Madoff confessed to his sons.

In response to harsh criticism of its handling of whistleblower complaints about Madoff, the SEC is revamping its procedures for handling whistleblower complaints and tips. The SEC has engaged the Center for Enterprise Modernization, a federally funded research and development center, to conduct a thorough review of the agency's internal procedures used to evaluate complaints, tips, and referrals. It is expected that, following this review, the SEC will implement procedures aimed at aggressively investigating all reasonably credible complaints filed with the agency. SEC Chairman Mary Schapiro recently

stated, "As we continue to reinvigorate our enforcement efforts as an agency, it's vitally important that we move very aggressively to improve staff's use of tips and complaints from investors and whistleblowers."<sup>12</sup> Indeed, Chairman Schapiro is not waiting for the final report to change how the agency handles whistleblower complaints: In January, she took steps to make it easier for enforcement staff to obtain approval to issue subpoenas based on whistleblower complaints. Regular practitioners before the SEC have noticed a significant increase in SEC subpoena activity since Chairman Schapiro's easing of subpoena-issuance procedures.

According to SEC statements, once the review process is completed, it plans to implement a centralized process to review and act swiftly on whistleblower complaints and other tips. The agency typically receives hundreds of thousands of tips and complaints each year at either its Washington, D.C., headquarters or its 11 regional offices across the country. To date, the agency has lacked any centralized process allowing for systemic review of whistleblower complaints. The SEC expects that the new process will more effectively identify credible leads for potential enforcement action, in addition to areas of high risk for compliance examinations.

The SEC is also getting pressure from the agency's independent inspector general to make significant changes to the agency's investigation and enforcement programs—changes that will likely improve the effectiveness of its enforcement programs. In September 2009, the SEC Inspector General H. David Kotz released reports concerning the agency's mishandling of the Madoff matter,<sup>13</sup> as well as a set of recommendations regarding the way the agency evaluates tips, trains investigators, and document examinations.<sup>14</sup> The recommended changes include incorporation of basic investigative techniques, such as recording witness interviews and using a database for tips and complaints. The SEC should also "require tips and complaints to be reviewed by at least two individuals experienced in the subject matter prior to deciding not to take further action," according to Kotz's report recommendations.<sup>15</sup>

Not to be outdone, in March FINRA, the largest independent regulator for domestic securities firms, established a new "Office of the Whistleblower." According to its press release, FINRA's whistleblower office will "expedite the review of high-risk tips by FINRA senior staff and ensure a rapid response for information that would merit further investigation." Brokers, investors, and any other individual with information suggesting that potentially illegal or unethical activity is taking place can use the service, said Herb Perone, a spokesman for FINRA. Any whistleblower tips that fall outside the FINRA's jurisdictional reach will be referred to the appropriate regulatory or law enforcement agencies, according to FINRA.

Bottom line: The SEC and FINRA's emphasis on whistleblower complaints and tips can only lead to an increase in the number of new investigations and enforcement actions, potentially up to record numbers. Public and political pressure to pursue corporate wrongdoers will add to the pressure hoisted on the agencies to take prompt and aggressive action.

#### Expect More Whistleblower Investigations, Findings by OSHA

The Occupational Safety & Health Administration (OSHA), which is the federal agency charged with investigating employee whistleblower claims under Sarbanes-Oxley and 13 other whistleblower statutes, received a 6 percent boost to its enforcement budget for the 2010 fiscal year. The Obama administration requested the additional funds to increase OSHA's ability to "vigorously enforce . . . whistleblower protections."<sup>16</sup> Not coincidentally, the increased funding came on the heels of a report from the Government Office of Accountability (GOA), which found that whistleblowers who call out illegal activities are not adequately protected from retaliation from their employer. The GOA report concluded that such problems resulted largely from a lack of sufficient resources and proper tracking of complaints, as well as a complicated patchwork of regulations intended to protect whistleblowers.<sup>17</sup>

According to OSHA's data, of the more than 1,800 whistleblower cases the

agency investigated in 2007, 21 percent of all investigations resulted in a favorable outcome for whistleblowers. In addition, approximately half of whistleblower investigators reported to GOA that they lacked necessary resources to properly investigate whistleblower complaints, including basic supplies such as computers, cell phones, and printers. OSHA's increased funding for investigation and enforcement capability will undoubtedly increase the number of agency investigations, and, ultimately, findings favorable to whistleblowers, and shine a bright spotlight on allegations of corporate fraud, waste, and other misconduct.

### Whistleblower Protections, Evolving Issues, and Employer Considerations

Courts analyzing whistleblower claims under the Recovery Act's McCaskill Amendment will likely turn to the legal standards that have been developed under section 806 of Sarbanes-Oxley.<sup>18</sup> Because the goals of section 806 and the McCaskill Amendment are similar—protecting from retaliation employees who report fraud—applying similar standards makes good sense and will give employers some guidance on the new law. Further, both statutes have similar burdens of proof in that they both require an employee to prove that the protected disclosure was a “contributing factor” in the employer's decision to take adverse employment action against the employee.<sup>19</sup> Thus, similar to section 806, an employee filing suit under the McCaskill Amendment will likely have to prove:

1. The employee engaged in protected activity.
2. The employer knew the employee engaged in the protected activity.
3. The employee suffered an unfavorable personnel action.
4. The protected activity was a *contributing factor* in the unfavorable action.<sup>20</sup>

Under section 806, courts apply an “objective reasonableness” standard to evaluate whether an employee in good faith believed the company engaged in fraud or other misconduct, considering the knowledge available to a person “in the

same factual circumstances with the same training and experience. . . .”<sup>21</sup>

Like Sarbanes-Oxley, however, the McCaskill Amendment will also present legal challenges for employers and legal practitioners, including determining what is “protected activity.” For example, in today's 24/7 media world, an employee is more likely than ever to report alleged corporate fraud or misconduct to the media. Is reporting to the media protected activity? If the employee's “whistleblowing” to the media includes the disclosure of confidential or proprietary information, can the employer discipline the employee for violating company policy? Moreover, look for more media involvement in whistleblower issues. Just as Michael Moore has done for his most recent film in which he publicly solicited Wall Street whistleblowers to help craft the script,<sup>22</sup> and *Time* magazine did when it named whistleblowers Cynthia Cooper of WorldCom, Sherron Watkins of Enron, and Coleen Rowley of the FBI as its “Persons of the Year,” whistleblowers will continue to attract popular attention.

Further, it should come as no surprise that the increased whistleblower protections come with a price tag to employers. The cost of defending a whistleblower investigation or lawsuit, and the accompanying media attention, can be devastating to a company, especially in today's tough economy. Defense costs include investigating the employee's retaliation complaint, defending the complaint at the administrative level, and potentially defending a court suit. Moreover, and perhaps more significant and costly, employers will also need to investigate the underlying substantive fraud or misconduct allegation of the whistleblower. These allegations may include purported accounting improprieties, violations of a multitude of federal or state laws applicable to the company, illegal kickbacks, tax violations, or a host of other wrongdoings offered by the whistleblower. If high-profile, the matter will attract media attention, adding yet another layer of complexity and risk to the equation.

Adding to the legal and financial challenges, legal scholars are proposing and advocating for broader protections

for whistleblowers. As whistleblower laws develop, advocates are proposing more flexible reporting requirements that expand protected activity to cover virtually all disclosures:

First, a whistleblower should receive protection for internal reports to supervisors or external reports to a government body so long as the employee reasonably believes that the report recipient can remedy the alleged wrongdoing. . . . Second, employees who report wrongdoing to the media or third party advocacy groups should receive protection if they can show that both an internal and external report would have been ineffective. Third, legislators should protect an employee who reports wrongdoing via the Internet if the employee has tried other channels to no avail, the employee reasonably believes that his or her posting will reach a recipient who can resolve the issue, and the employer is actually violating the law.<sup>23</sup>

As can be imagined, all these evolving issues and challenges make whistleblower laws and regulations extremely difficult and complicated for employers to anticipate and manage. A good example of how these new whistleblower protections, coupled with the struggling economy and a disgruntled workforce, may create the “perfect storm” is illustrated in the recent decision of *Harp v. Charter Communications*.<sup>24</sup> In *Harp*, a laid-off employee filed suit under Sarbanes-Oxley's whistleblower protections, alleging that her discharge was retaliation for reporting shareholder fraud. The plaintiff claimed that she was discharged after reporting that payments were being authorized to a contractor for work that was not performed.

Although the court dismissed the case based on its finding that the employee did not have an objectively reasonable belief that fraud had occurred, the dissent persuasively identified several points that it contended could have swayed a jury to find the company retaliated against the employee. Specifically, the dissent highlighted facts that undermined the employer's case, such

as comments from a human resources manager to the plaintiff that her allegations of fraud would be investigated and “its going to get ugly”; and further noting that the reduction in force of the entire auditing department could be seen as an easy way for the company to eliminate the “pesky unit” that uncovered the problem. As the dissent clearly illustrates, reasonable people can formulate different inferences from facts, and ultimately differ as to the merits of whistleblower claims. These differences of opinion and uncertainty are what make whistleblower claims extremely difficult to anticipate when making employment decisions, and ultimately, difficult to defend.

The new whistleblower protections, and challenges arising from them, and existing whistleblower protection statutes make it all the more important for employers to have the appropriate policies and procedures in place for responding to whistleblowers and their allegations. Employers have to be prepared to adequately investigate allegations and ensure that no one within the company or organization takes any action that might be considered retaliatory. The failure to have a responsive plan or system in place can be a costly mistake.

### What to Expect . . . More Complaints, More Enforcement

Since the passage of Sarbanes-Oxley, whistleblower complaints and tips have dramatically altered the corporate accountability landscape. Employees emboldened by the protections offered by whistleblower statutes have more freely lodged complaints asserting a variety of perceived corporate malfeasance. For many, the events of the past year have more clearly than ever highlighted how important it is that employee complaints and other tips be taken seriously by government enforcement agencies. And

these beliefs are supported by empirical data: According to the 2008 Association of Certified Fraud Examiners' *Report to the Nation*, occupational fraud in corporate environments is most frequently discovered as a result of whistleblower complaints or tips.<sup>25</sup> The federal government's recent actions to add new whistleblower protections, increased funding, and revamped processes will undoubtedly increase the pace of complaints, tips, and ultimately, enforcement activity by federal agencies.

### Endnotes

1. Pub. L. No. 111-21.
2. Pub. L. No. 111-5.
3. *Id.* at § 1553(a).
4. *Id.* at § 1553(e).
5. *Id.* at § 1553(b)(2)(A)(i)-(ii).
6. *Id.* at § 1553(c)(2).
7. Susan Berger & Barrie Tabin, *Accountability and Transparency in the American Recovery and Reinvestment Act*, ENTREPRENEUR, June 2009 (available at [www.entrepreneur.com/tradejournals/article/202073030.html](http://www.entrepreneur.com/tradejournals/article/202073030.html)).
8. Sarah N. Lynch, *SEC Moves to Review Whistleblower Complaints*, WALL ST. J., March 5, 2009 (available at <http://online.wsj.com/article/SB123627112950241429.html>).
9. Ross Kerber, *The Whistleblower: Dogged Pursuer of Madoff Wary of Fame*, BOSTON GLOBE, January 8, 2009 (available at [www.boston.com/business/articles/2009/01/08/the\\_whistleblower?mode=PF](http://www.boston.com/business/articles/2009/01/08/the_whistleblower?mode=PF)).
10. Lynch, *supra* Note 8.
11. Kevin McCoy, *Madoff Case Spurs SEC to Revamp Whistleblower Policy*, USA TODAY, March 5, 2009 (available at [www.usatoday.com/money/markets/2009-03-05-madoff-sec-whistle-blower-complaints\\_N.htm](http://www.usatoday.com/money/markets/2009-03-05-madoff-sec-whistle-blower-complaints_N.htm)).
12. Lynch, *supra* Note 8.
13. U.S. Securities and Exchange Commission Office of Inspector General, Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Public Version)* (August 31, 2009) (available at [www.sec.gov/news/studies/2009/oig-509.pdf](http://www.sec.gov/news/studies/2009/oig-509.pdf)).
14. U.S. Securities and Exchange Commission Office of Inspector General, Office of Audits, *Program Improvements Needed Within the SEC's Division of Enforcement* (September 29, 2009) (available at [www.sec-oig.gov/Reports/AuditsInspections/2009/467.pdf](http://www.sec-oig.gov/Reports/AuditsInspections/2009/467.pdf)).
15. *Id.*
16. Tom Starnes, *Obama's Budget Priorities*, HUMAN RESOURCES EXECUTIVE ONLINE, March 9, 2009, (available at [www.hreonline.com/HRE/story.jsp?storyId=185020230](http://www.hreonline.com/HRE/story.jsp?storyId=185020230)).
17. U.S. Government Accountability Office, *Whistleblower Protection Program—Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency* (January 2009).
18. 18 U.S.C. § 1514A
19. Compare 29 C.F.R. § 1980.104(b)(1)(iv) (under Sarbanes-Oxley, a complainant establishes a prima facie case by showing that “protected activity was a contributing factor in the unfavorable action”) with section 1553(c)(1)(A)(i) (under the McCaskill Amendment, a person alleging reprisal for protected disclosures must show that the disclosure was a “contributing factor in the reprisal”) (emphasis added).
20. 29 C.F.R. § 1980.104(b)(1) (outlining the burden of proof under Sarbanes-Oxley) (emphasis added).
21. *Allen v. Admin. Review Board*, 514 F.3d 468, 477 (5th Cir. 2008).
22. [www.michaelmoore.com/words/message/index.php?messageDate=2009-02-11](http://www.michaelmoore.com/words/message/index.php?messageDate=2009-02-11) (“Will You Help Me With My Next Film? . . . a request from Michael Moore” posted February 11, 2009, last visited June 2, 2009).
23. Gerard Sindzak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1661 (2008).
24. 558 F.3d 722 (7th Cir. 2009).
25. Association of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud & Abuse* (available at [www.acfe.com/documents/2008-rttn.pdf](http://www.acfe.com/documents/2008-rttn.pdf)).



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## Editors' Message

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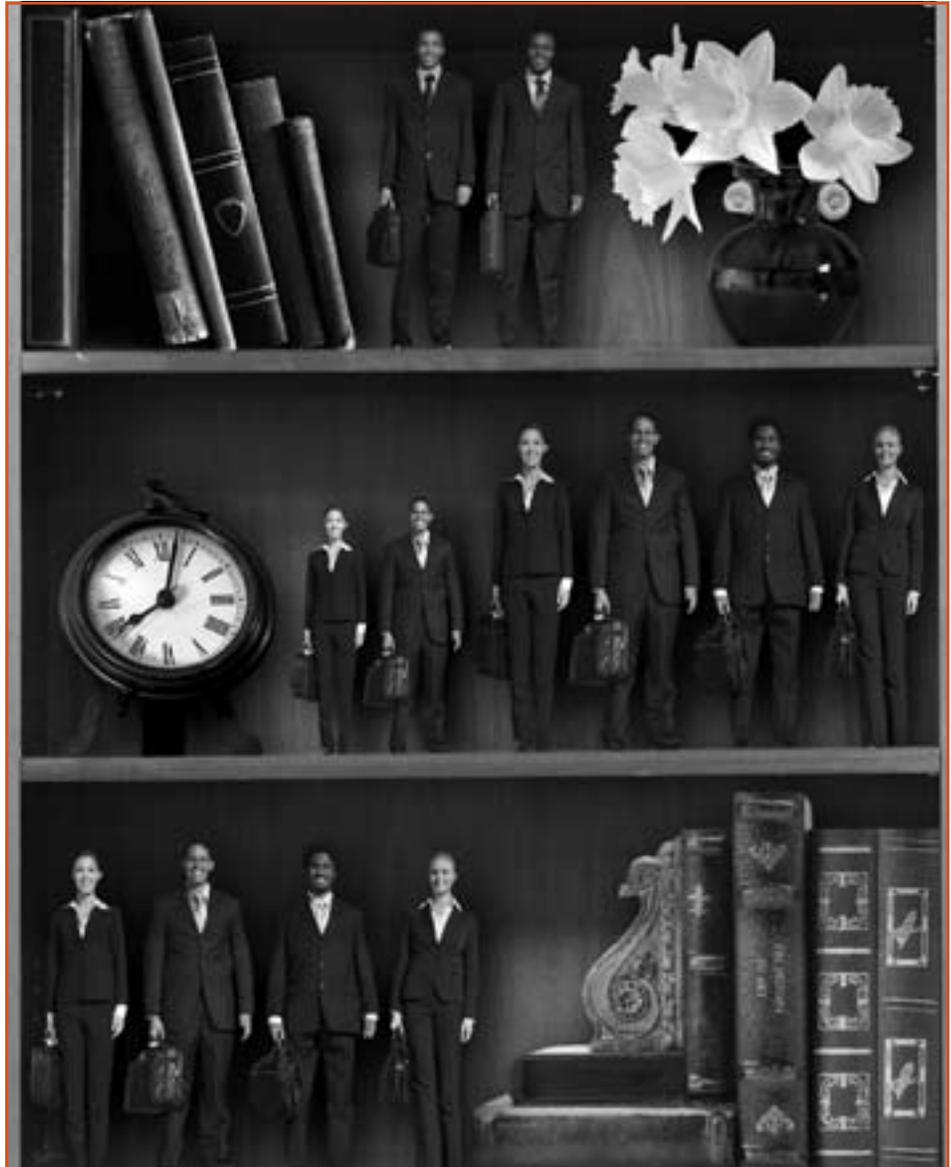
In this area rife with legal uncertainty and sometimes conflicting signals from the courts, Pierce and Thomas offer straightforward tips and recommendations pertinent to nearly all employment law cases litigated in today's environment.

Richard D. Fincher, in his article entitled "Mediating Disputes of the Highly Paid Executive," examines the often complex and equally contentious issues that inevitably come with mediating disputes involving upper management. As a practitioner and longtime mediator who has successfully mediated numerous such disputes, Fincher addresses the challenges of mediating this subclass of disputes, while also offering practitioners pertinent and helpful advice for successfully resolving them.

Finally, in "Supreme Court Upholds CBA Provision Requiring Union Members to Arbitrate ADEA Claims," Joseph M. Gagliardo and Heather R.M. Becker comprehensively review the Supreme Court's recent decision in *14 Penn Plaza LLC v. Pyett*. Gagliardo and Becker examine the Court's holding in *Pyett*, which paves the way for enforceability of clauses in union contracts that require the arbitration of individual statutory claims, and also provide insight into the likely practical effects of the Court's decision.

As always, we continue to encourage your submission of articles to the committee's newsletter and website ([www.abanet.org/litigation/committees/employment](http://www.abanet.org/litigation/committees/employment)). Please feel free to contact us if you are interested in contributing or if you would like to become more active in any of the committee's activities. We appreciate your interests and look forward to working with you in the future.

**William C. Martucci  
and Brian Koji**



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