The College of Labor & Employment Lawyers

Spring 2003 Newsletter
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INSIDE THIS ISSUE:

NEWS AND CURRENT EVENTS

Annual Induction Dinner – As mentioned in our last newsletter, the Board of Governors met on May 19th to make difficult decisions with regard to the Class of 2003. Having instituted a cap which limits the number of inductees to no more than ten percent of the current membership, the Board was allowed to choose only sixty-one new Fellows this year. We appreciate the efforts of this year's Circuit Credentials Committees for the hard work they did in making their recommendations to the Board. Unfortunately, because so many distinguished lawyers were recommended, it became the Governors' responsibility to narrow the 118 applications down to meet the sixty-one membership openings. We look forward to celebrating those Fellows, all of whom are acknowledged on page 2 of this newsletter, at this summer's Induction Dinner.

Scheduled for Sunday, August 10th at San Francisco's Palace Hotel, Fellows and their guests will be treated to an evening of great food and wonderful company. Invitations have been mailed. Be sure to return your RSVP, along with payment, before August 1st. The College instituted a mentor program several years ago, designed to help our newest Fellows meet other Fellows at the dinner. An early reception is held on the night of the Induction Dinner to allow this group to meet and mingle. If you have any interest in serving as a mentor at this year's dinner, please notify Susan Wan at (202) 955-8225. Age is not a factor in determining if you are qualified to serve as a mentor, only your interest in promoting the College, its membership and events.

Inaugural New York Meeting is a Success. On Monday, May 12, approximately twenty-five Fellows of the College met in New York for an informal, but substantive, gathering. Invitations had been sent by e-mail to all Fellows in the tri-state area (Connecticut, New Jersey and New York) to come and share ideas and thoughts about current issues affecting our membership. We were fortunate to be hosted by Evan Spelfogel at Epstein, Becker & Green, who provided drinks and a buffet dinner. Our moderator, John Sands, with our two lead speakers, Pat Stanton and Lou DiLorenzo, provoked a lively and interactive discussion about the difficulties of dealing with the requirements of Sarbanes/Oxley as it affects labor and employment issues.

The clear consensus was that such meetings ought to continue, and we set the next day for November 17. Our topic at that time will be case examples presenting recurrent difficult problems, and how to deal most effectively with them.

We would encourage other regions with a reasonable concentration of Fellows to organize similar gatherings. We found it provided a great opportunity to meet other Fellows in a collegial setting, and engage in a creative and interesting discussion. Anyone interested in participating in a regional gathering should contact either Joe Garrison, Wayne Outten, or Susan Wan.

BOARD ELECTS FELLOWS FOR CLASS OF 2003

At a meeting of the Board of Governors held May 19th, the following distinguished lawyers were elected Fellows of the College. The induction ceremony, scheduled to take place in San Francisco, CA, will be held Sunday, August 10th. Mark your calendars now for what should be an exciting evening.

Fred W. Alvarez, Palo Alto, CA
James G. Baker, Overland Park, KS
Patricia C. Benassi, Peoria, IL
Edwin H. Benn, Glencoe, IL
Harlan Bernstein, Portland, OR
Nancy Bornn, Marina del Rey, CA
G. Ross Bridgman, Columbus, OH
Thomas B. Buescher, Denver, CO
David R. Cashdan, Washington, DC
Julia P. Clark, Washington, DC
Jonathan A. Cohen, Washington, DC
James M. Dawson, Minneapolis, MN
Edward J. Dempsey, Hartford, CT
Victoria de Toledo, Stamford, CT
Anthony E. Dombrow, Chicago, IL
Jacquelin F. Drucker, New York, NY
H. Reed Ellis, Newark, NJ
B. Frank Flaherty, Garden City, NY
Michael R. Fox, Madison, WI
Leonard D. Givens, Detroit, MI
Melva Harmon, Little Rock, AR
Edwin A. Harnden, Portland, OR
Margaret A. Harris, Houston, TX
Janet E. Hill, Athens, GA
Peyton S. Irby, Jr., Jackson, MS
T. Warren Jackson, El Segundo, CA
Wendy L. Kahn, Washington, DC
Ellen C. Kearns, Boston, MA
I. Harold Koretzky, New Orleans, LA
Louis B. Kushner, Pittsburgh, PA
Homer LaRue, Columbia, MD
John T. Lavey, Little Rock, AR
Mary Lee Leahy, Springfield, IL
Charisse R. Lillie, Philadelphia, PA
Donald R. Livingston, Washington, DC
Judith A. Lonnquist, Seattle, WA
Michael Maroko, Los Angeles, CA
Peggy Renate Mastroianni, Washington, DC
John A. McGuinn, San Francisco, CA
J. Joseph McKittrick, North Hampton, NH
Raymond E. Morales, San Juan, PR
Neil Mullin, Montclair, NJ
Harvey A. Nathan, Chicago, IL
Samuel J. Nicholas, Jr., Jackson, MS
Martha Clewis Perrin, Atlanta, GA
Michael L. Pitt, Royal Oak, MI
Donald J. Polden, Memphis, TN
Harry R. Pringle, Portland, ME
Charles M. Quinn, Birmingham, AL
Russell J. Reid, Seattle, WA
Nancy A. Richards-Stower, Merrimack, NH
J. Lewis Sapp, Atlanta, GA
Margaret L. Shaw, New York, NY
G. Phillip Shuler, III, New Orleans, LA
Thomas F. Sonneborn, Western Springs, IL
Harry R. Stang, Santa Monica, CA
Stanley R. Strauss, Washington, DC
Howard S. Susskind, Coral Gables, FL
James E. Tobin, Detroit, MI ∗
W. Gary Vause, Gulfport, FL ‡
Kathryn T. Whalen, Portland, OR
Gwynne A. Wilcox, New York, NY
Pearl Zuchlewski, New York, NY

‡ Posthumously
∗ Emeritus

COMMENTARY – ARBITRATION OF EMPLOYMENT CLAIMS HAS ITS BENEFITS

By James K.L. Lawrence

A management lawyer, Mr. Lawrence is a partner in the law firm of Frost Brown Todd LLC in Cincinnati, Ohio, and was inducted as a Fellow of the College in 1999. The author wishes to acknowledge the assistance of Robert Seidler, also of Frost Brown Todd LLC, in preparing this response.

Arbitration is often more expeditious than the judicial process, often being over in a few months as compared to the potential for a lawsuit to drag on for years.

In response to the thoughtful article of Stephen Jones, "Some Second Thoughts on The Use of Arbitration to Resolve Employment Discrimination Claims" which appeared in the Fall 2002 Newsletter, may I respectfully suggest that the value of arbitration in the employment context has never been so pronounced as it is at the present time. The Administrative Office of the U.S. Courts reports that employment litigation in federal courts has increased nearly 300% over the past twelve years since the Civil Rights Act of 1991 was enacted, and now represents ten percent of all federal court filings. It takes an average of twenty-one months to move a case through federal court, and takes more than forty-one months in ten percent of all cases. Table C-10, "U.S. District Courts – Time intervals from Filing to Trial Ending September 30, 1999." Administrative Office of the U.S. Courts (Sept. 30, 1999). At least one study demonstrates that the average cost to an employer for a seriously contested employment discrimination case is $130,000. Jacqueline DeSouza, "Alternative Dispute Resolution: Methods to Address Workplace Conflicts in Health Services Organizations," Journal of Healthcare Management (Sept. 1, 1998). Further, while employers are usually victorious in employment cases, the median award to plaintiffs in employment cases is six times that of other civil cases, and the likelihood of punitive damages is quadruple that of civil cases. Civil Trial Cases in Large Counties (1996), *www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm.* Clearly costs and demands of time support a more efficient solution.

Binding arbitration, properly tailored, can provide such a solution. Courts will generally enforce pre-dispute arbitration agreements if they offer substantive and procedural due process (i.e., they are fair in the absence of trial by jury) and provide the possibility for full legal remedies. See *Morrison v. Circuit City Stores* and *Shankle v. Pep Boys*, 317 F.3d 646, 90 FEP Cases 1697 (6th Cir. 2003) (opinion en banc, February 6, 2003). Binding arbitration offers a number of benefits:

* **Jury Avoidance:** Presumably, an experienced arbitrator is much less likely to decide a case on the basis of sympathy or prejudice than is a jury. Jurors are often suspicious of employers' reasons for making employment decisions, and may be predisposed to find in favor of the employee. An arbitrator is far more likely to find that hasty, ill-conceived or frankly stupid management decisions are not illegal.

* **More reasonable damage awards:** Arbitrators are less likely to award compensatory damages for "emotional distress" or punitive damages solely because of "gut reactions" to the allegations of the case. In contrast, juries have handed out huge awards in employment cases.

* **More cost and time efficient resolution:** Arbitration is often more expeditious than the judicial process, often being over in a few months as compared to the potential for a lawsuit to drag on for years. This reduces the chance that evidence will disappear or witnesses' memories fade. In addition, discovery is curtailed and expensive motion practice is significantly confined, thereby adding to the cost savings. The average cost of defending an employment claim in court is greater than $100,000. However, arbitrator fees typically run from $800 to $1,000 per day, with the total average cost of an employment arbitration at approximately $20,000. Samuel Estreicher, "Saturns for Rickshaws, Why Predispute Employment Arbitration Should Be Preserved," *ADR Currents* 1 (American Arbitration Association Dec. 2001-Feb. 2002). Further, according to a recent law firm survey, 85 to 95% of all claims under a mandatory program were resolved prior to arbitration. David H. Gibbs, "Employment Survey Says that Major Companies Increasingly Use Tailored Programs and Processes," 19 *Alternatives to the High Costs of Litigation* 237 (November 2001). See also Richard B. Ross, "The Pros and Cons of Mandatory Company Employment Programs," 20 *Alternatives* 183 (December 2002).

* **Fewer meritless disputes:** Arbitration agreements may reduce the likelihood that plaintiffs' attorneys – who often work on a

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THE LAST THING WE DO IS KILL ALL THE LAWYERS

By Mary L. Mikva

A plaintiff's lawyer, Ms. Mikva is a partner in the law firm of Abrahamson Vorachek & Mikva in Chicago, Illinois. She was inducted as a Fellow of the College in 2001.

"The public regards lawyers with great distrust. They think lawyers are smarter than the average guy, but use their intelligence deviously. Well, they're wrong. Usually, they're not smarter."

We've all been there. We've been dragged to a party. Perhaps it's a spouse's work-related gathering. We hardly know anyone, and somebody we've never met before, but with whom we're trying to make pleasant conversation, learns that we're a lawyer. Without intending any personal offense, our new friend decides to barrage us with the most recent crop of bad lawyer jokes.

> *You are trapped in a room with a tiger, a rattlesnake, and a lawyer. You have a gun with two bullets. What should you do? You shoot the lawyer -- twice!*
>
> *What do you have when you bury six lawyers up to their necks in sand? Not enough sand!*
>
> *What's the difference between a lawyer and an onion? You cry when you cut up the onion!*

How do we respond? Usually we laugh politely (because contrary to popular opinion, most lawyers are polite). Sometimes we look around for a different conversation to engage, but sometimes, we trade lawyer jokes -- joining in the fun.

It's that last response, which I, myself, have certainly done, that prompts this article. I am reminded of an episode from my youth, when I repeated to my parents what I thought was a very funny anti-Semitic joke that I had already repeated several times to my friends. I can't remember the joke, but I certainly remember my parents' reaction. All I wanted to do, as an insecure adolescent, was fit in with my non-Jewish peers. However, my parents let me understand that I was endorsing the negative stereotyping of Jews and that I was only promoting more of the anti-Jewish feelings that were already making me uncomfortable.

At this point, there are probably more lawyers in my family than there are Jews. Certainly, no one in my family tells anti-Semitic jokes. Fortunately, my children are growing up in a time and culture where jokes of this kind would never be acceptable nor needed in order to fit in. However, my children feel free -- as do many of the adults in my family -- to tell anti-lawyer jokes. I certainly don't see this as anything close to an ethnic, racist or sexist joke. Nor do I think Title VII protection needs to be extended to lawyers as a class. However, I do think that we, as lawyers, have some obligation to stop promoting the anti-lawyer feelings that are so prevalent today. It is probably no more healthy to be a lawyer-hating lawyer than it is to be an anti-Semitic Jew.

Mary L. Mikva

Of course, some prominent lawyers have not hesitated to join in the lawyer-bashing. For example, one often quoted remark is the following:

> The public regards lawyers with great distrust. They think lawyers are smarter than the average guy, but use their intelligence deviously. Well, they're wrong. Usually, they're not smarter.
>
> F. Lee Bailey, *Los Angeles Times*, January 9, 1972.

With all due respect to Mr. Bailey, whose talents I greatly admire, this remark does not put him in good company. Another infamous lawyer-basher was Adolph Hitler, who said: "I shall not rest until every German sees that it is a shameful thing to be a lawyer."

In order to put a more intellectual spin on all their anti-lawyer feelings, some people quote Shakespeare: "The first thing we do; let's kill all the lawyers." *Henry VI, Part 2*, Act. IV, sc.ii. While this line is frequently quoted, it is rarely put in context. That exhortation was made by a small group of self-serving revolutionaries to rouse the masses. The speaker, Dick the Butcher, recognized that, in order to make the rebellion successful, the first thing needed was to get rid of those who knew and enforced the system of law. In the next scene, Dick the Butcher suggests: "If we mean to thrive and do good, break open the jails and let out the prisoners." You get the picture.

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It's true, we tend to over-elevate the importance of our work, but we work in a stressful profession where our mistakes and losses have a far longer shelf life than our insights and victories.

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I like to think that William Shakespeare's own opinion of lawyers is better reflected in this quote from *Taming Of The Shrew*, Act I, Scene ii: "Do as adversaries do in law; Strive mightily, but eat and drink as friends."

Although I am sure Shakespeare was a better playwright, I would prefer to quote Harrison Tweed. It is my understanding that this quote is prominently displayed on a plaque in the Harvard Law Library. I personally remember it because it was also prominently displayed in the chambers of Judge Prentice Marshall, of the United States District Court for the Northern District of Illinois, for whom I clerked after graduating from law school:

> I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with, or play with, or fight with, or drink with, than most varieties of mankind.

Judge Marshall displayed this quote in his chambers, because he believed it with all his heart. He deeply respected the lawyers that appeared before him, and it is part of what made him such an outstanding jurist. As a clerk, it made me enthusiastic about the profession I was entering. As a litigator, I try to keep it in mind in dealings with my adversaries. Almost all the time, those dealings confirm this sentiment.

It's not that we're perfect. It's not that we don't sometimes succumb -- almost all of us -- to nastiness, avarice, pettiness or lowball tactics. It is not that we don't need, as Arnie Pedowitz exhorted us in the last Newsletter, to strive, both within the profession and within the College, for greater diversity. It's not that we don't have to push ourselves to contribute more, both to the profession and the community, through meaningful *pro bono* work. It's not that we don't sometimes fail to serve our clients or, at other times, fail to be there for our families or allow ourselves a full and well-rounded life. It's true, we tend to over-elevate the importance of our work, but we work in a stressful profession where our mistakes and losses have a far longer shelf life than our insights and victories. Yes, many of us make a comfortable living, but most of us want to both do well and do good. In short, while we may not be the "chosen people," we're certainly not the bottom feeders that some would paint us.

So, when asked what we'd do if trapped in a room with a tiger, a rattlesnake, a lawyer, and a gun with two bullets, perhaps we can and should say that we'd shoot the tiger and the rattlesnake, because chances are pretty good that the lawyer -- even if up to his neck in sand -- is worth keeping.

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contingency fee basis and depend on large jury awards for compensation – will encourage employees to bring claims having questionable merit. Minor disputes, e.g., disputes not involving termination, constructive discharge, demotion or failure to accommodate a disability, may be excluded from the agreement to arbitrate.

* **More private:** Arbitration is a private matter, unless otherwise agreed by the parties, and issues are not made public as in the court system. The proceedings and their resolution remain confidential.

While the benefits of binding arbitration in the employment context are often great, it should be approached with some degree of caution. There is a risk that some claims that would be weeded out at the summary judgment stage of litigation will be arbitrated to completion. While employers generally view binding arbitration as advantageous, many sing a different tune when an arbitrator rules for their employee.

However, if one is able to accept the risks that come along with the above benefits, binding arbitration is an attractive alternative to litigation. Contrary to the position of Mr. Jones, the superiority of arbitration – and other alternatives to litigation – has never been so clear, and the earlier these alternatives are invoked the better the outcome for all parties.

HARASSMENT, WHISTLEBLOWERS AND OTHER CORPORATE INVESTIGATIONS

By Hope B. Eastman

A management lawyer, Hope Eastman heads the Employment Law Group at Paley, Rothman, Goldstein, Rosenberg & Cooper, Chartered, in Bethesda, Maryland. Her practice involves advising, guiding, and defending employers in their implementation of the employment laws, including the investigation of employee claims and employee misconduct in the workplace. She was inducted into the College as a Fellow in 1997.

The Sarbanes-Oxley whistleblower protections are triggering new needs for very careful investigations.

Introduction. Five years ago, the Supreme Court put investigations of sexual harassment at the center of an affirmative defense against Title VII claims for supervisor harassment in the workplace. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Since then, the case law on the sufficiency of investigations has grown. Enron, Worldcom and other widely publicized cases of alleged misconduct by corporate employees have joined sensational sexual harassment cases on the front pages. In their wake, Congress enacted the Sarbanes-Oxley Act of 2002, addressing corporate responsibility, creating protections for employees who report improper conduct, and imposing obligations on attorneys to report corporate misconduct up the ladder.

The conduct of internal investigations, thus, remains in the legal limelight in an ever more complex environment for the lawyers involved in them, whether In-house counsel, outside counsel representing employers, or lawyers representing employees. Just a few of the issues needing attention including understanding when the quality of an investigation will be key to a claim or defense and how to conduct it, navigating the complexities of privilege issues when the purpose of an investigation can shift over time, coping with the expanded role of the Fair Credit Reporting Act, and, where applicable, complying with the new Sarbanes-Oxley rules for lawyers.

Protective Value of Quality Investigations. The quality of the investigation will often be key in cases involving claims of retaliation, whistle blowing, disparate treatment, and other claims by alleged victims of corporate decision-making. For example, in *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000), the Tenth Circuit ruled that an employee discharged for misconduct after a thorough investigation could not establish pretext. Similarly, in *Pugh v. City of Attica*, 259 F.3d 619 (7th Cir. 2001), the Court said the employer was justified in relying on its lengthy investigation into possible misappropriation of funds to terminate the employee and rejected the plaintiff's claim under the Americans with Disabilities Act.

The California Supreme Court weighed in on the need for investigation in 948 P.2d 413 (Cal. 1998). Resolving a split in the lower courts of California involving situations where there was an implied agreement not to be dismissed except for "good cause," Cotran rejected both the notion that the employee could prevail by disproving the factual basis for the termination and the notion that the court should simply accept an employer's subjective belief. It ruled that a jury could determine whether the employer had a reasoned basis for its conclusion, supported by "substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." 948 P.2d at 422. A recent Fourth Circuit decision, *Hill v. Lockheed Martin Logistics, Inc.*, 314 F.3d 657 (4th Cir. 2003), *vacated and reh'g granted*, (Feb. 12, 2003), although heading for en banc review, highlighted the protective role of a good investigation. Finding that no one above the allegedly biased subordinate had independently evaluated the basis for a dismissal, the Court allowed the plaintiff to proceed under *Price Waterhouse*, indicating "a subordinate lacks substantial influence over the final employment decision when the formal decision-maker conducts an independent investigation and exercises independent judgment that is free of discrimination." Id. at 671.

Hope B. Eastman

The Sarbanes-Oxley whistleblower protections are triggering new needs for very careful investigations. Employees of public companies, and some privately held ones, WHO disclose information regarding any conduct they reason-

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ably believe constitutes fraud or related violations of Sarbanes-Oxley or other federal statutes to government investigators, members of Congress, or supervisors within the company are in some circumstances protected against retaliation by an array of civil remedies and criminal penalties. 18 U.S.C. § 1514A and 1513(e). Employers choosing to take adverse personnel actions against such employees need to insure that they very carefully, by investigation, establish a strong and documented basis for such actions.

Planning a Quality Investigation. The post-*Faragher and Ellerth* harassment investigation cases are the clearest set of judicial pronouncements on what qualifies as a quality investigation. Illuminating examples of inadequate investigations include *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (employer's defense rejected when investigators refused to re-interview the plaintiff when he insisted that his lawyer be present); *Smith v. Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000) (investigation ineffective where failure to question harasser about specific incidents and decision to label conduct "bad" management took place in environment where written employer policy led employees to believe that there had to be some kind of sexual advance before the conduct could constitute sexual harassment, top management participated in lewd conversations and sexually explicit jokes and had a close relationship with the alleged harasser); *EEOC v. R&R Ventures*, 244 F.3d 334 (4th Cir. 2001) (employer delayed investigation and failed to interview complaining employee or alleged harasser); *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (investigation inadequate where other African-Americans in the office not interviewed and investigator found no harassment despite clear evidence); *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001) (investigation rejected where employer failed to interview other female employees who had corroborating stories); *Blackmon v. Pinkerton Sec. & Investigative Serv.*, 182 F.3d 629 (8th Cir. 1999) (investigation inadequate where employer did not interview harassers, meet with complaining witness, or interview employees on the night shift where employee and alleged harassers worked); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000) (investigation without an interpreter where alleged harassers and witnesses spoke only limited English inadequate); and *Ogden v. Wax Works, Inc*. 214 F.3d 999 (8th Cir. 2000) (cursory investigation focused on the complaining employee's performance, not on alleged harasser's conduct, permitted jury finding against employer).

In contrast, in *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167 (9th Cir. 2001), the Ninth Circuit found the investigation to be "a paradigm of the 'reasonable efforts' the Supreme Court sought to encourage…." Id. at 1181. An outside employment lawyer repeatedly sought the plaintiff's participation in the investigation and interviewed six employees, including the alleged harasser and all but one of the employees who reported to him. Also relying on a proper investigation, the Tenth Circuit, in *Scarberry v. Exxonmobil Oil Corp*, 2003 WL 2008201, 91 FEP 1320 (10th Cir. May 2, 2003), very recently upheld a grant of summary judgment for the employer, finding that the employer's action ended the harassment and was also reasonably calculated to demonstrate to all employees that its policy against sexual harassment would be enforced.

What may begin as a traditional investigation for the purpose of giving legal advice to the employer may require public disclosure or affirmative use of the investigative report in court.

Privileges: The Moving Target. Employee misconduct investigations often have multiple and changing purposes. What may begin as a traditional investigation for the purpose of giving legal advice to the employer may require public disclosure or affirmative use of the investigative report in court. Issues of attorney-client and work product privileges, and the disclosures and disqualifications that follow from their loss, must be considered at the outset of any investigation. Where the quality and sufficiency of the investigation is not to be at issue in litigation, precautions should be taken to preserve the privilege. Where there is a question about future use of the investigation, the employer must consciously decide how to investigate effectively and how to obtain legal advice without jeopardizing the privilege of the latter as the investigation proceeds.

If the adequacy of the investigation is asserted as an affirmative defense, it is unlikely that the factual part of the investigation will be protected by the attorney-client privilege. Several courts have rejected employers' attempts to prevent disclosure of attorney-investigators' notes, reports, and deposition testimony after the employers assert the affirmative defense of effective remedial action. *See, e.g., Worthington v. Endee*, 177 F.R.D. 113 (N.D.N.Y. 1998) (defendants waived privilege by putting "at issue" the measures they used to remedy plaintiff's allegations, making entire report at issue and discoverable).

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While facts must be disclosed, whether the legal advice rendered will be exposed remains uncertain. Courts are split as to whether legal advice given to the employer during an investigation is privileged. Compare *Johnson v. Rauland-Borg Corp.*, 961 F. Supp. 208 (N.D. Ill. 1997) (when an employer relies on the legal advice of counsel in conducting an investigation of a sex harassment claim, it waives the attorney client privilege in its entirety because whether the employer acted reasonably will depend on the advice it received from the attorney) with *Harding v. Dana Transp.*, 914 F. Supp. 1084, 1103-04 (D.N.J. 1996) (ordering production of all documents except those that reflect legal advice which "do(es) not relate to the company's reaction to the investigation"). Under these circumstances, employers should consider bifurcating responsibilities between lawyers, with one firm conducting the investigation and a separate firm receiving the results of the investigation and rendering legal advice to the employer.

There is no general prohibition against deposing a lawyer where he or she has relevant information.

In addition, the investigating lawyer may become a fact witness in subsequent litigation involving the subject matter of the investigation. the Model Rules of Professional Conduct provide that a lawyer shall not act as an advocate in a trial where he or she is likely to be a necessary witness. See Model Code of Prof'l Conduct R. 3.17 (2002). There is no general prohibition against deposing a lawyer where he or she has relevant information. There is no blanket assertion of privilege by the attorney; it must be asserted as to each specific question to be avoided or document to be withheld. *United States v. Rockwell Int'l.*, 897 F.2d 1255, 1265 (3rd Cir. 1990). To protect against this result, many employers retain their usual firms to advise them and handle litigation and use a separate lawyer to conduct the investigation.

FCRA: A Law Misapplied. Lawyers conducting investigations need also to be mindful of the application of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et seq., to employee investigations. In an exercise in the law of unintended consequences, on April 5, 1999, an FTC staff opinion letter (known as Keller-Vail letter) interpreted the FCRA to apply to workplace investigations. This position has caused a great deal of concern because the FCRA notice, consent and disclosure requirements could impede effective investigations, especially where outside investigators are used.

The FTC Chairman has supported the staff opinion as an interpretation of the law as written and suggesting that changes would have to come from Congress. Congressman Pete Sessions (R. Tex.) has introduced the "Fair Credit Reporting Amendments Act." It would address reports prepared "solely for the purpose of investigating allegations of drug use or sales, violence, sexual harassment, employment discrimination, job safety or health violations, criminal activity, or other violations of law" so outside investigators or law firms would be treated as the alter ego of the employer, without the imposition of additional requirements. The bill would remove the prior notification requirement. The employee would not be entitled to a copy of the raw data, only a summary of the information gathered, in the event that adverse employment action is taken based on the finding of the investigation. No action is currently planned on the bill.

At least three federal district courts have rejected the FTC position. See *Hartman v. Lisle Park Dist.*, 158 F. Supp. 2d 869 (N.D. Ill. 2001) (court noted that nothing in the legislative history "indicates that Congress intended to abrogate … privileges"; that an attorney investigating an employee's dealings with the employer is acting as the client, not a "third party"; and that investigation was not a consumer report because did not concern credit history, character, general reputation, or personal characteristics or mode of living, but only "transactions or experiences between the consumer and the person making the report" that are not covered by FCRA); *Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268, 1273-74 (M.D. Ala. 2001) (outside forensic investigator report fell within "transactions and experiences" exception to "consumer reports" and this type of work not large enough percentage of usual work to turn him into a "consumer reporting agency"; court also agreed with distinction between workplace conduct and general consumer reputation); and *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 148 (S.D.N.Y. 1999) (Court found FTC opinion letters advisory and not binding on court and distinguished between reports used by an employer to "take corrective or disciplinary action" from those prepared ito "provide legal advice.").

Lawyer Reporting Obligations. Sarbanes-Oxley has added another complexity for lawyers, whether in-house or outside counsel, conducting investigations and reporting the results to their clients. Under Section 307 of Sarbanes-Oxley,

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The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.

SPOTLIGHT ON FELLOWS

▶ ***Fellow Norman Brand***, an arbitrator in San Francisco, had his latest book published by the Bureau of National Affairs in December 2002, *How ADR Works*.

▶ ***Fellow Roxanne Barton Conlin***, was named to the Board of Trustees for the National Institute for Trial Advocacy on June 2nd. Ms. Conlin has her own firm in Des Moines, Iowa and practices as a plaintiff's lawyers. She was inducted a Fellow of the College in 2002.

▶ ***Fellow Louis DiLorenzo***, a management attorney at Bond Schoeneck & King, was recently named as one of Syracuse's top seven experts to call "when all hell breaks loose." *Corporate Legal Times*, one of the most well-respected national legal magazines in the country, recently explored the "seven deadly scenarios" businesses and organizations could face. The magazine named Mr. DiLorenzo the "Great Negotiator" for his skills in handling difficult labor situations that can have major adverse impacts on a company.

▶ ***Fellow Constantine ("Peter") Lambos***, senior partner of Lambos & Junge in New York City, passed away on February 8, 2003, at his home in Tampa Florida. He was seventy-six years old. Mr. Lambos, chief management counsel to the East Coast longshore industry for the past forty years, was one of the leading pioneers who shepherded the Container Revolution into the longshore industry. He was an adjunct professor of law at New York University Law School and was named a Fellow of the College in its inaugural class of 1996.

▶ **Video Producer Carol Rosenbaum**, who has worked over the past several years with the College's Video History Project, wrote and produced a local CBS-affiliate documentary series that was aired May 22nd in the Philadelphia viewing area. The documentary was a four-part health series entitled *Temple Lifelines*, which focused on powerful, personal stories of patients with advanced diseases who have been treated, and dramatically helped, in different centers at Temple University Hospital. Ms. Rosenbaum is a nationally-honored independent producer.

▶ ***Fellow Donald Spero***, an arbitrator and mediator in south Florida, had two recent articles published in the January and February issues of *The Florida Bar Journal*. The articles were entitled *Burdens of Proof of Reasonableness* and *Undue Hardship Under Titles I, II, and III of the Americans With Disabilities Act*.

▶ ***Fellow Charles Warner***, a management attorney at Porter Wright Morris & Arthur in Columbus, Ohio, received the Community Service Award from the Ohio State Bar Association. The award was presented on Law Day - recognized for his service as President and Board member of non-profit professional, arts, education, historical and inner-city organizations during the past thirty years.

Charles Warner

(cont'd. from pg. 8)

and the SEC's implementing regulations, lawyers are required to report evidence of material violations of securities law, breaches of fiduciary duty, and other violations to the CEO or the chief legal officer and, if they do not respond appropriately, to the Board of Directors or its audit committee. While these obligations are now limited to attorneys appearing or practicing before the SEC, there is an effort underway to revise the Model Rules of Professional Responsibility to impose these obligations on all lawyers. Still under intense dispute is whether and under what circumstances lawyers should be obliged to report outside their clients and withdraw from the representation. These obligations present interesting challenges to lawyers called in to do investigations of alleged wrongdoing who then need to become monitors of the corporate response. Here again, the use of multiple attorneys with different roles would seem essential.

Conclusion. All of these issues insure that there will continue to be litigation surrounding workplace investigations. The push toward quality investigations in the misconduct context helps both employees accused of wrongdoing and corporations increasingly called upon to defend their actions in court, before regulators and in the press. Careful structuring of investigations can insure that legal advice remains privileged, while some disclosure of the investigation itself can prevent injustices from occurring and contribute to public understanding of corporate compliance efforts. As always in these high-stakes situations, careful planning and involvement of both inside and outside counsel of an investigation can prevent costly mistakes.

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