THE COLLEGE OF LABOR & EMPLOYMENT LAWYERS

Spring 2004 Newsletter
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INSIDE THIS ISSUE:

CORPORATE MISCONDUCT: WHAT DO JURORS REALLY THINK?

The College's November 7th Annual Lecture was a lively and well-attended panel discussion on juror attitudes toward corporations in the aftermath of recent corporate misconduct. The panel, which was moderated by Veta Richardson, General Counsel of the Minority Corporate Counsel Association, looked at these issues from the perspective of a public relations person who counsels corporate clients, an academic researcher who has studied civil juries and a jury consultant who works with corporations to help them present themselves positively to jurors.

Julia Sutherland, a Washington-based public relations principal with Public Strategies, provided the context for the discussion. It is her perspective that a company facing allegations of corporate misconduct needs to respond openly and fully, highlighting the efforts the company makes to meet its legal and regulatory obligations to the public. This point of view was echoed in the presentations of panel members who have looked at how jurors treat corporations in civil litigation.

Valerie Hans, a professor in the Department of Sociology and Criminal Justice at the University of Delaware, began her research on the attitudes of jurors toward corporate defendants with certain widely held assumptions: that juries are pro-plaintiff, prejudiced against business and take a "deep pockets" approach. The results of that research, which included interviews with over 250 civil jurors as well as mock juries and public opinion polling, are reported in her book *Business on Trial: The Civil Jury & Corporate Responsibility*. Contrary to her expectations, Dr. Hans found that jurors are ambivalent about and sometimes hostile to plaintiffs and that anti-business prejudice is rare. She found that, in general, juries do not inflate awards when the defendant is a wealthy business. The only differential treatment she found directed at corporate defendants is that jurors hold corporations to a higher standard of responsibility than individuals.

Targeting the Top in Corporate Crime
Former WorldCom CEO Charged in Accounting Scandal
Enron Investigation Continues with Indictment of Former Executive
Martha Stewart's Conviction Sends the Wrong Message
Avoid another Enron with proper punishment

Dr. Hans concluded that jury treatment of corporations is highly dependent on the facts about its conduct and linked to distinctive qualities of the corporation itself. Jurors are, moreover, concerned about the potential impact of litigation on the business's ability to function.

In the wake of Enron, WorldCom and other recent corporate scandals, Bowne DecisionQuest conducted a nationwide telephone survey, which identified deeply felt and well thought out distrust of corporations even among people who are ordinarily the strongest supporters of corporations. Galina Davidoff reported that distrust is focused on senior corporate managers who, jurors believe, are motivated to be dishonest because of the way they are compensated. Jurors feel strongly that corporations neglect long-term goals in order to make money now and that corporations have a long way to go to make sure that their senior management behaves honestly. They also believe that big companies do not pay adequate attention to the needs of people in their surrounding communities or to the opinions and concerns of their own employees.

Davidoff suggested a number of strategies that corporate defendants should consider in addressing these attitudes. She stressed the importance of building an image at trial of the defendant as a knowledgeable and responsible corporate citizen and the use of witnesses from lower in the

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PRESIDENT'S PERSPECTIVE

Writing this column feels something like accepting an Oscar in the Academy Awards. There is a ritual about it – a formula to be followed. One proceeds from the general to the particular. The College is strong and getting stronger; its members are the best in our area of the profession; those who serve on the Board do so with dedication and ability; and last, I am honored to be serving as your President for the coming year. The fact is, the formula reflects the truth. That is why every incoming President probably wracks his or her brains to say something different or original, but ends up with a variation on the theme. This column is about the College, which has been successful, to date, by pursuing a limited number of activities and doing them well.

Recently, your Board decided to survey all of you, to see if you believe that we have been on the right track in directing the College. To those of you who responded (about one-third of the membership), thank you very much for your comments. The Board held a retreat on January 23 and 24, to determine the future direction of the College and reorganize, delete, add or improve on the activities we have been conducting.

Based on your input, we focused on improving the collegiality of this national organization by looking at how to do things regionally. Regional meetings have already begun in New York and California, and have been uniformly successful. Fellows have enjoyed the opportunity to interact with each other so far in the context of an informal dinner. We are encouraging Board members, and others who wish to take the lead, to organize new meetings in different venues. The Board has made $500 available to any Fellow or firm organizing a regional meeting, to defray expenses of an initial meeting.

We also reviewed whether, instead of organizing one lecture per year, which many have had difficulty attending, we could take advantage of our expertise by expanding educational opportunities for Fellows around the country. We decided that we will continue the lecture series, but the lecture will be held at a major law firm, with video conferencing facilities, so it may be televised in numerous locations around the country. Thus, the next lecture should be available to many more of us.

We are establishing a standing committee on professionalism and ethics, to reflect the basic mission of the College, which will consist of at least one Fellow in each Circuit. We will look to this committee to supply creative ideas in the difficult process of educating the broad base of lawyers across the country that civility in our practice benefits everyone. In line with this process, we will work with the ABA in its mentoring project with the hope that many Fellows become mentors.

Finally, we are making our financial information available. In this newsletter, we are summarizing our finances, and will continue to do so periodically. Please note this: our expenses are substantially understated because we have continued to receive a very generous subsidy from Gibson Dunn & Crutcher, which grants us our space along with needed supplies, all without charge. Gibson Dunn has extended this generosity to us from our inception, and we owe a huge debt of gratitude to them.

At the bottom line, we believe we are making this organization more relevant to you. I would like to give my sincere thanks to my predecessor, Bob Dohrmann, for the excellent work he did in continuing this endeavor. As your new President, I appreciate and thank you as well for any assistance you can give.

Joseph D. Garrison
President 2004

BOARD OF GOVERNORS WELCOMES A NEW PRESIDENT AND FOUR NEW MEMBERS

As the year 2003 came to a close, we welcomed a new president and four new members of the Board of Governors. Joe Garrison from New Haven, Connecticut has taken the reigns of the College from Bob Dohrmann and four outstanding Fellows have been selected to replace those departing members. Mark Rudy from San Francisco was elected as the plaintiff representatives. Bob Siegel from Los Angeles will be the management replacement. Joel Glanstein from New York City and Don Capuano from Washington DC will serve as union representatives to the Board. We would like to take this opportunity to express our sincere gratitude to retiring Board members Wayne Outten and Elliott Bredhoff for their service as members of the Board of Governors for the past seven years. Both worked quite hard on many different College endeavors. Bob Dohrmann and Steve Pepe have finished their time on the Board as well, but as past presidents, they continue to have a voice, but no vote, at the regularly scheduled board meetings. We hope they will continue to participate in all facets of the College. Short biographies and pictures of our newest members are below.

Joe Garrison

ABOUT OUR NEW PRESIDENT – JOSEPH D. GARRISON

Joe Garrison, a member of the governing board of the College since 1996, has been elected to serve as our eighth president. He began his term on January 1, 2004, succeeding Bob Dohrmann. President Garrison is Managing Shareholder in Garrison, Levin-Epstein, Chimes & Richardson, P.C., in New Haven, Connecticut. He focuses his practice on employee rights and labor law. He graduated from Wesleyan University in 1965 and Cornell Law School in 1968 and has served as President of the Connecticut Bar Association Labor and Employment Law Section, as the Chairman by judicial appointment of the Federal Court Grievance Committee, was the founding Chairman of the Connecticut Employment Lawyers Association, and is on the Board of Directors and a past President of the National Employment Lawyers Association (Advocates for Employee Rights), a specialty bar association with over 3,500 members. Joe has been a speaker at national employment law seminars sponsored by the American Bar Association, BNA Books and the National Employment Lawyers Association, and is a frequent lecturer and seminar contributor in Connecticut. He has been honored by The Best Lawyers in America from 1987 to the present and The Outstanding Lawyers of America.

Don Capuano

Don Capuano - Mr. Capuano is a graduate of the University at Albany, State University of New York and the Georgetown University School of Law where he was a member of the Georgetown Law Journal staff. After law school he served as law clerk to Judge Charles F. McLaughlin, U.S. District Court for the District of Columbia. Don is a senior partner at O'Donoghue & O'Donoghue, in Washington, D.C. where he practices union side labor law and represents multi-employer jointly administered employee benefit plans. He served as Chair of the ABA's Section of Labor and Employment Law for the 1991-1992 year.

Joel Glanstein

Joel Glanstein – Mr. Glanstein has been practicing law since 1967, representing national and local unions in the private and public sectors as well as various Taft-Hartley Trusts. Since 1980, he has been a partner in O'Donnell, Schwartz, Glanstein & Lilly, LLP and its predecessors in New York City. He received his LLB and LLM (in Labor Law) from New York University School of Law. Joel has also served

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THERE IS NO PRECEDENT AT THE NATIONAL LABOR RELATIONS BOARD

By W.V. Bernie Siebert

A management attorney, Mr. Siebert is a Member of the law firm of Sherman & Howard LLC in Denver, Colorado. He was inducted as a Fellow of College in 1996

Many practitioners believe that the politicalization of the Board began with the appointments by President Reagan which ushered in the era of Chairman Dotson.

Members of the National Labor Relations Board (hereinafter "NLRB" or "Board") are appointed by the President and confirmed by the Senate for staggered terms. The President may appoint only three of the Members from his own political party. However, the three can become a majority vote on important issues. Because the appointments are clearly political, do Board Members owe their allegiance to the President who appointed them and his labor philosophy, or the long standing precedent arising from more than sixty years of Board rulings? It would appear that there is no precedent for precedent at the NLRB.

Notwithstanding the speeches of newly appointed Members that they will not be political in their decision-making and they merely want to apply existing law to the mountains of pending cases, the fact is that their decisions are political; they are selected for their positions based on the understanding that their labor philosophy is the same as that of the President who appointed them. Necessarily then, the decisions of the political appointees reflect that philosophy and are political in nature.

> In the administering of regulatory statutes it has been fashionable to create so-called "independent" agencies such as the NLRB. One of the connotations is that these agencies are to be free from political forces. It is evident, however, that these agencies are not wholly independent, but follow the election returns. New appointees are chosen because they represent the policy views of the administration. Summers, *Politics, Policy Making, and the NLRB,* 6 Syracuse L. rev. 93, 99 (1954-55).

Many practitioners believe that the politicalization of the Board began with the appointments by President Reagan which ushered in the era of Chairman Dotson. The politicalization was then heightened with the appointees of President Clinton to the Board. However, since the very first appointees to the Board by President Roosevelt, there have been complaints that the Board was either pro-union or pro-employer. Recall, that for the first seventeen years of its existence, all of the Board members were appointed by either President Roosevelt or President Truman. It was not until 1952 and the election of President Eisenhower, that the Republicans had their first opportunity to make appointments to the NLRB. Predictably, the criticism of the Board as being pro-union during those first seventeen years turned quickly to cries of the Board being pro-employer following the Eisenhower appointments. With the election of President Kennedy in 1960, and his appointments to the Board, the criticism again shifted. "The Board seems to want every employee in the nation to wear a union label. . .President Kennedy had a blatantly pro-union majority within a year or so of his accession." Petro, *Expertise, The NLRB, and the Constitution*: *Things Abused and Things Forgotten,* 14 Wayne L. Rev. 1126, 1146, 1151 (1968).

The criticism of the Board intensified in volume and tone with respect to the Reagan-Bush appointees to the Board. The sharpest criticism was leveled during the reign of Chairman Dotson. With respect to the issue of precedent during the era of Chairman Dotson, Thomas Gleason, then President of the Longshoreman's Union, stated in 1984 that "the pendulum in Labor Board decisions has swung so rapidly and erratically over the recent past that volumes of Board precedents no longer can be relied on by unions or employers and their legal counsel." *Criticizing the NLRB at Republican Hearings,* 116 Lab. rel. Rep. (BNA) 189, 190 (Oct. 29, 1984).

Following the election of President Clinton, there was again a series of appointments to the Board which resulted, unfortunately, in long

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periods of time when the Board did not operate at full strength. When the Clinton Board did issue decisions, the employer bar was quick to sharply criticize the Clinton Board for its reversal of long standing precedent and for being pro-union. This is not to say that the Clinton Board was any more political in its decisions than say the Reagan Board. The cases in the past few years seem more egregious to some because the reversals involved cases that had been accepted law for many years, and in some cases, decades.

Examples of the Clinton Board's reversal of long standing precedent are numerous. In *Levitz Furniture Co.*, 333 NLRB No. 105 (2001), the Board reversed fifty years of precedent. *Levitz* held that before an employer could withdraw recognition from the union, the employer had to demonstrate by objective evidence that the incumbent union had lost its majority status, not merely that the employer had a good faith doubt of the union's continuing majority status. The holding overruled *Celeanese Corp.*, 95 NLRB 664 (1951), which permitted the employer to withdraw recognition where it had a good faith doubt of the union's continuing majority status. In *Boston Medical Center*, 330 NLRB 152 (1999) the Board ruled that interns and residents (house staff) were employees and therefore entitled to all the protections of the Act including the right to organize. The Board overruled *Cedars-Sinai Medical*, 223 NLRB 254 (1976), and twenty-three years of precedent to the contrary. The Board then used the rationale of *Boston Medical* to find that graduate teaching and research assistants at a university were employees entitled to the protections of the Act in *New York University*, 332 NLRB No. 11 (2000). *Mississippi Power*, 328 NLRB 965 (19999) overruled *Big Rivers Electric Corp.*, 266 NLRB 380 (1983) and sixteen years of precedent, finding that distribution dispatchers and system dispatchers for a utility company were not in fact supervisors even though they assigned and directed field employees. In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), the Board ruled that a non-union setting. The Board had previously adhered to a contrary view based on its ruling in *Gourmet Foods*, 270 NLRB 578 (1984). Similarly, in *St. Elizabeth Manor, Inc.,* LRB 341 (1999) the Board held that there existed a "successor bar" to a challenge to the union's majority status for a reasonable time following the existence of successorship. The Board overruled *Southern Moldings, Inc.*, 219 NLRB 119 (1975), and in doing so, nearly twenty-five years of precedent. However, the Bush-appointed Board quickly reversed the holding of *St. Elizabeth Manor, Inc.*, with its ruling in *MV Transportation*, 337 NLRB No. 129 (2002).

Examples of the Clinton Board's reversal of long standing precedent are numerous. In Levitz Furniture Co., 333 NLRB No. 105 (2001), the Board reversed fifty years of precedent.

The cases of *St. Elizabeth Manor, Inc.* and *MV Transportation* indicate the political nature of the decision making process at the NLRB. However, to fully appreciate the machinations of the NLRB with this issue, one must understand the Supreme Court's ruling in *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972) and earlier Board rulings. In *Burns*, the Supreme Court ruled that Burns, as a successor to the unionized Wackenhut Corporation, had a duty to bargain with the union that represented Wackenhut's employees, but that it did not have an obligation to adopt the collective bargaining agreement between the predecessor and the union. The Supreme Court noted that among the problems created by the Board's ruling that the successor had to adopt the labor contract was that "...a successor will be bound to observe the contract despite good-faith doubts about the union's majority during the time that the contract is a bar to another representation election." *Id.* at 209 (citation omitted). Three years later, the Board had an opportunity to again address the issue of a successor's bargaining obligation in *Southern Moldings*. In that case, the successor agreed to recognize the union which represented the predecessor's employees. However, before the bargaining commenced, the employees filed a decertification petition. The Board reasoned that the union is not entitled to any greater rights with the successor than it had with the predecessor. Therefore, if the predecessor employer could claim a good faith doubt of the union's majority status at a time when no contract was in effect, so could the successor employer. The Board specifically rejected the notion of any "successor bar" to an election.

In *St. Elizabeth Manor*, the Board ruled that a petition for an election may not be processed where there is a successor employer until the parties, the successor employer and the union

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THE EMPLOYMENT LAWYER'S CATCH-22: RECONCILING THE DUAL ROLES OF COUNSELOR AND ADVOCATE IN HARASSMENT CASES

By D. Patton Pelfrey

A management attorney, Mr. Pelfrey is a member of the law firm of Frost Brown Todd LLC in Louisville, Kentucky. He was inducted as a Fellow of College in 2001.

Employment counsel are unusual among many practitioners who concentrate on a single field of the law. Unlike most litigation or corporate counsel, employment lawyers seldom practice law exclusively inside or outside the courtroom. The practice of employment law is often split between a process of counseling (prospectively advising clients on compliance with the law) and advocacy (retrospective argument that one's client has previously complied with the law).

Patton Pelfry

While the dual nature of the employment lawyer's practice can be advantageous, it also creates a unique problem in the context of sexual and other forms of harassment.

While the dual nature of the employment lawyer's practice can be advantageous, it also creates a unique problem in the context of sexual and other forms of harassment. In that context, a dual role of counselor and advocate may be impossible.

The role of counselor usually comes first. The Supreme Court, in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), advised employers to implement comprehensive anti-harassment policies and enforce them effectively. Consequently, the employment lawyer's first duty as counselor is to draft employment policies designed to prevent and correct sexual and other forms of harassment.

When harassment complaints come in, the employment counsel, familiar with *Faragher* and *Ellerth*, usually advises the employer to conduct a thorough investigation of the allegations contained in the complaint. Frequently, the investigation is the responsibility of the employment counsel, who is an expert on both the requirements of an effective investigation and the way the employer's particular policies are designed to operate.

Not all harassment cases end with an investigation; some employees bring charges or lawsuits against the employer. The onset of litigation drastically changes the attorney's role. When the attorney's role as counselor transforms into that of advocate, several serious problems arise.

To counter charges of a hostile environment, the employment counsel can demonstrate that the client possessed adequate procedures for preventing harassment. This will be easy for our employment attorney, who had a hand in drafting the very policies that are now the subject of litigation. Additionally, the employer must prove that it took sufficient steps to remedy the harassment once it occurred, usually by demonstrating that the employer undertook a thorough investigation. Again, this proof is easy for the employment counsel, who conducted the investigation that now forms an element of the client's defense. Once counsel offers sufficient proof of an adequate preventative policy and effective investigation of the employee's allegations, *Faragher* and *Ellerth* protect the employer from liability for coworker harassment.

By now, the problem inherent in this hypothetical situation should be obvious. Our employment attorney must demonstrate the adequacy of the client's anti-harassment policy, which was drafted by the employment counsel. Also, the employment counsel must demonstrate that the client thoroughly investigated the employee's allegations of harassment, but the employment attorney was the very individual conducting the investigation on behalf of the employer. The lawyer must be both advocate and witness on behalf of the client.

The dual role of our hypothetical employment lawyer creates two important problems. First, there is a question of whether the attorney's representation of the client during litigation represents a conflict of interest. Can the attorney serve as a witness for the client? And, if possible, is it even advisable? The second question is similar, but focuses on preserving the attorney/

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client privilege. Where the employer's anti-harassment policies — and the employer's implementation thereof — are a substantive issue in the litigation, can the privilege be maintained? And, should it be?

Under Fed.R.Civ.P. 26, parties may obtain discovery on any matter, not privileged, which is relevant to the subject matter of the litigation. At least one court has held that the process of the investigation, and not just the outcome, is relevant to the *Faragher/Ellerth* defense. The New Jersey Supreme Court in *Payton v. N.J. Turnpike Authority*, 73 FEP Cases 1149 (N.J. 1997), held that an investigation that reaches the correct result but which also allows the harassment to continue during a prolonged period is ineffective under *Faragher* and *Ellerth*. Thus, the employment lawyer's participation in the process is relevant to the case, and presumptively discoverable.

Even if the employment counsel's actions during the investigation of the harassment allegation are not discoverable, the privilege against disclosure may be meaningless.

Since the process of the investigation is relevant, the next issue is whether or not the employee can overcome the attorney/client privilege. We will assume, for purposes of analysis, that the privilege actually attaches to the investigation. This is not a foregone conclusion – unless the investigation was undertaken in anticipation of litigation or can be classified as the provision of "legal advice," the attorney/client privilege is inapplicable. In *Scott v. Avondale Industries, et al.*, 2003 U.S. Dist. Lexis 6696, 91 FEP Cases 1442 (E.D. La. 2003), the Court held that documents created by a company's human resources investigator (who was not an attorney) were not protected by the work product privilege, because they were created in the ordinary course of business, and not in anticipation of litigation. Simple enforcement of company policy or a desire to comply with a legal duty is also insufficient motive to trigger the protection of the privilege. *See Payton*, *supra*. Thus, it seems clear that an employment attorney cannot preserve the privilege simply by instructing the employer's human resources department to prevent litigation by following the harassment policy and investigating every allegation.

If the privilege attaches, courts must decide whether or not society's interest in eliminating discrimination outweighs the countervailing interest of confidentiality. The outcome of this balancing test will determine whether or not the employer can protect the confidential elements of its investigation from disclosure.

Even if the employment counsel's actions during the investigation of the harassment allegation are not discoverable, the privilege against disclosure may be meaningless. If the only effective defense to the employee's claim involves proof of an effective investigation of the harassment allegations, the employment lawyer may need to convince the client that a waiver of the privilege is in the client's best interests. In this situation, the maintenance of the privilege is squarely at odds with the employment attorney's obligation to serve as an effective advocate for the client. If the client is truly not liable for the harassment because the investigation was adequate, the only way to prove the client's innocence may be to waive the attorney/client privilege. Indeed, simply by raising the *Faragher/Ellerth* affirmative defense, the employer may have unintentionally already waived the privilege. *See Payton*, *supra*.

There are significant implications to a waiver of the privilege, voluntary or otherwise. When the next harassment allegation surfaces, the client is likely to be far more guarded in communications with the employment attorney, knowing that future litigation may require waiver of the attorney/client privilege. This reluctance defeats the very purpose of the privilege: to foster open and honest communication between attorney and client. By waiving the privilege in one harassment case, the attorney may irreparably damage the ability to represent that client in future cases.

The ethical issues raised by our hypothetical employment attorney are also significant. Strangely, the employment attorney may be the best witness that the employer has met each of the elements of the *Faragher/Ellerth* defense. The employment attorney wrote the policies that are now under fire, and is likely most qualified to testify to the scope and intended effect of those policies. Additionally, having conducted the inquiry into the harassment allegations, the employment attorney is uniquely qualified to testify as to the effectiveness of the investigation.

If the employment lawyer is the best witness for the client on the *Faragher/Ellerth* issues, can the attorney be an effective advocate as well?

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CENTRAL EUROPE FROM A PLAINTIFF LAWYER'S PERSPECTIVE

By Paul H. Tobias

A plaintiff attorney, Mr. Tobias is a member of the law firm of Tobias Kraus & Torchia in Cincinnati, Ohio. He was inducted as a Fellow of College in 1996.

A group of NELA lawyers recently returned from a two-week trip to Central Europe: Budapest, Vienna, Prague and Berlin. We visited with lawyers, professors, government officials and union leaders. Our purpose was to learn how employment and labor disputes are resolved on the continent. In prior years we had visited Great Britain, Ireland, France, Belgium, and Switzerland with special stops at European Union (EU) Headquarter in Brussels and the International Labor Organization (ILO) in Geneva. Our trips have helped us to understand not only European law and practice but also, because of the differences, our own institutions here in America.

Paul Tobias

On "the continent", there is a tradition of socialism, and "social partnership" between companies and their employees unknown in the USA.

The employment "at-will" doctrine is unique to United States. Most countries in Europe impose a "just cause" standard governing terminations. In general, damages available in wrongful termination cases are modest – not exceeding a year's pay and usually much less. Except in Great Britain, employees do not ordinarily receive punitive damages, emotional distress damages, or front pay. However several months of severance pay in the case of layoff or redundancy is the norm.

The EU has recently enacted a set of anti-discrimination laws – incorporating concepts of our Title VII, ADEA, ADA and FMLA. Member countries are required to adopt these laws. For example, Great Britain for the first time will soon have an age discrimination act. The countries soon to join the EU – for example the Czech Republic, Poland and Hungary, will be required to enact anti-discrimination laws. Strangely, European lawyers do not expect these laws to have a dramatic impact on employment law practice. When questioned about "sex harassment" claims, most European lawyers say they are few and far between, indicating to me that Europe is in pre-Anita Hill hearing climate, where victims have, up to now, not been encouraged to come forward.

On "the continent", there is a tradition of socialism, and "social partnership" between companies and their employees unknown in the USA. As a result unions and works councils have a dominant influence in the major industries. Unions negotiate collective bargaining agreements covering not only union shops but also non-union employees.

In Germany, Austria, and some other countries, each employer is required to have a works council, elected by its employees. The works council is a unit separate and apart from a union. By law and practice, the employer must give advance information to its works council concerning impending layoffs, reorganizations, plan shutdowns and other important changes in working conditions. The law requires consultation and agreement with the works council concerning the "social plan" governing the reorganization or layoff.

In Germany employees have equal representation on a corporate governing body called the "supervisory board" which oversees a separate management board. These European systems of cooperation between employees and employers concerning major decision-making are in sharp contrast to the practices of corporate America.

Specialized labor courts are the norm in Europe, including the British Isles. Normally, dismissal cases are heard by a three-person panel consisting of a neutral judge, a lay representative of employee interests and a lay representative of management interests. In general there is very little "discovery" and the hearings are not lengthy.

In Germany at the first hearing, the lawyers briefly summarize the facts and then the neutral judge tries to obtain a settlement, all in open court. Before the second hearing, the parties submit 4-5 page summaries of the evidence, without lengthy attachments. Again at the

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second hearing the judge will try to cajole a settlement by indicating his or her own suggestions. At the third hearing, witnesses will be heard. The hearing lasts only a few hours with the judge doing most of the questioning and with very little cross-examination.

The parties usually can appeal adverse decisions of labor courts to appellate courts of general jurisdiction. Normally only one national law applies, with no local or regional law being relevant.

Generalizations concerning the American and European systems are apparent. Our history of individualism; employer aversion to unions; and laissez faire economics, have shaped our employment and labor laws.

Of course, each country has its unique features. For example, the Czech Republic (CR) does not have separate labor courts. In the CR the law requires each employee to have a written employment contract. Also no termination is valid without two months notice (three months in case of redundancy) except where there has been gross misconduct. In Austria, when making decisions concerning who shall be laid off, employers must consider several "social criteria" such as the size of the family. In Hungry and Great Britain there are special agencies that are available for mediation of disputes. There are no enforcement agencies such as the NLRB or EEOC in Europe.

In general contingency fee agreements are either forbidden or are uncommon. As a result there are only a few lawyers who specialize solely in representing non-union employees. However, in some countries, the employer must pay a reasonable fee to the prevailing employee's lawyer. In some countries unions represent non-union employees in legal proceedings. Austria has a unique publicly funded organization, which provides general assistance and legal services to non-union employees.

In France and Germany the work-week is 35 hours and vacations are 4-6 weeks for everyone. In general on the European continent, fringe benefits such as medical care and pensions are provided by the government and funded by taxes, rather than funded by employers based on the employment relationship. Generally, unemployment benefits are for longer periods and are more generous than in America. There is an economic crisis in Germany and other countries which has prompted calls for cut backs in employee benefits e.g. raising the age of pension eligibility. The unions in Europe are hoping for more cooperation between national unions in dealing with multi-national companies.

Generalizations concerning the American and European systems are apparent. Our history of individualism; employer aversion to unions; and laissez faire economics, have shaped our employment and labor laws. However, here in America strong anti-discrimination laws, trial by jury, and fear of large verdicts have been instruments of social control – which act as brakes on management exploitation of employees. However, in my opinion, we could benefit if corporate America did adopt some of the European practices of consultation with the workforce concerning upcoming reductions in force and reorganizations. In addition, there is no good reason for hanging on to the patently unfair "at-will" doctrine in dismissal cases.

SPOTLIGHT ON FELLOWS

"Buddy" Cooper

▶ Fellow Emeritus ***Jerome "Buddy" Cooper*** passed away October 14, 2003, at the age of 90. Considered by many a "Southern pioneer in labor law", Mr. Cooper was admitted to the College in its inaugural class of 1996. A Harvard Law School graduate, he clerked for Supreme Court Justice Hugo Black and served in the US Navy before returning to Birmingham, Alabama where he represented labor unions. He was counsel of record in many important labor cases, most notably the "Steelworkers Trilogy", and was a preeminent figure in Alabama's labor and civil rights history. He was recently recognized by *Birmingham* magazine and the Birmingham Regional Chamber of Commerce as a recipient of the annual "Live The Dream Award" for his lifetime of dedication and achievement as an advocate of justice.

▶ Fellow ***Francis X. Dee*** was inducted into the International Academy of Trial Lawyers. Mr. Dee is a Senior Partner in the Newark, New Jersey law firm of Carpenter Bennett & Morrissey. His area of practice is primarily representing employers in labor and employment matters. Mr. Dee graduated from Manhattan College with a BA degree and received his JD from the Catholic University of America School of Law. He received his LLM degree (in Labor Law) from New York University School of Law. Mr. Dee is also a Fellow of the American College of Trial Lawyers and is admitted to practice in New York and New Jersey.

Hope Eastman

▶ Fellow ***Hope Eastman***, director of the employment law practice group at Paley Rothman in Bethesda, Maryland, has been elected Chair of the Board of Directors of the American Employment Law Council (AELC). She has chaired the AELC's 10th and 11th annual conferences in the past two years. "It is an energetic and highly committed group and I'm proud to take on the responsibility of leading it." Ms. Eastman has more than thirty years of legal experience in representing a wide range of businesses, trade associations and nonprofit organizations in all areas of employment law. Her practice focuses on helping employers develop regulatory-sensitive employment policies and representing those employers in matters brought before the EEOC, Department of Labor and other federal and state agencies. A cum laude graduate of Harvard Law School, Ms. Eastman is a member of the Bars of Maryland, the District of Columbia & California and is admitted to practice before the Supreme Court of the United States. She is a member of the Governing Council of the American Bar Association's Labor & Employment Law Section and a former Co-Chair of that section's Equal Employment Opportunity in the Profession Committee.

▶ Congratulations to Fellow and past president ***Steve Pepe***, a vintner in his other life, on receiving a 96 for the 2002 Loring Clos Pepe vineyard Pinot Noir from the *Pinot Report* which awarded it the best Pinot Noir in 2003. *The Wine Spectator* rated it a 95. His Clos Pepe vineyard was touted as "one of the best Pinot vineyards in California."

▶ Fellow ***John True*** of Oakland, California took office as a Judge of the Court in the Superior Court of California, County of Alameda, last October. Mr. True was a partner at Leonard Carder LLP and prior to that he was a partner with the firm of Rudy Exelrod Zieff & True. He also was a senior staff lawyer with the Employment Law Center of the San Francisco Legal Aid Society, specializing in class action impact litigation on behalf of low-income employees. He has extensive experience as an arbitrator and mediator both for the Superior Court and for private parties in addition to teaching in the field of labor and employment law at Boalt Hall, University of San Francisco and Santa Clara University law schools. He lectures frequently and regularly writes for the *Civil Litigation Reporter* and the *California Employment Law Reporter.* Inducted a Fellow in 2001, Judge True received is BA from Trinity College and his JD from Boalt Hall.

Jay Waks

▶ Fellow ***Jay Waks***, a management attorney with Kaye Scholer in New York City, has been published recently, including a commentary featured in *The Expert's Eye* column in the *National Law Journal*

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(10/20/03) and an article published in the *American Lawyer* August 2003 edition of the *New York Employment Law & Practice Newsletter.* He also was a panelist at a live broadcast of the ABA Satellite Seminar (December 2003) on the subject of "Employment Law Arbitration: The Ultimate Arbitration Update" and spoke on the subject of "Class Certification and Decertification: Advocacy, Strategies and Tactics." at the *National CLE Conference on Labor and Employment Law* (January 2004). Finally, he addressed the subject of "Developing Effective and Enforceable Mandatory Arbitration and Other ADR Programs" at the American Conference Institute's *Employment Super-conference, 2004.* Mr. Waks was inducted as a Fellow of the College in 2002.

COLLEGE SURVEY RESULTS

The Board of Governors would like to thank the 208 Fellows who took the time to fill out its recent membership survey. The collated and statistically examined survey results were carefully reviewed by the Board during its recent retreat. In an ongoing desire to meet the needs of its membership the insight gained from these survey responses will be used to improve prior College activities and to continue to develop its successful pilot regional meeting series. Highlights of the survey responses are set forth below:

Demographic Overview: Of the 208 Fellows who took the time to respond to the survey: 126 or 60% were Management attorneys; 25 or 12% were Plaintiff's Attorneys; 31 or 14.8% were Union Attorneys; 8 or 3.8% were Academicians; 16 or 7.7% were Neutrals; 2 or 1% were members of the Judiciary; and 1 or .5% was an Honorary member.

The College's Regional Meeting Concept– An overwhelming 94% thought the College should encourage regional meetings of Fellows.

No Statistically Significant Different Survey Responses Exist Among the College's Diverse Constituent Groups. Considerable care was taken to determine if any significant statistical different survey results existed among the following three diverse constituent groups found within the College: 1) management attorneys 2) plaintiff and union attorneys and 3) academicians, neutrals, judicial and honorary members It may be a surprise to some Fellows, that our diverse membership shares remarkably similar opinions about the College's current endeavors and holds unified opinions about what new or different programs or other activities the College should consider encouraging or sponsoring. A brief overview of some of specific survey findings follow:

The College's Regional Meeting Concept. An overwhelming 94% thought the College should encourage regional meetings of Fellows. One hundred and four of the 208 Fellows who took the survey listed the professional, legal and social goals they wanted achieved at regional meetings. Most of the responding members listed one or both of the following professional, legal and social goals they wanted to see achieved at a regional meeting: either social interaction to strengthen the bonds of collegiality, professionalism and civility; or/and the desire to discuss important regional, legal and professional developments at a significantly more advance level than is currently available.

There was no strong consensus on the best time to hold a regional meeting. The majority of Fellows (44%) wanted meetings held immediately after work, with a lunch time meeting being a close second (33%). Meetings on the weekend and before work were less desireable (13% and 11%, respectively).

The College's Annual Lecture Series. Eighty-five percent of the Fellows knew of the series and 18% had attended one or more lecture. Of the 77% of the respondents who gave a reason why they didn't attend, an inconvenient location was the most common reason (45.6%). Other factors discouraging attendance included the date (31.9%) and the cost of travel (24.4%). Seventy-nine percent of the membership agreed strongly or agreed that the Annual Lecture Series was an important endeavor and 84% agreed strongly or agreed that it should continue.

The College's Video History Project. Although approximately 80% of all respondents agreed or agreed strongly that the video history project is an important endeavor and should be continued, many of the respondents felt it could be improved upon. The more common suggestions included: improve the marketing of the project so that more people have a great awareness of the project and its value; use of the newsletter to summarize the contents of a video and to describe the project goals, methods and procedures; and speeding up the interview process and decrease the length of each interview to decrease production costs.

REGIONAL MEETINGS WELL RECEIVED

Past presidents Bob Dohrmann and Steve Pepe hosted the gathering of twenty-eight Fellows, one of whom came from Arizona.

SECOND CIRCUIT / NEW JERSEY AREA - On November 17th, twenty-five of the College's Second Circuit and New Jersey Fellows held their second regional dinner meeting hosted by Evan Spelfogel at his firm, Epstein Becker & Green. Then College President-Elect Joe Garrison gave welcoming remarks. John Sands chaired the program, for which four fellows representing labor, management, plaintiffs, and the impartial process described the most interesting or challenging issues with which each of them was currently dealing. Each presentation was followed by lively discussion from the floor. Joel Glanstein, from New York City representing labor, spoke first concerning the unusual problems that arose when a high-level union officer ran unsuccessfully against the incumbent president and, after losing, went with a competing union where he used confidential information to his former employer's disadvantage. The ensuing litigation reflected some of the issues management attorneys face enforcing non-compete agreements but complicated by NLRA preemption considerations. Richard Mariani, a New Jersey management attorney, described a fascinating reverse racial discrimination case brought by four police officers against the Union County Township that Rich represents. John Sands, a New Jersey arbitrator and mediator, described the issues and outcomes of his experience mediating negotiations, as a permissive subject of bargaining, of a multi-employer association with an international union to create a voluntary program for arbitration of future statutory claims by individual employees who opt into the program in exchange for receipt of cash consideration. Because of time constraints, the final speaker, Pearl Zuchlewski, who represents plaintiffs in New York City, deferred until the next regional dinner meeting her discussion of the special considerations that must be addressed when a defendant employer offers unconditional reinstatement to a plaintiff. Pearl will chair that meeting, scheduled to occur on May 10, 2004 at Epstein Becker's New York City Office.

NINTH CIRCUIT SOUTH - Fellows from the 9th Circuit-South met for their first regional meeting on Friday, January 9th at the offices of O'Melveny & Myers in Los Angeles. Past presidents Bob Dohrmann and Steve Pepe hosted the gathering of twenty-eight Fellows, one of whom came from Arizona. There was a general agreement to meet twice a year and mid-September was suggested for the next meeting. Fellows will meet at Gibson Dunn & Crutcher and Warren Jackson agreed to assemble a panel and lead a discussion of improving minority participation in the College and the Bar. Any Fellows from the 9th Circuit-South, who have expressed an interest in becoming involved in the College, please let Bob Dohrmann or Steve Pepe know.

NINTH CIRCUIT NORTH - The first meeting took place Friday February 6th at the O'Melveny and Myers Offices in San Francisco. Ten Fellows were able to attend the meeting and, while few in number, the group was long in ideas. They are particularly interested in the program tentatively being planned for September in Los Angeles (mentioned above). Fellows from 9th Circuit-North would like to be invited to that event and would like to plan one of their own to be held in San Francisco next January. Fellows from the 9th Circuit-South would be invited to attend. Another idea proposed was that, when the new Fellows announcement is made, an informal reception for Fellows from the 9th Circuit-North be held, possibly at some one's home. This proposal was in response to the attendees' perception that the mentor program, which in past years focuses mainly on the annual induction dinner, doesn't adequately serve to welcome new Fellows, as a gathering on a local basis would.

TENTH CIRCUIT - Fellows from the Tenth Circuit met on January 22nd at the Denver Athletic Club for their first annual meeting. Twelve of the twenty Fellows from the six-state circuit attended, two coming by plane from Oklahoma City and Albuquerque. The meeting, for cocktails and dinner, proved highly successful leading to plans for a second meeting next year

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and possibly an informal reception to include selected young labor and employment lawyers as guests. The evening included an informal roundtable discussion concerning the decisions in *Pacificare Health Systems v. Book* and *Howsam v. Dean Witter Reynolds, Inc.* Interestingly, the Fellows attending were divided equally in number among management lawyers on the one hand and union/employee lawyers on the other.

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as a Chair of the Labor and Employment Law Section of the New York State Bar Association, adjunct professor of law and is a contributing editor to *How Arbitration Works* and *The Developing Labor Law*. Admitted to practice in New York and Washington, DC, as well as to the US Supreme Court and nine of the US Courts of Appeal, he was inducted into the College in 2000.

Mark Rudy

Mark Rudy – Mr. Rudy is a partner with Rudy Exelrod & Zieff, LLP. He has represented plaintiffs in all forms of employment matters since 1974. He has been nominated as Best Lawyer in America every year since 1990. Mark also serves as a mediator and has been named by both the *San Francisco Recorder* and the *Los Angeles Daily Journal* as one of the top mediators in the State of California.

Robert Siegel

Robert Siegel - Mr. Siegel is a partner in O'Melveny & Myers LLP's Los Angeles office, Chairman of the Labor and Employment Law Department and a member of the firm's governing Policy Committee. He specializes in employment law litigation in state and federal court, including representing employers in wrongful discharge and employment discrimination matters. Bob has also specialized in representing airlines under the Railway Labor Act. In addition to litigation, Bob has regularly represented employers in OFCCP audits, EEOC investigations, and general employment law counseling. He is the past Co-Chairman of the American Bar Association's Railway and Airline Labor Law Committee, and is a Senior Editor of *The Railway Labor Act* (BNA).

NOTICE:

Our new address is:

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corporate ranks. Jurors want to hear, she said, from someone "who knows what's going on," more than they want to meet "the man in charge." For plaintiffs, the converse of these strategies are obvious: to keep the focus on the company's failure to meet reasonable well-accepted standards in the treatment of employees and to attempt to place responsibility at the highest level of corporate management.

Fellows in attendance had the opportunity to talk informally with the panelists at a reception following the program. The College is currently considering the possibility of doing events like this one on a regional basis to provide the opportunity for this type of interaction to more members.

Mary Anne Sedey
Member, Board of Governors

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have a reasonable time to bargain for a new collective bargaining agreement. According to the Board majority, there is a "successor bar" to the processing of a petition. The Board majority characterized the Supreme Court's ruling in *Burns* as merely a "...reflection of Board laws at the time." The Board majority simply rejected the ruling in *Southern Moldings.* The Board majority analogized the successorship situation to the case of a new, voluntarily recognized unit. In the case of voluntary recognition, the Board had previously held in *Keller Plastics*, 157 NLRB 538 (1966), that no petition for an election would be entertained by the Board until the parties had a reasonable time to bargain for a new collective bargaining agreement. There was a "recognition bar" to the processing of a petition.

St. Elizabeth Manor remained the law only until such time as the dissenting minority in *St. Elizabeth Manor* gained another compatriot and became a majority. Within two years, the Board reversed course and ruled in *MV Transportation* that there was no such concept as a "successor bar." The new majority ruled that the reasoning of *St. Elizabeth Manor* was erroneous and that the Board should return to the holdings of *Burns* and *Southern Moldings*.

Which decision, if either, was politically motivated and which decision was based on reason, logic and precedent? It could be argued that both were politically motivated decisions and that both were based on reason, logic and precedent. However, in both cases, the majority opinion reflected the labor philosophy of the President that appointed them.

Interestingly, this same allegiance to philosophy does not seem to translate to a President's appointment of federal judges. Without any empirical data to support this thesis, it would be reasonable to assume that President Roosevelt may have been surprised with the results of his appointment of Felix Frankfurter to the Supreme Court. Similarly, President Eisenhower was even more surprised with the decisions of his appointee Earl Warren. The same surprise with the decisions of appointees can be said of President Nixon's appointment of Justice Blackmun and President Bush's appointment of Justice Souter. The seeming lack of philosophical allegiance by at least some judges, does not appear to translate to Presidential appointments to an "independent" agency such as the NLRB. Is the difference the appointment for life of a Federal Judge versus a fixed term for a Board Member? Or, could it be that the charge to Board Members is to interpret the statute as opposed to a Federal Judge applying existing law?

It would seem that so long as Board Members are political appointees, and a majority of the Board Members are from the political party of the President and therefore reflect the same labor philosophy as the President who appoints them, there can be no precedent for a precedent at the National Labor Relations Board.

While each of these video projects is important by itself, the Board of Governors believes that the totality of the video project will be greater than the sum of the videos.

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Model Rule 3.7 of the ABA Model Rules of Professional Conduct strictly limits the circumstances under which an attorney can be both an advocate and a witness for a client. The practice is prohibited unless the issue is uncontested, the testimony relates to the nature and value of legal services rendered in the case, or disqualification would be a substantial hardship for the client. So, the possibility of our employment counsel acting as both witness and advocate is remote.

It may be that it is simply impossible for our employment attorney to continue to lead the double life of counselor and advocate. Rather than risk disqualification or undermining the attorney/client privilege, it may be necessary for employment counsel to avoid the investigator's role once a harassment allegation surfaces. Giving up control over the investigation has its price, however, as it places an arguably less qualified individual in charge of investigating the allegations, implicating the validity of the employer's *Faragher/Ellerth* defense. At the same time, it also makes every element of the investigation discoverable. *Scott*, *supra*.

If a choice between counselor and advocate is necessary, it is one that few other attorneys must make. It is a fluke of employment law that makes this choice necessary for employment attorneys. Until the law or the ethical rules change, however, the choice is unavoidable.

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