NYSBA SPRING 2003 | VOLUME 28 | NO. 1

L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

The Section's Annual Meeting took place on January 24 in New York City. Two hundred and forty-five attorneys registered for a three-hour program which included HIPAA privacy rules and new *Weingarten* and whistleblower rights of employees in public and private sector workplaces, followed by an ethics segment on dealing with difficult adversaries, litigants and clients. Attendees received three MCLE credit hours, including one hour in ethics. Thanks to Program Chair Richard Zuckerman and all of the participants responsible for this timely and meaningful program.

At the Annual Meeting of Section members immediately following the MCLE program, the membership elected Pearl Zuchlewski to be the new Chair Elect effective June 1, 2003, and the following district representatives for three-year terms beginning June 1, 2003: Fifth District—Mairead Connor; Sixth District—Todd Kilpatrick; Seventh District—Peter Nelson; and Eighth District—Anne Simet. The prior evening at the Section's Executive Committee Meeting, Jim Sandner was elected as the new Alternate Delegate to the NYSBA House of Delegates. Jim will assume that role on June 1 when current Alternate Delegate Bruce Millman becomes the Section's Delegate to the House of Delegates upon the expiration of Michael Harren's two-year term. Also, Mark Leeds was elected to join the Executive Committee as Twelfth District Representative to complete a term which expires May 31, 2004, which became vacant upon the resignation of Jim Brady. We thank Jim for his contribution to the Section. Congratulations, all.

The Annual Meeting was followed by the Section luncheon. It was my pleasure to recognize immediate past chair Linda Bartlett for her considerable service to the Section. Luncheon attendees heard guest speaker Eugene Scalia, immediate past Solicitor of the U.S. Department of Labor, who discussed D.O.L. initiatives and answered a number of questions, including enforcement of the whistleblower provision of Sarbanes-Oxley, which was a subject of the morning's MCLE program.

At the L&E Section's Executive Committee Meeting we discussed a report from the NYSBA's Committee on Women in the Law entitled *Gender Equity in the Legal Profession*. The report was adopted by the NYSBA House of Delegates at its June 2002 meeting and contains a number of recommendations. NYSBA formed a Task Force on Gender Equity and I will be nominating a representative from our Section for appointment to the Task Force. Sec-

Inside

tion leadership will be reviewing the report and making recommendations for appropriate action by our Section. We also discussed the NYSBA's Strategic Planning Report, in particular the goals and objectives which relate to building an active and diverse membership. Our Section committee chairs will, in the coming months, be assessing their committees and determining ways in which they can best attract and involve diverse and energetic Section members.

Further, to that end, I have appointed Bill Frumkin Co-Chair of the Section's Membership and Finance Committee. Bill will direct his energies to the membership functions of that committee, including a membership survey. There are vacancies on the Membership Committee and I invite Section members who have a particular interest in the nurturing and growing of the Section's membership to notify Bill Frumkin or the Bar Association staff of your interest.

I have also reappointed Jerome Lefkowitz, Gary Johnson and Mel Osterman as Co-Chairs of the L&E Section's Committee on Public Sector Book, as it is once again time to begin work on the two-year supplement of *Public Sector Labor and Employment Law*, NYSBA's authoritative source on public employee labor law in New York State.

Our Section is fortunate to have many active members who contribute their time and talent to the Section. We have undertaken initiatives to attract more members to active committee participation. I urge you to mark your calendars for the Section's Fall Program, September 12-14 in Ottawa.

Richard N. Chapman

From the Editor

This edition of the *Newsletter* is rather late because an express delivery service lost the copy. The company extends its regrets to the members of the Section. We will resume the regular schedule with the next issue.

In this issue, we have two articles on the subject of whistleblowing, from American and British perspectives, by Michael Sciotti and Christopher Walter. In addition, there is an article on dismissal laws in Italy, by Franco Rindone; a guest appearance in "Ethics Matters" by Ellen Mitchell; a summary of recent New York labor legislation by Ivor Moskowitz; and information about the proposed merger of PERB and SERB. My appreciation to all the authors of articles in this edition.

On December 2, 2002, the Supreme Court granted *certiorari* in *Grutter v. Bollinger*[1] and *Gratz v. Bollinger*,[2] to review the affirmative action programs used by the law and undergraduate schools of the University of Michigan.[3] The Court has agreed to consider the extent to which public educational institutions may use race-based affirmative action, where the institution is not under a court order to remedy past discrimination. By granting *certiorari* in *Gratz* before it was decided in the 6th Circuit, the Court acknowledged that affirmative action "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination."[4]

The case has generated intense interest among employers and unions because the outcome will have implications for the workplace. The following is a discussion of some of the elements that may be considered by the Court.

It is possible that the justices may apply differing standards of review to the issue of affirmative action. In *Bakke*, the last such case heard by the Court, it struck down a racial quota program on the grounds that the program violated the Equal Protection Clause, although it indicated that race could be considered as one factor in admissions decisions.[5] The Court in *Bakke* did not establish which level of equal protection scrutiny, strict or intermediate, should be applied to affirmative action programs.[6]

If the University is to win, supporters of the intermediate scrutiny standard need only be convinced that its programs are substantially related to an important state interest. The University, however, will have to convince supporters of strict scrutiny that its affirmative action programs are narrowly tailored—that is, necessary—to serve a compelling state interest.

The case of *Adarand Constructors* shows how the Court split on the issue of scrutiny in a recent affirmative action case. Five of the current justices argued that Equal Protection requires strict scrutiny for any use of racial classifications.[7] Four of the justices supported the use of intermediate scrutiny, arguing that affirmative action represents a benign use of racial classifications and is to be distinguished from invidious racial discrimination.[8]

Strict scrutiny requires the University to show a compelling interest in using an affirmative action program. While individual remedies might pass muster, affirmative action policies are designed to cure societal discrimination. Advocates of strict scrutiny may not find a group remedy to be a compelling interest that justifies the admissions program. Justice Scalia has stated that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[9] In her dissenting opinion in *Metro Broadcasting Inc. v. FCC*, which Justices Rehnquist, Kennedy, and Scalia joined, Justice O'Connor wrote, "An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications. In *Croson*, we held that an interest in remedying societal discrimination cannot be considered compelling."[10] Justice Thomas went further, stating that there is a moral and constitutional equivalence "between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[11]

Under intermediate scrutiny, the social goal might be important enough to justify an affirmative action policy. In his dissenting opinion in *Adarand Constructors*, which Justices Ginsburg and Breyer joined, Justice Souter stated that the power to remedy past discrimination "extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination."[12] Justice Ginsburg stated that Congress is able "to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."[13] Justice Stevens has stated previously that such programs are not limited to remedying past discrimination.[14]

As for testing and other predictors, it may not be sufficient for the University to claim an interest in mitigating the impact of basing admissions decisions on tests such as the SAT and LSAT, which have been said to result in underrepresentation of some minority groups.[15] The majority of the Court could agree with the district court in *Grutter,* that any disadvantage suffered by minority students on the LSAT test may be attributed to discrimination in society as a whole.[16] If that were the case, a majority might find decreased reliance on test scores to be a better alternative than a race-based affirmative action program. It is also unlikely that increasing the number of minority law students and lawyers would be seen as a compelling interest.

The law school argued that it has a compelling interest in racial diversity because diversity improves the quality of education. Considering the opinions in *Adarand,* it is possible that four justices will accept the idea that diversity is compelling enough to withstand scrutiny.[17] The other justices, however, may not be convinced.[18]

The Court will need to find not only that the law school has a compelling interest, but that the disputed programs are necessary to achieve that interest. The programs will not withstand strict scrutiny if there are less discriminatory methods possible, particularly race-neutral ones.[19]

Those who challenge the affirmative action programs may argue that the University has established *de facto* racial quotas.[20] Although the Court has indicated that the use of racial quotas might be permissible in certain narrow circumstances, it has been extremely reluctant to allow their use.[21] It is more likely that the University will prevail if the Court finds that race is only one factor considered in admissions.[22] Although the University does not use a formal quota system, it does use race as an important factor.

The outcome in the University of Michigan affirmative action cases depends on whether a majority will agree that diversity is a compelling interest for institutions of higher education, and that the use of race as one factor in the admissions process is necessary to achieve diversity.

Janet McEneaney

Endnotes

1. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (Mem) (U.S. Dec. 2, 2002) (No. 02-241).
2. *Gratz v. Bollinger*, 309 F.3d 329 (6th Cir. 2001), *cert. granted*, 123 S. Ct. 602 (Mem) (U.S. Dec. 2, 2002) (No. 02-516) (granting petition for writ of *certiorari* before judgment granted).
3. The court for the Eastern District of Michigan struck down the affirmative action program in *Grutter*, but upheld the program in *Gratz*. These divergent outcomes may be the result of different approaches taken by the judges rather than from differences in the programs.
4. Sup. Ct. R. 11. The 6th Circuit reversed the district court opinion in *Grutter*, upholding the law school's affirmative action program, but had not rendered a decision in *Gratz*.
5. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).
6. *Id*. at 271-72.
7. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
8. *Id*. at 243-49 (Stevens, with whom Ginsburg joined, dissenting) (affirmative action programs are not the same as invidious discrimination); *id*. at 273 (Ginsburg, with whom Breyer joined, dissenting) (distinguishing between permissible and impermissible governmental use of race).
9. *Adarand Constructors, Inc*., 515 U.S. at 239 (Scalia, concurring in part and in judgment).
10. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603 (1990), citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).
11. *Adarand Constructors, Inc*., 515 U.S. at 240 (Thomas, concurring in part and in judgment).
12. *Adarand Constructors, Inc*., 515 U.S. at 269.
13. *Id*. at 273 (Ginsburg, dissenting).
14. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, dissenting); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 601 (1990) (Stevens, concurring).
15. Educational institutions have recognized that these exams may not be wholly accurate in predicting academic potential. *See, e.g., Grutter v. Bollinger*, 137 F. Supp. 2d 821, 831, 870 (6th Cir. 2001).
16. *Id*. at 868-69.
17. In *Adarand*, Justices Stevens and Ginsburg wrote that *Metro Broadcasting* settled the point that an interest in diversity justified racial classifications. 515 U.S. 200, 249-50 (1995). Justice Stevens stated, "The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination." *Id*. at 269.
18. Justices O'Connor, Rehnquist, Kennedy, and Scalia have suggested that racial classifications should be "strictly reserved for remedial settings." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). *See also*, *Metro Broadcasting*, 497 U.S. 547, 612 (1990), wherein Justice O'Connor, joined by Justices Rehnquist, Kennedy, and Scalia, wrote, "[t]he interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."
19. "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson* at 509.
20. It was established in *Grutter,* 137 F. Supp. 2d 821 at 832-33, that the University's law school decided that a "critical mass" of approximately 11% minority students was necessary to "realize the educational benefits of a diverse student body," and it has admitted students accordingly.
21. *See, e.g.*, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267 (1986); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *but see Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment).
22. *See, e.g.*, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (using race as one factor in the consideration of an applicant is less harmful to the equal protection rights of majority applicants than using quotas); *Metro Broadcasting,* 497 U.S. 547, 612 (1990) (the FCC was allowed to consider race).

Sarbanes-Oxley Act of 2002—Whistleblower Protections

By Michael J. Sciotti

Late in the summer of 2002 and in response to the Enron and WorldCom situations, Congress enacted the Sarbanes-Oxley Act of 2002. As one commentator observed, "[t]he Act might be more appropriately referred to as the Enron/WorldCom Response Act."[1] It was Enron that "triggered the initiative, but it took the WorldCom collapse to bring it to fruition."[2] While on its face the Sarbanes-Oxley Act addresses corporate fraud and accountability, it also contains a whistleblower provision and enacts criminal penalties for retaliation. Labor and employment practitioners should become familiar with the statute in order to properly identify and advise clients on the civil and criminal implications of this new law. This article highlights the general areas of the Act which address the civil and criminal retaliation provisions.

The Sarbanes-Oxley Act became effective July 30, 2002.[3] The Act added 18 U.S.C. § 1514A, which provides protections from retaliation for employees of publicly traded companies. More specifically, it applies to publicly traded companies "with a class of securities registered under . . . 15 U.S.C. § 781,"[4] or a publicly traded company which is "required to file reports under . . . 15 U.S.C. § 78o(d)."[5] The Act prohibits illegal conduct not only by the company, but also by any "officer, employee, contractor, subcontractor, or agent of such company."[6] The Act protects an employee from being discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment.[7] The term "retaliation" as used in the title of 18 U.S.C. § 1514A is therefore somewhat deceptive in that on its face, as the Act protects employees from being threatened and harassed, and implies that a plaintiff may not need to suffer economic damages in order to state a claim.

The Act protects employees who "provide information, cause information to be provided or otherwise assist in an investigation"[8] or who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed."[9] It does not on its face protect employees who know of illegal conduct and who are terminated because of such knowledge, but have never engaged in the type of activity the Act protects. Further, in order for an employee's actions to be protected by the Act the following conditions must also be met: (1) the employee's actions must be lawful;[10] (2) the employee must provide the information to a federal regulatory agency, a federal law enforcement agency,[11] any member of Congress, any committee of Congress[12] or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate [the] misconduct);[13] and (3) the employee must reasonably believe that the information he or she is providing "constitutes a violation of [18 U.S.C.] section 1341,[14] 1343,[15] 1344,[16] 1348,[17] or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders."[18]

An individual who claims a violation of the Act may file a complaint with the United States Secretary of Labor.[19] If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the plaintiff, the plaintiff may bring an action at law or equity for *de novo* review in the appropriate district court of the United States.[20] The Act grants the district courts jurisdiction over such actions without regard to the amount in controversy.[21]

"[The Sarbanes-Oxley Act of 2002] . . . 'might be more appropriately referred to as the Enron/WorldCom Response Act.'"

Interestingly, the complaint procedure which plaintiffs need to follow for filing complaints with the Secretary of Labor is adopted from 49 U.S.C. § 42121(b), which deals with whistleblower protections of employees in the airline industry who are discriminated against for providing certain types of air safety information.

Section 42121(b)(1) of 49 U.S.C. , in conjunction with 18 U.S.C. § 1514A(b)(2)(B), sets forth the filing and notification requirements for complaints filed under the Act. Specifically, the complaint must be filed with the Secretary of State within ninety (90) days after the date on which such violation occurs.[22] The Secretary of Labor will then notify the person named in the complaint, and the employer[23] of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the investigation procedure.[24]

The Secretary of Labor is required to dismiss any complaint, without investigation, if the employee fails to make a *prima facie* showing of a violation.[25] Further, even if the Secretary of Labor determines that the behavior described in the complaint was a contributing factor in the unfavorable personnel action alleged in the complaint,[26] no investigation will be conducted "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[27] Once the employer is notified of the existence of the complaint it may submit a written response to the complaint and have an opportunity to meet with a representative of the Secretary to present statements from witnesses.[28] If at this point the employer is successful in making its showing, no investigation will occur.

Within sixty (60) days of receiving the complaint, and allowing the employer the opportunity to respond—assuming the employer was not successful in making its showing—the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit.[29] The Secretary must notify both the employee and the employer of the findings, in writing.[30] If there is reasonable cause to believe that a violation has occurred, the findings shall also include a preliminary order.[31] The preliminary findings shall indicate the proposed remedies.[32]

The employee or employer, within thirty (30) days after the date of notification of findings,[33] may file written objections to the findings or preliminary order, or both, and request a hearing on the record.[34] If no hearing is requested, the "preliminary order shall be deemed a final order that is not subject to judicial review."[35] Assuming the preliminary findings indicate that reinstatement must occur, the employer's request for a hearing does not stay the preliminary order of reinstatement.[36]

In order for an employee to be successful, he or she need not show that the illegal action was the only factor upon which the employer acted. Rather, the employee need only show it that was a contributing factor in the unfavorable personnel action alleged in the complaint.[37] An employer can avoid relief being ordered, even if a violation of the Act occurred, if it "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[38]

If a hearing is requested, within one hundred and twenty (120) days from the conclusion of same, the Secretary of Labor shall issue a final order either stating the relief or denying the complaint.[39] This order can be appealed to the appropriate United States Court of Appeals. The parties are, of course, free to resolve the matter by entering into a settlement agreement before issuance of a final order. The settlement is entered into by the Secretary of Labor, the complainant, and the employer.[40]

An employee who prevails is entitled to a wide variety of relief, including: (1) all relief necessary to make the employee whole;[41] and (2) compensatory damages which shall include: (a) reinstatement with the same seniority status that the employee would have had, but for the discrimination;[42] (b) back pay, with interest;[43] and (c) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees.[44] The Act also does not diminish any other claims the plaintiff may have as a result of any federal or state law, or under any collective bargaining agreement.[45]

In addition to civil liability, the Act also imposes criminal liability on employers for any retaliatory conduct. One of the more frightening provisions of the Act is § 1107—retaliation against informants. This section of the Act adds a new provision to 18 U.S.C. § 1513. It specifically states:

> Whoever knowingly, with the intent to retaliate, takes an action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this Title and imprisoned not more than ten years, or both.

With the potential for criminal prosecution now available, employment attorneys must carefully guide employers that wish to discharge, demote, reprimand, suspend, or even write up an employee who may be engaging in activity protected by the Act.

In summary, employees have another set of rights and remedies which counsel must be aware of in order to properly guide their clients, due to the very real potential for criminal and civil prosecution against employers.

Endnotes

1. Bloomenthal, Harold S., *Sarbanes-Oxley Act in Perspective*, p. 1 (2002).
2. *Id*.
3. Added Pub. L. 107-204, July 30, 2002, 116 Stat. 802.
4. 18 U.S.C. § 1514A(a) (West 2002).
5. *Id*.
6. 18 U.S.C. § 1514A(a).
7. *Id*.
8. 18 U.S.C. § 1514A(a)(1).
9. 18 U.S.C. § 1514A(a)(2).
10. 18 U.S.C. § 1514A(a).
11. 18 U.S.C. § 1514A(a)(1)(A).
12. 18 U.S.C. § 1514A(a)(1)(B).
13. 18 U.S.C. § 1514A(a)(1)(C).

14. 18 U.S.C. § 1341. Frauds and swindles—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000, or imprisoned not more than 30 years, or both.

15. 18 U.S.C. § 1343. Fraud by wire, radio, or television—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

16. 18 U.S.C. § 1344. Bank fraud—Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

17. 18 U.S.C. § 1348. Securities fraud—Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.

18. 18 U.S.C. § 1514A(a)(1) & (2).

19. 18 U.S.C. § 1514A(b)(1).

20. 18 U.S.C. § 1514A(b)(2).

21. *Id.*

22. 49 U.S.C. § 42121(b)(1).

23. 18 U.S.C. § 1514A(b)(2)(B).

24. 49 U.S.C. § 42121(b)(2).

25. 49 U.S.C. § 42121(b)(2)(B).

26. 49 U.S.C. § 42121(b)(2)(B)(i).

27. 49 U.S.C. § 42121(b)(2)(B)(ii).

28. 49 U.S.C. § 42121(b)(2)(A).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 49 U.S.C. § 42121(b)(2)(B)(iii).

38. 49 U.S.C. § 42121(b)(2)(B)(iv).

39. 49 U.S.C. § 42121(b)(3)(A).

40. *Id.*

41. 18 U.S.C. § 1514A(c)(1).

42. 18 U.S.C. § 1514A(c)(2)(A).

43. 18 U.S.C. § 1514A(c)(2)(B).

44. 18 U.S.C. § 1514A(c)(2)(C).

45. 18 U.S.C. § 1514A(d).

Michael J. Sciotti is a partner with the law firm of Hancock & Estabrook, LLP in Syracuse, New York. He is a graduate of the Rochester Institute of Technology (B.S.) and the Syracuse University College of Law (J.D. & LL.M.). Mr. Sciotti can be reached at msciotti@hancocklaw.com.

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

Janet McEneaney, Esq.
205-02 33rd Avenue
Flushing, NY 11361
(718) 428-8369
E-mail:mceneaneyj@aol.com

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Blowing the Whistle in the U.S. and the UK

By Christopher Walter

New U.S. laws are providing increasing protection for "whistleblowers" (employees who report perceived corporate wrongdoing by their employers), following the various high profile business failures reported recently. The new laws parallel recent developments in Europe where organizations such as the UK Charity, Public Concern at Work, have been consulting with the Organisation for Economic Co-operation and Development, the Council of Europe and the Global Forum to promote similar initiatives for a number of years.

In this article we outline the new protections afforded to whistleblowers in the U.S., consider how these protections compare with the UK legislation, the Public Interest Disclosure Act 1998 (PIDA), and draw some conclusions as to the practical implications for employers.

"In the United States, the recently enacted Sarbanes-Oxley Act of 2002 arms whistleblowers who report violations of federal securities laws with significant new protections . . ."

United States

Sarbanes-Oxley Act 2002

In the United States, the recently enacted Sarbanes-Oxley Act of 2002 arms whistleblowers who report violations of federal securities laws with significant new protections, in large part because of Congress' experience with the hearings surrounding possible corporate wrongdoing at Enron. As Senator Patrick Leahy explained from the Senate floor, "We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court."

Before this Act, securities law whistleblowers were afforded only limited protection against retaliatory discrimination and firing by spotty, sometimes absent, state laws. An employer who attempted to intimidate an employee in order to prevent him or her from testifying at an official proceeding could find itself prosecuted criminally for tampering with a witness, facing fines and/or imprisonment for up to 10 years. But there existed no federal statute under which a whistleblowing employee could be fully compensated for the injuries he or she had suffered.

Remit of Sarbanes-Oxley Act

Under the terms of the newly enacted law, no public company may discriminate against any employee because of the employee's involvement in an investigation of any conduct that the employee reasonably believes constitutes a violation of federal fraud statutes, including any statute relating to fraud against shareholders, or the violation of any rule or regulation of the Securities and Exchange Commission. These restrictions apply to prevent discrimination against the whistleblower by the company's officers, employees, contractors, subcontractors, and agents.

The protections of the Sarbanes-Oxley Act extend only to "employees." An employee who assists in an investigation of activity that the employee "reasonably believes" constitutes a violation of federal securities laws or who participates in a proceeding relating to an alleged violation of federal securities laws cannot be discriminated against in any manner because of his or her whistleblowing activities. In order to merit whistleblower protection, the employee must have assisted in an investigation conducted by a federal agency, Congress, the employee's supervisor, or anyone working for the employer who has authority to investigate or terminate misconduct.

Procedure and Compensation

While other federal whistleblower statutes limit an employee to an administrative action before the Secretary of Labor, the Sarbanes-Oxley Act empowers a securities law whistleblower to bring a private lawsuit against the discriminating party in order to recover compensatory damages and attorneys' fees. In order to recover damages under the Act, the employee must file a complaint with the Secretary of Labor within 90 days of the discriminatory act. If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, the employee may file an action in federal court. The employee must show that his or her whistleblowing activities contributed to the unfavorable personnel action alleged in the complaint, while the employer must prove that it would have taken the same unfavorable personnel action absent any whistleblowing.

The injured employee is eligible to recover "all relief necessary to make the employee whole," including reinstatement to the position that the employee would have had absent the discrimination, back pay with interest, and special damages sustained as a result of the litigation such as costs, witness' fees, and lawyers' fees. While punitive damages are not directly available under the Sarbanes-Oxley Act, the statute preserves the whistleblower's rights to any remedy available under other federal or state law, or any collective bargaining agreement.

Lawyers' Responsibilities

Lawyers who practice before the Securities and Exchange Commission on behalf of public companies will also be charged with whistleblowing responsibility under the Act. The Act required the SEC to create and adopt rules for lawyers appearing before it. Proposals for these rules were made by the SEC in November 2002 and are subject to a brief period of consultation. The rules, as proposed, will place an obligation on lawyers to report evidence of a material violation of securities law or breach of fiduciary duty by a public company or its agent(s) to the chief legal counsel or chief executive officer of the company. If the counsel or CEO does not respond appropriately, the lawyer must report the evidence to the company's board of directors. Where internal reporting does not suffice the rules, as currently drafted, will require lawyers to withdraw from acting and disclose their reasons for doing so. The rules will also cover any foreign lawyers who "appear and practice" before the SEC.

The proposed rules are currently the subject of consultation by the SEC. There has been notable lobbying against the current draft by international lawyers who have expressed concerns that the requirement to make a 'noisy withdrawal' may breach client confidentiality and privilege and that any lawyer who gives a local law opinion which is exhibited to a SEC registration statement may fall within the provision covering foreign lawyers. It is anticipated that the SEC will announce a final rule, taking into account consultations, by the end of January 2003.

Public Company Obligations

The Sarbanes-Oxley Act contains additional provisions designed to encourage whistleblowing. Importantly, the Act requires every public company to establish a mechanism to permit whistleblowers to bring information anonymously and confidentially to the attention of the company's board of directors. The company's audit committee must also receive and address complaints regarding accounting, internal accounting controls, or auditing matters.

Penalties

As noted above, breach of the Act can result in civil penalties, either as a result of regulatory proceedings by the Department of Labor, or a civil law suit. Additionally, the Sarbanes-Oxley Act contains provisions under which retaliation against a whistleblower can also result in criminal prosecution of the company and individuals involved. Criminal prosecution will be possible where a whistleblower has provided truthful information to "a law enforcement officer" and prohibits any form of intentional retaliation, "including interference with the lawful employment or livelihood of any person," and the underlying crime can be "any Federal offense," regardless of whether it relates to business fraud.

> *"Statutory protection in the UK is even more wide-ranging than that in the United States."*

United Kingdom; Public Interest Disclosure Act 1998 (PIDA)

Remit of PIDA

Statutory protection in the UK is even more wide-ranging than that in the United States. PIDA applies to both employees and "workers," which includes certain contractors and others providing services personally to the company. Nor is it necessary for the employee/worker to have assisted in an investigation in order to be protected under PIDA. The Act makes it unlawful to subject any employee to a detriment at work, or to dismiss the employee on the grounds that the employee made a "protected disclosure." A protected disclosure is one which tends to show that a company is about to, or is already:

- committing a criminal offense
- endangering the health and safety of any individual
- damaging the environment
- failing to comply with "any legal obligation" to which it is subject.

It is immaterial whether the relevant act or omission is alleged to occur in the UK or elsewhere and whether the law applying to it is that of the UK or another country. As with the U.S. law, the employee only need have a reasonable belief that any of the above circumstances are occurring, or about to occur. The reference in the legislation to "any other legal obligation" has been held to mean that a protected disclosure could even include a concern expressed by an employee about the terms of his or her individual contractual arrangements (see *Parkins & Sodexho Ltd*. [2002] IRLR 109). The ambit of PIDA therefore extends well beyond just "white collar" crime.

Procedure and Compensation

Any employee/worker who claims detrimental treatment on the grounds of having made a protected disclosure may issue proceedings before an Employment Tribunal within three months of the act complained of. If the claim succeeds, then the Tribunal may award such sum as is "just and equitable" by way of compensation. If an employee is dismissed in connection with the making of a protected disclosure, then he or she will be entitled to a declaration by the Tribunal of automatic unfair dismissal and uncapped compensation. As an illustration of levels of compensation being awarded under the Act in November 2002, a senior barrister was recently awarded £275,000, comprising £50,000 for injury to feelings and £217,897.82 for loss of earnings.

There are no criminal penalties comparable to those that can be found under the U.S. Sarbanes-Oxley Act.

Disclosure to Third Parties

PIDA anticipates that protected disclosures will generally be made only to the employer. However, it is possible to make a protected disclosure to certain prescribed third parties where it is reasonable to do so. An external disclosure will be justified where the employee believes that he or she might be subjected to a detriment if a disclosure is made to the employer. In order to avoid this eventuality, to manage risk and to ensure that staff appreciate there is a safe alternative to silence, many employers publish clear policies on whistleblowing. Among other things, these will outline procedures enabling employees to blow the whistle on a confidential basis (where practicable) and provide assurances that those who do so will not be subjected to any detrimental treatment as a result.

Conclusion

In conclusion, there are similarities between the new U.S. whistleblowing legislation and the UK's, though UK legislation offers wider protection for whistleblowers. Employers in the UK have recognized that if they are to minimize the potential for external disclosures and the adverse publicity which can result, it is necessary for them to implement procedures providing employees with the means for making confidential internal disclosures. As stated above, it is now compulsory for U.S. public companies to establish whistleblowing mechanisms. Taking into account the increasingly global nature of many businesses, the apparent convergence of the law in this area and the prominence being given to the issue of whistleblowing, now seems the time for those companies which have not already done so to be preparing even more far-reaching, umbrella policies on disclosures at work, demonstrating both a global and local commitment to the principles underpinning whistleblowing legislation.

Christopher Walter is the Head of the European Employment Group and based in the London office of Covington & Burling.

For Your Information

News in Brief

Allegra L. Fishel has become of counsel for the firm of **Outten & Golden**. **Piper Hoffman, Linda A. Neilan** and **Claire Shubik** have become associates of the firm.

Jeannemarie O'Brien has become a member of the firm of **Wachtell, Lipton, Rosen & Katz.**

Eric B. Fisher, a former Assistant U.S. Attorney in the Southern District of New York, has become associated with the **Gregory P. Joseph Law Offices**.

Charles Kaplan of **Thelen Reid & Priest LLP** announces a change of address for the firm to 875 Third Avenue, 10th Floor, New York, New York, 10022-6225.

NASD Dispute Resolution, Inc. has relocated its New York headquarters office and Northeast Regional Office to One Liberty Plaza, 27th Floor, 165 Broadway, New York, New York 10006.

The Regulatory Framework of Dismissal in Italy

By Franco Rindone

Italian case law has always been oriented to consider the employee as the weaker party in the employment relationship and, therefore, the party that deserves greater protection from unfair termination. This article provides a general overview of the protection and remedies for unjust dismissal that are available to employees under Italian law.

This topic is covered by the following provisions of law:

- Section 2118 and 2119 of the Italian Civil Code
- Law July 15, 1966 n. 604 (applicable to dismissal of individuals)
- Law May 20, 1970 n. 300 (setting forth statute of employees' rights)
- Law July 23, 1991 n. 223 (relevant to collective dismissal)

Law July 15, 1966 n. 604

Law n. 604 of 1966 introduced the principle that an employee, other than an executive, can be dismissed only for cause, by means of a letter of dismissal.[1] If the dismissal is not carried out by means of a letter, it will be null and void.

As for cause, Law n. 604 of 1966 states that the dismissal can be based either on *giusta causa* or *giustificato motivo*. If a dismissal is deprived of *giusta causa* or *giustificato motivo*, it will be declared unlawful by the Court.

The *giusta causa* dismissal is based exclusively on a specific improper conduct, usually implying a personal breach of trust, which makes it absolutely impossible to continue the employment relationship. Therefore, the dismissal for *giusta causa* does not require notice.[2]

The *giustificato motivo* supporting the dismissal may arise from employee conduct which is not as serious as that found in *giusta causa* dismissal. It may also arise from an objective situation relating to changes in work organization, such as the closing of a department, as well as from situations affecting the company's existence and productivity, like a company crisis.

Dismissal for *giustificato motivo* always requires notice. However, the employer can terminate employment prior to the notice expiration date by paying to the employee an indemnity instead of providing notice.[3]

Should the dismissal lack *giusta causa* or *giustificato motivo*, it will be declared unlawful by the competent Judge and the employee will be entitled to damages ranging from 2.5 to 6 monthly installments of his or her actual salary. These damages could be increased to 10-month installments if the employee's length of service is more than 10 years, and to 14-month installments if the length of service is over 20 years.

Law May 20, 1970 n. 300

Law n. 300 of 1970 provides greater protection for individuals employed by companies with more than 15 employees. In case of unlawful dismissal, the employee will be entitled to require, as damages compensation, back pay from time of dismissal, but not less than 5 months' salary. In addition, at his or her sole discretion, the employee will be entitled either to be rehired or to receive an indemnification equal to 15 months' salary.[4]

This stronger protection was called *tutela reale* (actual protection) in comparison with the protection granted to employees employed by an employer who employs up to 15 employees in order to stress the fact that, as a consequence of an unlawful dismissal, the larger employer will not only have to pay compensation for damages but also rehire the dismissed employee.

This law also introduced the procedure to be followed when an employer adopts an internal code of conduct, setting out ethical standards to which all its employees must conform. Pursuant to Law n. 300 of 1970, internal rules or policies shall be made known to all employees and posted in a location that is easily accessible by all the employees.[5] This includes any possible consequences of violations of the code. In general terms, such sanctions may be listed as follows:

i. oral reproach;
ii. written reproach;
iii. monetary fine;
iv. suspension from work and withholding of salary;
v. dismissal, with or without notice.

In addition, any sanction, other than oral reproach, shall be adopted by the employer only after having submitted a written claim to the employee stating the alleged violation.[6] The employee has a time period of not less than five days to answer the allegation and has the right to be assisted by the trade unions. There must be just motivation for the sanction and the employee's defenses will be taken into account. If the employer does not abide by these rules, the sanction will be considered unlawful by the Court.[7]

Case Law Concerning Sanctions

According to the case law, an employer is free to establish internal rules and policies. Where there is a sanction for violation of the rules and policies, it must be in proportion to the seriousness of the violation. The employer shall ensure continuation of employment as much as is practicable, and will terminate employment for breach of the internal code only as an extreme measure when the employee persists in the breach and/or explicitly refuses to conform to the internal code.[8]

This procedure, provided by Law n. 300 of 1970, must also be applied to any dismissal substantially based on the employee's conduct, whether or not it is due to *giusta causa* or *giustificato motivo*.[9]

This procedure applies in all cases of termination of employment, unless there are objective circumstances such as reorganization or discontinuance of business activity. Therefore, if an employee is dismissed because of conduct, the employer shall initially provide written notice to the employee objecting to the conduct and giving at least five days to set forth possible defenses. Then, the employer shall evaluate such defenses before dismissing the employee. If this procedure is not followed, the dismissal will be considered as unlawful as if it were not based on *giusta causa* or *giustificato motivo* and the employer will be subject to *tutela reale* whether or not it employs more than 15 employees.

Dismissal of Executives

Executives are not protected under Italian law, except that notice is required unless the termination is for *giusta causa*. Where there is unjust dismissal and the employer acted in bad faith, the executive is entitled to certain payments. In addition to indemnification for lack of notice, if not liquidated, there will be a further indemnification ranging from 2 months' to 18 or 22 months' pay, depending on circumstances.[10]

Collective Dismissal

If an employer with more than 15 employees plans to dismiss 5 or more employees within 120 days, the law provides a collective dismissal procedure under articles 4 and 24, Law no. 223/91. Applicable circumstances may be reduction or conversion of business activity or its discontinuance, which constitutes a "justified reason." The main stages of the collective dismissal procedure are as follows:

1. Prior written notice to the trade unions as well as to the trade associations and to the regional employment office (i.e., *Ufficio Provinciale del Lavoro*), which must indicate:
   - technical organization and productive reasons as the basis of collective dismissal;
   - number, level and professional roles of the exceeding staff;
   - time frame to carry out the "collective dismissal" program;
   - measures planned to deal with the social consequences of the dismissal.
2. Meeting with the unions to agree on a plan to implement the dismissals. If there is no agreement within 45 days, the parties must appear before the competent Employment Office and will have another 30 days to negotiate a solution.
3. However, 75 days from the service of the written notice, the employer can dismiss the employees.

If the collective dismissal is found to be unjustified, the employer will be subject to a *tutela reale* system. In any case, non-compliance with the above-mentioned procedure will render the dismissals unlawful.[11]

Endnotes

1. Section 1 and 3 of Act. July 15, 1966 n. 604.
2. Section 2119 of Italian Civil Code.
3. Section 2118 of Italian Civil Code.
4. Section 18 Act May 20, 1970 n. 300.
5. Section 7 Act May 20, 1970 n. 300.
6. Section 7 of Law n. 300 of 1970.
7. Italian Supreme Court June 24, 1995 n. 7178.
8. Italian Supreme Court September 23, 2002 n. 736 and Italian Supreme Court August 17, 2001 n. 11153.
9. Italian Constitutional Court November 30, 1982 n. 204 and Italian Constitutional Court July 25, 1989 n. 427.
10. Italian Supreme Court November 8, 2001 n. 13839.
11. Italian Supreme Court August 2, 2001 n. 10576.

Franco Rindone specializes in employment and labor law at Coudert Schürmann. He has represented multinational corporations and smaller, privately-held entities with respect to mergers, acquisitions and downsizing in Italy and Europe. His practice also includes counseling foreign clients and litigating labor and employment law issues. He can be reached at rindonef@coudert.it.

Ethics Matters

By Ellen Mitchell

Usually this column focuses on a specific ethical issue of interest to members of the Labor and Employment Law Section. This issue's column, however, provides a brief summary of each of the seven ethics opinions issued by the NYSBA Committee on Professional Ethics during 2002. This summary was prepared by Ellen Mitchell, Associate Counsel, CSEA Legal Department. Ellen is a member of the Labor and Employment Law Section's Committee on Ethics.

Opinion: 751
(01/31/02; Revised 05/06/02)

Code: DR 1-104(F), 2-110(B)(2), 4-101, 6-101(A), 6-102(A), 7-101(A)(2)-(3); EC 7-7, 7-8, 7-13, 7-14.

QUESTION: May a lawyer for a government social services agency accept more matters than the lawyer believes that he or she may competently handle?

OPINION: Once a lawyer undertakes to represent a client in a particular matter, the lawyer must conduct the representation competently. DR 6-101(A)(2), (3). Implicit in these obligations is a lawyer's duty to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable. *See* ABA 399 (1996).

The staff attorney must consult with the client (through a supervising lawyer or officials in the agency) to attempt to resolve concerns about the excessiveness of the caseload. The staff attorney should seek the supervising attorney's permission for the staff attorney to reassign matters or withdraw from the matters in which the department does not require legal representation, so that the staff attorney has time to handle essential matters. The staff attorney may assist the department in seeking court appointments of lawyers from the private bar to handle some of the department's cases. If the client refuses to exercise its authority to decide which of the matters should be reassigned or withdrawn from, the lawyer may resign or decline to handle cases that cannot be handled competently and then deal with whatever employment consequences may follow.

Related cases: ABA 347 (1981); Mich. Op. RI-252 (1996); Wis. Op. E-84-11 (1984); N.Y. State 664 (1994); Charles W. Wolfram, Modern Legal Ethics 187 (1986); N.Y. State 713 (1999); N.Y. State 604 (1989); N.Y. State 728 (2000); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C.L. Rev. 789 (2000); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*?, 9 Widener J. of Public Law 235 (2000); *cf*. Wisconsin E-91-3.

Opinion: 752
(02/22/02)

Code: DR 1-106; DR 1-107; DR 5-101(A); EC 1-12.

QUESTION: New York recently adopted a new disciplinary rule, DR 1-106, addressing the responsibilities of lawyers or law firms providing non-legal services to clients or other persons. The question considered in this opinion is the extent to which earlier opinions and the disciplinary rules on which they were based, dealing with lawyer involvement in ancillary business, still apply after the promulgation of the new rule.

OPINION: DR 1-106 (22 N.Y.C.R.R.) addresses the responsibilities of lawyers or law firms providing non-legal services to clients or other persons whether the lawyer provides those service directly or through an entity he or she owns or controls. The rule suggests that the disciplinary rules, or at least certain of them, presumptively will not apply to the lawyer's rendition of non-legal services if those services are distinct from any legal services rendered and if the client is informed in writing that the protections of the attorney-client relationship do not apply to those non-legal services. DR 1-106(A)(4).

In the past, the Committee had opined that in certain circumstances a lawyer also engaged in a non-legal business cannot provide both legal and non-legal services in the same transaction even with the consent of the client. The rationale has been that the lawyer's "non-legal" interest in closing the transaction may interfere with the lawyer's ability (and obligations under DR 5-101) to render independent legal advice with respect to the transaction. The Committee concluded that the concerns expressed in its earlier decisions continue to be applicable even after DR 1-106. DR 1-106 only relieves the lawyer or law firm from the application of the disciplinary rules to the non-legal services. The application of DR 5-101(A) that resulted in the prohibitions on dual roles in certain circumstances arose from the application of that rule to the provision of legal services. It was the effect on the exercise of legal judgment that was the concern, just as with any other personal conflict created by the lawyer's own financial, business or personal interests under DR 5-101(A). The promulgation of DR 1-106 does not alter the application of DR 5-101(A) just because the personal interest that is at issue is the lawyer's participation in a non-legal business offering services to the client. *See also* EC 1-14.

Related cases: N.Y. State 208 (1971); N.Y. State 291 (1973); N.Y. State 340 (1974); N.Y. State 493 (1978); N.Y. State 536 (1981); N.Y. State 619 (1991); N.Y. County 685 (1991); N.Y. State 694 (1997); N.Y. State 687 (1997); N.Y. State 711 (1998); N.Y. State 595 (1988); N.Y. State 621 (1991); N.Y. State 738 (2001).

Opinion: 753

(02/26/02)

Code: DR 1-106; DR 1-107; DR 5-101(A); DR 5-105; EC 1-14.

QUESTIONS: A lawyer is the sole shareholder of a licensed New York mortgage brokerage corporation and a separate title abstract company. Where the attorney informs the client of the attorney's other business relationships and discloses same to the client in a Statement of Client's Rights in Cooperative Business Arrangements, and where the client gives informed consent, may the attorney and/or the attorney's companies:

1. Represent the selling client in a real estate transaction and (a) broker the mortgage for the buyer, (b) act as the lender's attorney at closing, and (c) act as the abstract company for the transaction?
2. Represent the buying client in a real estate transaction and (a) broker the mortgage for the buyer, (b) act as the lender's attorney at closing, and (c) act as the abstract company for the transaction?

OPINION: This is another opinion involving newly promulgated DR 1-106, which addresses the responsibilities of lawyers or law firms providing non-legal services to clients or other persons.

The Committee reaffirmed the applicability of DR 5-105 to these situations. The proposal to represent both the buying client and the lender in the same transaction creates the potential for a conflict. In situations in which the lawyer for the buyer could be called upon to negotiate with the lawyer for the lender, it would not be possible for one lawyer to play both roles, even with consent, because that would put the lawyer in the position of negotiating with himself or herself. In such circumstances, the lawyer could not "zealously" represent both parties. *See* DR 5-105(C); N.Y. City 2001-2.

On the other hand, the Committee recognized that in circumstances where there is no negotiation or assertion of rights between the lender and buyer (in which a lawyer has any role), so long as full disclosure of the risks of dual representation has been made and knowing consent obtained, dual representation may be permissible. N.Y. State 8 (1965); N.Y. State 199 (1971); N.Y. State 438 (1976); N.Y. State 694 (1997). (The Committee had earlier recognized that representation of a seller and a lender, who commonly do not directly negotiate with each other at all, can be permissible with consent after disclosure.) N.Y. State 611 (1990).

Also at play here was whether the brokerage company could act as the buyer's mortgage broker in the same transaction in which the inquirer represents as counsel either the seller or the buyer, and the lender. The Committee had held in a number of opinions that a lawyer cannot act as a real estate broker and as counsel to a party in the *same* transaction. N.Y. State 208, 291, 340, 493. The Committee concluded that the same result should apply with respect to the mortgage brokerage business.

In N.Y. State 595, 621 and 738, the Committee found that a lawyer could not refer real estate clients to a title abstract company in which the lawyer had an ownership interest and that would be hired to provide insurance or perform other than ministerial tasks, based on DR 5-101(A). Those rules continue to apply even after the promulgation of DR 1-106. The Committee's opinion in N.Y. State 595 expressly extended this prohibition to counsel for the lender. The lender's interests in marketable, insured title at the lowest price are little different from the buyer's.

To the extent that the abstract company examines the title and makes recommendations on insurability or exceptions, it would appear to have an irreconcilable conflict with its attorney-owner's duty to provide independent advice and negotiate title problems, if necessary.

Related cases: N.Y. State 208 (1971); N.Y. State 291 (1973); N.Y. State 340 (1974); N.Y. State 493 (1978); N.Y. County 685 (1991); N.Y. State 694 (1997); N.Y. State 536 (1981); N.Y. State 619 (1991); ABA Inf. 643 (1963); ABA Inf. 837 (1965); Nassau County 89-33; Nassau County 41/87; N.C. 248 (1997); S.C. 96-04; *In re Kelly*, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937, 945-46 (1968); N.Y. State 738 (2001); N.Y. State 687 (1997); N.Y. State 711 (1998); N.Y. State 595 (1988); N.Y. State 621 (1991); N.Y. State 731 (2000); N.Y. State 752 (2002); Nassau County 98-10; N.Y. State 516 (1980); 22 N.Y.C.R.R. § 1205.4; DR 1-107; EC 1-14.

Opinion: 754
(02/25/02)

Code: DR 2-106(D); DR 5-103(B)(1); EC 5-8.

QUESTION: May a lawyer borrowing funds to advance expenses in contingent fee litigation pass on to the client the interest charged on such borrowings?

OPINION: In N.Y. State 666 (1994), the Committee held that a lawyer could refer a client to a lender who would provide economic support to the client during the pendency of the case, provided the lawyer had no interest in the lender, received no payment for the referral, and did not compromise client confidentiality in making the referral. In N.Y. State 399 (1975), the Committee held that a lawyer may ethically charge interest on a delinquent account, provided the client was given adequate advance notice of and consented to the arrangement, the interest rate and the time period after which interest is charged are reasonable, and the total charges are not excessive. In N.Y. State 729 (2000), the Committee held that it is not unethical for a lawyer to charge interest on unpaid disbursements in a contingent fee matter, provided that

> (1) the client is clearly advised that an interest charge will be imposed on disbursements that are not paid within a stated period of time and that the client consents to the arrangement before it goes into effect, (2) the client is billed for the disbursements promptly after they have been incurred so the client may decide whether to pay the disbursements or incur the interest charge, (3) the period of time between the bill and the imposition of the interest charge is reasonable, (4) the disbursement itself is appropriate . . . and (5) the interest rate is reasonable.

If the five conditions described in N.Y. State 729 are met and the lawyer receives no other benefit from the lender than the loan itself, the lawyer ethically may borrow to finance disbursements and pass on the interest incurred to the client. As noted in N.Y. State 666, the lawyer may not compromise client confidentiality in connection with the financing arrangement. Further, in a contingent fee matter the interest charge arrangement must be set forth in the writing required by DR 2-106(D). (The Committee did not address whether and how such an arrangement might comport with the court rules governing fee calculations in many contingent fee cases (*see* 22 N.Y.C.R.R. §§ 603.7(e); 691.20(a)-(c); 806.13(b) and 1022.31(b)).

Related cases: N.Y. City 1997-1

Opinion: 755

(04/10/02)

Code: DR 1-102(A); DR 1-106; DR 1-107; DR 2-101(C); DR 2-102(A), (B); DR 2-103(A), (B); DR 5-101(A); DR 5-104(A); EC 1-9; EC 1-10; EC 1-11; EC 1-12; EC 1-14.

QUESTIONS: A lawyer is the sole shareholder of a company providing non-legal services to clients or other persons. Where the company provides services to clients of the lawyer, and the lawyer informs the clients in writing in accordance with DR 1-106(A)(4) that the services provided by that business are not legal services and that the protection of the attorney-client relationship does not exist with respect to the non-legal services:

1. To what extent do the disclosure rules and substantive restrictions of DR 5-104(A), relating to business transactions between a lawyer and a client, apply to the non-legal services or to the lawyer's recommendation that the clients employ the non-legal business?

2. To what extent can the lawyer permit the non-legal business to recommend employment of the lawyer by in-person or telephone contact without violating DR 2-103(A)?

OPINION: As noted earlier, DR 1-106 addresses the responsibilities of lawyers or law firms providing non-legal services to clients or other persons that are "distinct" from legal services being provided to that person, or are provided through a separate entity. Compliance with the written notice provisions of DR 1-106(A)(4) does not provide a "safe harbor" from all disciplinary rules that could limit the non-legal service provider's ability to provide services to the lawyer's clients. The Committee observed that its earlier opinions govern the disclosure necessary when a lawyer recommends employment of a business in which the lawyer has a financial interest. *See, e.g.*, N.Y. State 595 (1988). DR 5-104(A) is a more specific conflicts rule that addresses business transactions between lawyers and clients and provides specific disclosure requirements and substantive fairness limitations applicable to such transactions.

A central limitation of DR 5-104(A) is that it applies only to transactions if "the client expects the lawyer to exercise professional judgment therein for the protection of the client." This provision closely parallels the operative language of DR 1-106, which is that the disciplinary rules apply to non-legal services rendered by a distinct, lawyer-owned business "if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship." DR 1-106(A)(2), 1-106(A)(3).

DR 1-106 provides some instruction on how to ensure that the client does not reasonably believe that the non-legal services are the subject of an attorney-client relationship. If a lawyer satisfies the requirements of DR 1-106, so that the client does not reasonably believe that the protections of the attorney-client relationship apply to the delivery of non-legal services, then those non-legal services will not constitute a business transaction in which the client expects the lawyer to be exercising professional judgment for the protections of the client within the meaning of DR 5-104(A).

The Committee did note that it was not suggesting that the mere statement, "I am not representing you in this matter," even in writing, is an automatic safe harbor. Rather, the lawyer must fully comply with the test in DR 1-106(A)(2) or (A)(3).

The Committee also concluded that the protections established by DR 5-101(A), requiring the disclosures noted above, and by DR 1-106(A)(2) and (3), requiring that the lawyer ensure that the client understands that the protections of the attorney-client relationship do not apply to the ancillary business, are sufficient protection when a lawyer refers a client to an ancillary business owned or controlled by the lawyer. The referral is not a "business transaction," it is merely advice, and ensuring the integrity of legal advice is the core concern of DR 5-101(A).

The Committee also noted that the new rules on multidisciplinary practice permit a lawyer to advertise the fact of an affiliation with an ancillary business and the nature and fees of those businesses. DR 2-101(C)(3), 2-102(A), (B). It also contemplates ongoing referral arrangements between the legal and non-legal businesses, although the lawyer is barred from providing a fee to the ancillary company for providing the referral. *See* DR 1-107(A)(2), (B); DR 2-103(B).

Related cases: N.Y. State 687 (1997); Report of the NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* 98-103 (2000) (the "MacCrate Report"); MacCrate Report at 326-36; Penn. Inf. Op. 98-20; Phila. 97-11; MacCrate Report at 339-40; *cf*. Penn. Inf. Op. 93-114 (1994); *In re Neville*, 708 P.2d 1297, 1303 (Ariz. 1985); N.J. 657 (1992); S.C. 93-05; Calif. 1995-141; Ill. 97-7 (1998); Mich. RI-135 (1992); Utah 146A (1995); Restatement (Third) of the Law Governing Lawyers § 126 comment c (2000); Charles W. Wolfram, *Modern Legal Ethics* 481 (2d ed. 1986). *In re Wong*, 275 A.D.2d 1, 5, 710 N.Y.S.2d 57, 60 (1st Dep't 2000); NYSBA *Lawyer's Code of Professional Responsibility*, Preliminary Statement; N.Y. State 709 (1998), N.Y. State 636 (1992); N.Y. State 536 (1981); N.Y. County 693 (1992); MacCrate Report at 333 n.23; N.C. 2000-9.

Opinion: 756
(03/13/02)

Code: DR 1-102(A)(4), 2-101(A), 2-101(D), 2-101(K); EC 2-10.

QUESTION: Must every advertisement of legal services include the street address of the lawyer or firm whose services are being offered or is it sufficient for the advertisement to include only a Web site or e-mail address?

OPINION: DR 2-101(K) requires that "all advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered."

In this case, the Committee concluded that, even in the absence of an explicit definition of "office address," the use of a Web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101(K). Consistent with the goal embodied in EC 2-10, the provision of a street address in the advertising of a lawyer's or law firm's services should facilitate a prospective client's ability to make an intelligent selection of a lawyer. The absence of a street address in a widely disseminated advertisement could be misleading by suggesting a physical proximity to the recipient that does not, in fact, exist and by suggesting the ability to serve in jurisdictions in which the advertising firm or lawyer is not qualified to practice.

The Committee also noted that the requirement of a street address in lawyer advertising serves the same purpose as Judiciary Law § 470, which requires non-resident New York attorneys to maintain an "office for the transaction of law business . . . within the state."

Related cases: DR 1-102(A)(4); DR 2-101(A); DR 2-101(D); *Lichtenstein v. Emerson*, 171 Misc. 2d 933, 656 N.Y.S.2d 180 (Sup. Ct. 1997), *aff'd,* 251 A.D.2d 64, 674 N.Y.S.2d 298

(1st Dep't 1998); *White River Paper Co. v. Ashmont Tissue, Inc.*, 110 Misc. 2d 373, 441 N.Y.S.2d 960 (Sup. Ct. 1981); N.Y. State 709 (1998); *Black's Law Dictionary* 1112 (7th ed. 1999).

Opinion: 757
(07/16/02)

Code: DR 2-101(A); 2-102(A)(2); 2-105(A); 2-105(C).

QUESTION: Must an announcement that a lawyer has been certified in a particular field of law by an organization accredited by the American Bar Association contain the disclaimer set forth in DR 2-105(C) if it is (a) mailed to members of the local bar association, (b) reprinted in the local bar association newsletter distributed to its members, and/or (c) mailed to present and former clients?

OPINION: DR 2-105 prohibits a lawyer from "publicly" identifying himself or herself as a "specialist" in an area of law unless he or she has been certified by certain approved organizations. If the lawyer so states, the lawyer must include a disclosure or disclaimer that (1) the certifying organization is not a government entity, (2) certification is not a requirement to practice law, and (3) certification does not necessarily imply greater competence than other attorneys experienced in the field of law. The Committee held that this rule is applicable even though the lawyer's proposed announcement does not use the word "specialist" or "specializes," but rather uses the term "certified as an Elder Law Attorney."

The Committee concluded that distributing a professional announcement to a number of people large enough to justify a mass mailing or printing in a newsletter is a "public" announcement for these purposes.

Related cases: N.Y. State 704 (1997); N.Y. State 557 (1984); Inf. Op. No. 970024; Tenn. 2001-F-144(b); Iowa No. 90-39 (1991); Mo. Rule of Conduct 7.4; Tenn. Sup. Ct. Rule 8; Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 208 (2002); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990).

Governor Proposes Merger of PERB and SERB

Governor Pataki has submitted with the Executive Budget an Article VII bill to merge the Public Employment Relations Board (PERB) and the State Employment Relations Board (SERB) into a new Public and Private Employment Relations Board (PPERB). It can be found at http://www.budget.state.ny.us/pubs/executive/fy0304littlebook/lb0304.html

According to the Web site, this bill will:

- Abolish SERB by repealing Section 702 of the Labor Law, assign SERB's existing statutory responsibilities to the new PPERB and amend all existing laws to rename the Public Employment Relations Board;
- Provide that PERB Board members continue to serve as members of the new Public and Private Employment Relations Board until their original terms of office expire. Also provide that the terms of the SERB Board members expire with enactment of this bill;
- Provide for several transitional measures required to implement the merger, including the transfer of employees and records to the new agency, and the continuity of the authority, rules and regulations of the Public Employment Relations Board and the State Employment Relations Board;
- Amend section 169 of the Executive Law to adjust the per diem compensation rate of board members.

PERB is established in article 14 of the Civil Service Law and is charged with assisting state and local governments and their unions in resolving labor impasses by providing mediation services. The Board also certifies unions and reviews improper labor practices. SERB, created by article 20 of the Labor Law, provides mediation and related services to private businesses and their unions and is also involved in resolving improper labor practices.

The merger of the Public Employment Relations Board and the State Employment Relations Board creates a single entity responsible for assisting the public and private sectors in resolving labor impasses. This bill establishes a single agency with an appropriately broad policy perspective in the critical area of labor relations. In addition, this consolidation creates efficiencies through shared staffing and it is expected to generate further economies in the future from shared office space.

* * *

The following information is from the state's Web site at <http://www.budget.state.ny.us>. I am reproducing the text portion, but a financial projection follows on the Web site.

Public and Private Employment Relations Board

Mission

The Public and Private Employment Relations Board is the entity that will be created by the merger of the State Employment Relations Board (SERB) with the Public Employment Relations Board (PERB). This merger will achieve General Fund savings while continuing all of the services previously provided by the predecessor agencies. The new Board will resolve labor disputes between employers and employees in both the public and the private sectors. The Board will provide mediation, fact-finding and arbitration in contract disputes for approximately 4,300 public sector negotiating units in New York and will provide mediation and arbitration services in the private sector pursuant to article 20 of the Labor Law. In addition, the Board will settle questions of union representation, conduct hearings on charges of improper or unfair labor practices, designate Management/Confidential positions, and act as a clearinghouse for information on wages, benefits and employment practices.

Organization and Staffing

The Board will consist of a full-time Chair and two part-time members nominated by the Governor for six-year terms. The Board's public sector jurisdiction includes state, county and local governments, certain special service districts, school districts and public authorities and its private sector jurisdiction is delineated in article 20 of the Labor Law. Central offices are in Albany, with additional staff in Manhattan, Buffalo and Brooklyn. The Board will have a workforce of 46 positions for 2003-2004.

Fiscal Background and Budget Highlights

The Board will receive 95 percent of its funding from the General Fund, which will support its mediation, fact-finding and arbitration services and administrative costs.

The Executive Budget recommends $4.6 million in General Fund support for the Board, and the Board's remaining expenses of $257,000 are financed by fees paid by employers and unions for filings and publications.

Program Highlights

The Board will provide three principal services: conciliation, settlement of petitions involving representation and rulings on charges of improper or unfair labor practices.

Conciliation

PERB provided assistance to approximately 340 of the 2,250 state and local contracts negotiated in 2001-2002. PERB followed many of these cases through the full range of impasse resolution steps including: mediation, followed by either fact-finding or arbitration, and conciliation. SERB provided assistance in 83 mediations in that fiscal year.

Representation

Through its Office of Public Employment Practices and Representation, the Board will review all petitions from public employee unions and employers requesting the creation of new negotiating units and may designate them management or confidential. In 2001-2002, PERB received 171 petitions raising questions about representation and conducted 11 elections for representation. SERB handled 28 representation matters in the prior fiscal year.

Employment Practices

The Board will conduct hearings and render decisions on improper practice charges. PERB received petitions on 799 charges of improper employment and negotiating practices in the previous year. In 2001-2002, PERB wrote over 158 decisions and closed, either by decision or settlement, over 795 improper practice cases. Each case must be addressed in a pre-hearing conference attended by the affected parties. If a case cannot be resolved, a Board administrative law judge must rule on the charge after conducting a formal hearing. SERB disposed of 19 unfair labor practice cases in the prior fiscal year.

J.M.

Recent Labor Legislation

By Ivor Moskowitz

2002 N.Y. Laws Ch. 471
Approved August 20, 2002
Effective November 18, 2002

TITLE . . . Requires commissioner of labor to prepare and distribute notice of rights of employees to each and every apparel and garment manufacturer or contractor.

- Authorizes commissioner of labor to prepare and distribute notice of the rights of employees to each and every apparel and garment manufacturer or contractor known to the department of labor; such notice shall be posted in the workplace of each such manufacturer and be in English, Spanish, Chinese and Korean.

2002 N.Y. Laws Ch. 565
New York Professional Employer Act
Approved September 24, 2002
Effective March 23, 2003

- Enacts the New York professional employer act; requires professional employer organizations operating in New York to be registered with the department of labor; provides definitions; exempts collective bargaining agreements; and describes the registration process.

2002 N.Y. Laws Ch. 281
Approved and Effective August 6, 2002

- Defines limited liability companies as "employers" for purposes of provisions of law pertaining to the payment of wages and the minimum wage.

2002 N.Y. Laws Ch. 282
Approved and Effective August 6, 2002

TITLE . . . Requires that certain employer charges of unemployment insurance benefits be charged to the general account.

- Requires that an employer charge for unemployment insurance benefits paid to claimants whose last employment was by an educational institution, the federal government or an out-of-state employer shall be charged to the general account; eliminates provision prohibiting the department of labor from considering the duration of offered employment in determining the eligibility of a claimant for unemployment benefits.

2002 N.Y. Laws Ch. 242
Approved July 30, 2002
Effective November 1, 2002

TITLE . . . Relates to actions for recovery from performance bonds on public work projects.

- Allows affected employees to recover from performance bonds on public work projects against the contractor, the subcontractor, or the issuer of such bond, within one year of the date of the filing of an order by the commissioner of labor or other fiscal officer determining a wage or supplement underpayment.

2002 N.Y. Laws Ch. 350
Approved August 6, 2002
Effective September 1, 2002
New York State Apparel Workers Fair Labor Conditions and Procurement Act

- Enacts the New York State Apparel Workers Fair Labor Conditions and Procurement Act; authorizes SUNY and CUNY, as state agencies, to consider certain labor standards and working conditions when purchasing apparel.

2002 N.Y. Laws Ch. 631
Approved and Effective October 9, 2002

- Relates to contracts entered into by the Schenectady Metroplex Development Authority; each contract the Schenectady Metroplex Development Authority is a party to shall be required to be in compliance with section 220 of the Labor Law.

Section Committees and Chairs

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

Alternative Dispute Resolution

Alfred G. Feliu
(212) 763-6802

Eugene S. Ginsberg
(516) 746-9307

Wayne N. Outten
(212) 245-1000

Continuing Legal Education

Richard K. Zuckerman
(516) 663-5418

Employee Benefits

Mark E. Brossman
(212) 756-2050

Jennifer A. Clark
(315) 422-7111

Equal Employment Opportunity Law

Alan M. Koral
(212) 407-7750

Pearl Zuchlewski
(212) 869-1940

Government Employee Labor Relations Law

Douglas E. Gerhardt
(518) 449-1063

Individual Rights and Responsibilities

Allegra L. Fishel
(212) 245-8909

Theodore O. Rogers, Jr.
(212) 558-3467

Internal Union Affairs and Administration

Robert L. Boreanaz
(716) 849-1333

Labor Arbitration and Collective Bargaining

Arthur Riegel
(516) 295-3208

Labor Relations Law and Procedure

Peter D. Conrad
(212) 969-3020

Donald D. Oliver
(315) 422-7111

Law School Liaison

Robert T. Simmelkjaer
(212) 650-5188

Legislation

Howard C. Edelman
(516) 764-4316

Ivor R. Moskowitz
(518) 213-6000

James N. Schmit
(716) 856-5500

Membership and Finance

William D. Frumkin
(914) 328-0366

Robert Kingsley Hull
(315) 536-9820

Ethics—Ad Hoc Committee

John Gaal
(315) 422-0121

Nancy E. Hoffman
(518) 257-1000, ext. 1443

Publications and Media—Ad Hoc Committee

Judith A. La Manna
(315) 478-1122, ext. 16

Public Sector Book—Ad Hoc Committee

Gary Johnson
(518) 457-2678

Jerome Lefkowitz
(518) 257-1443

Melvin Osterman
(518) 487-7600

Section Newsletter

Janet McEneaney
(718) 428-8369

Publication—Editorial Policy—Non-Member Subscriptions

Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

After we've discussed it, the article should be submitted by e-mail along with a letter granting permission for publication and a one-paragraph bio. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

Editorial Policy: The articles in the *L&E Newsletter* represent the author's viewpoint and research and not that of the *L&E Newsletter* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2003 is $75.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

Editor
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
(718) 428-8369
E-mail:mceneaneyj@aol.com

ISSN 1530-3950

NYSBA
Labor and Employment Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155