MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW

NEWSLETTER

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From The Chair

by Jerry R. Goldstein

As I'm sure you are aware, the area of labor and employment law is constantly evolving through Supreme Court and other judicial decisions like Desert Palace, Inc. v. Costa, through changes in regulations like the proposed changes in federal overtime pay regulations, through procedural changes like the electronic case filing system in the federal courts, and through the passage of new laws like Sarbanes-Oxley. It is therefore essential for us to keep up to date on new developments.

We are in the midst of another busy year of programs and other efforts to attempt to keep our Section members abreast of the current state of labor and employment law. You should have received an updated Section Directory, which includes areas of practice for those members wishing to list that information, we continue to produce excellent newsletters like this one full of articles relevant to our practice areas, we had a fall program with MICPEL on state labor and employment laws, and a fall dinner meeting with the Vice Chair of the EEOC. We also have updated the MSBA's "Employees' Rights in the Workplace" brochure, which is a useful vehicle to distribute to your clients to familiarize them with labor and employment laws and your expertise in that area.

For 2004, we have another program planned with MICPEL on arbitration for labor and employment cases, which is tentatively scheduled for February 11th. We will also sponsor a spring dinner meeting where we intend to have one or more judges speak to us. In addition, we will be presenting a program at the MSBA annual meeting in Ocean City on June 18th. Watch for announcements about all of these programs. I encourage you to attend them as an inexpensive way to keep current in our practice area.

EDITOR'S CORNER

by Albert W. Palewicz

This issue brings to a close another volume of the Section's Newsletter. We continue to have many volunteers to prepare the material published here; and the feedback from members indicates the articles remain of current interest to those in the labor and employment law practice. The issue you hold in your hands is no exception. The materials presented here were prepared by attorneys at the firm of Ober, Kaler, Grimes, & Shriver, with Pamela White serving as coordinator. The focus of the issue is attorney ethics, particularly in the arena of discriminatory practices, and attorney-to-attorney behavior. We hope the material is thought-provoking, and a cause for some self-examination among those who read the material. It can only help the practice of law in general, and our effectiveness for our clients, if we are more willing to learn from each other, and to correct our behavior when it is not professionally conducted.

This issue's article on "NLRB Developments" is by Ed Gutman, of Semmes. Bowen, & Semmes. Ed has prepared a practice alert for several areas of NLRB practice that should be of interest to all those who practice before the NLRB, or advise clients in this area.

You will also find here the Executive Summary and list of recommendation of the Maryland Judicial Task Force on Professionalism's report submitted to the Court of Special Appeals on November 10, 2003. The full report is available on MSBA's web site. We hope the selection here, reprinted with permission of the Task Force, will whet your appetite to delve into the complete document. Its findings and recommendations are very interesting.

The next issue will be sponsored by Whiteford, Taylor, & Preston, with Peter Guattrery as coordinator. The target date for publication of the issue is March 2004. Perhaps this is a

EDITOR'S CORNER (CONTINUED)

good time to mention that we are about halfway through the list of those who have sponsored the newsletter previously and are now doing it for the second time. The practice we are observing is to call upon those who have done the newsletter previously, in the order in which they sponsored issues previously. However, any firm, or group, which has not previously sponsored an issue, can let me know of their interest at any time at 410-962-2811, and they will be slotted in for the next available issue. We have been happy to find two new sponsors over the last six issues, and we hope to find more. The only criterion for eligibility to sponsor an issue is that at least one writer of the sponsoring group be a member of the MSBA Section of Labor and Employment Law. The material should be of interest to members of the Section.

If you are considering sponsoring an issue, please call me at the number above, and I will discuss our "requirements" with you, and answer any questions you may have.

In closing, I wold like to call to your attention in particular, to one of the Section programs mentioned by Jerry in his "From the Chair" message. The MICPEL program on arbitration will be an excellent way to learn about arbitration, its use in the collective-bargaining context, and in the general employment context. The presenters are highly skilled people, willing to share their expertise with those attending. Likewise, the materials distributed at the session will be first-rate, and up to date in both the presentation of law, and the methods of practice in the arbitration arena. It will be well worth your time to attend this one.

Thanks to all the Section members who have supported our programs over the past year, and the very best wishes to all of you for a happy and successful 2004!

ARTICLES

DISCRIMINATORY CONDUCT AS SACTIONABLE LAWYER MISCONDUCT

by Pamela J. White

A special "Ethics 2002" committee of lawyers appointed by the Court of Appeals and chaired by Judge Lawrence Rodowsky has recommended that Maryland's lawyer ethics rules should identify discriminatory conduct as professional misconduct. New Rule 8.4(e) of the Maryland Lawyers Rules of Professional Conduct would instruct:

> It is professional misconduct for a lawyer to:
>
> * * * *
>
> (e) knowingly manifest when acting in a professional capacity, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such actions are prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;
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> * * * *

A proposed new Comment explains:

> [5] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in Paragraph (e). See Md. Code of Judicial Conduct, Canon 3 A (10).

Disciplining lawyers for discriminatory conduct is not a new phenomenon. The Rules commonly invoked against discrimination are Rule 8.4, which defines misconduct, and Rules 1.7 and 1.8 on conflicts of interest.[1]

Attorneys have been sanctioned for racial, ethnic and religious remarks. A Minnesota Court labeled as a "racial slur" a comment by a lawyer that another lawyer was a "sheeny Hebrew."[2] A New York attorney sanctioned for misconduct had submitted an affidavit implying the opposing counsel was connected with the mafia and wrote on the copy served to opposing counsel, "Hi Joe, what do you hear from the mob? Chiao!"[3] The court found these remarks "degrading to the court" and motivated in substantial part by an ethnic bias which appears to have interfered with [the attorney's] judgment sufficiently so as to reflect on his fitness to practice law." The attorney was publicly reprimanded.

In a brief filed with an Iowa court, an attorney argued at length about "members of the black underclass" who wanted nothing more than to "suck at the teat of the welfare state forever," labeled them "paupers," stated that lower-income groups "contain a higher-than-normal percentage of liars and weirdos," and called legal aid attorneys assisting such clients "willfully perverse" for their work.[4] The court held that these remarks were "replete with the most offensive racism and cruel sarcasm about the poor," and censured the attorney.

Sexual harassment by attorneys provide the greatest number of reported disciplinary opinions for discrimination. A New Hampshire attorney had hired a client as his secretary and physically and sexually assaulted her at work.[5]

The attorney entered a room where the secretary/client was working on the floor, locking the door behind him. As the secretary attempted to stand, he kicked her under the chin, picked her up, carried her to a couch, and began to sexually assault her. He stopped only after the secretary, who remembered that the attorney had an arm injury, pushed on his arm to hurt him. The attorney was disbarred for violating Rules 1.7 and 1.8. The conflict of interest punishable under Rule 1.7(b) arose from the fact that the attorney should have known that his relationship with the secretary could result in the need for new counsel and the delay of her proceedings which ensued. The attorney also was sanctioned under Rule 1.8(b) because he knew from his professional contact with her that she was financially and emotionally vulnerable and exploited that knowledge by making sexual advances.

The actions of an Indiana attorney who grabbed a client, kissed her, and raised her blouse were held to "constitute illegal conduct involving moral turpitude and conduct which adversely reflects on [the attorney's] fitness to practice."[6]

Here in Maryland, an attorney who kissed a client against her will and who regularly spanked his secretary, "on more than just a handful of occasions" on her bare buttocks, was sanctioned for prejudicial conduct that adversely reflected on his fitness to practice law in violation of Rule 8.4. Attorney Grievance Comm'n v. Goldsborough, 624 A.2d 503, 505-07 (Md. 1993). In addition to arguing lack of notice, Goldsborough argued that the behavior was not "relevant to the practice of law," hence could not be punished under the ethical codes. Id. The Court noted that the comment accompanying Rule 8.4 states that "[i]n most cases . . . violations of Rule 8.4(d) involve misconduct during litigation." By implication, according to the court, the drafters knew that some such behavior occurred outside the realm of litigation and could still be punished under the ethical codes. Id.

The Goldsborough case is a good example why the general language of §8.4(d) seems ill suited to the occasion. It is awkward at best to debate whether spanking a secretary on her bare buttocks constitutes conduct prejudicial to the administration of justice. Maine's former Chief Justice Daniel Wathen noted that "the discordance between base behavior and abstract professional norms encourages strained defenses and claims of lack of knowledge. In most instances, only the vagueness of the ethical principles permits the assertion of a defense." However, defenses such as lack of notice are particularly unseemly and unlikely to instill public confidence in the profession.

Former Chief Justice Wathen continued: "With respect to discrimination, the goals of prevention and public notice do not seem to be meaningfully advanced through the application of existing ethical provisions. In effect, the general language of the existing codes lies dormant until the public trust has been damaged. Noticeably absent from the codes is any proactive measure to prevent the injury. The public is only truly protected from discrimination when it does not *occur.* To punish an attorney for discrimination after a member of the public suffers the effects can fulfill the retribution interest of the injured party, and may deter other lawyers from similar conduct in the future, but by definition does not protect the injured person."

The solution to add specific anti-discrimination provisions to the ethical codes provides public notice that discrimination is not tolerated by the legal profession, and may help maintain public trust in the profession by reassuring the public that any acts of discrimination which do occur will be punished. At the same time, an anti-discrimination provision will not likely affect a lawyer's traditional prerogative not to represent a potential client because a lawyer's strong personal prejudice may interfere with the duty of zealous representation.

Perhaps more importantly, for lawyers unaware of the risk, an explicit ethics rule will warn lawyers that the risk of discriminatory conduct with clients, colleagues or co-workers is not limited to Title VII claims but extends to the loss of their law practice.

The advance sheets described[7] a Colorado lawyer who sexually harassed three female employees and was suspended from practice. One paralegal worked for four days during which the attorney "engaged in sexually provocative conduct in her presence and made numerous lewd, sexually graphic remarks to her. On one occasion he grabbed her hips and kissed her, according to the Colorado Supreme Court. An associate was touched or grabbed on the breast and the attorney kissed another associate and engaged in sexually suggestive discussions sometimes addressing his sexual prowess or others' sexual abilities. The lawyer had introduced evidence of a prior federal civil judgment against him in favor of the three victims for $1.4 Million, including punitive damages.

The infamous Baker & McKenzie case remains an apt example of the toll which sexual harassment claims can exact on a firm.[8]

These examples demonstrate the need for a rule of professional conduct principally to educate lawyers about the problem.[9] Even as we may share concerns about overregulation of lawyers with more rules, a rule condemning harassment by lawyers will address the worst kind of unprofessional conduct even if it also may constitute civilly actionable gender discrimination in employment.

Such a rule also could help the lawyer's image to address dubious conduct which might not be criminal or even tortious while increasing the bar's sensitivity to discrimination, promote diversity in the legal profession, and necessarily educate and reinforce the notion of proper and civil conduct by lawyers toward each other and toward clients.

Most importantly, the rule is intended to reflect the commitment of bench and bar to fundamental principles of access to justice. Maryland judges already are instructed by their Judicial Canons as to the importance of avoiding even the appearance of discriminatory bias.

Accordingly to Judicial Canon 3, a judge "shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . ." (Canon 3A(9)). Nor may a judge permit "staff, court officials and others subject to the judge's direction and control" to manifest bias or prejudice. Judges also are responsible for lawyers' conduct in proceedings before the court (Canon 3A(10)):

"A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section does not preclude legitimate advocacy when [such] factors are issues in the proceeding."

These guidelines in the Judicial Canons (Md. Rules of Procedure 16-813) were added after the 1989 Gender Bias Committee Report and efforts by the joint bench-bar Select Committee on Gender Equality to inform both the bench and bar of problems of gender bias affecting the judicial system. The Select Committee understood the devastating impact of bias, or the perception of bias, on justice in Maryland. The Judicial Canons were amended "to emphasize the requirements of impartial decision-making and the appearance of fairness in the courtroom."

Articles in a recent issue of the Maryland Bar Journal on Professionalism and Civility concerns noted the need for continuing attention to the subject of discriminatory bias in our judicial system. The October 2001 release of the Report of the Select Committee on Gender Equality which identified issues of race and ethnic bias as well as continuing concerns of gender bias. When Chief Judge Robert M. Bell and the MSBA received the Report and pointed out that Maryland lawyers and judges need to understand the consequence of discriminatory conduct, that "public trust and respect for the rule of law is undermined whenever justice is seen to deliver less to one group than another." There can also be "no room at the bar for bias among colleagues who have taken an oath to act fairly and honorably and who expect to interact with clients, judges and colleagues with civility and collegiality."

The October 2001 Report was most significant for its attention to troubling perceptions of racism in our justice system. The Report prompted Chief Judge Bell to create a new Court Commission on Racial and Ethnic Fairness in the Judicial Process, chaired by Court of Appeals Judge Dale R. Cathell. In his April 2002 Order creating the new Anti-Bias Commission, Chief Judge Bell reiterated "that an essential element of public trust and confidence requires that the judicial process not only be, but also be seen to be, without racial or ethnic bias."

Now, the Rodowsky Committee takes a further step to condemn bias in the new text of ethics Rule 8.4. The perception of prejudice in our legal system becomes a critical reason for a black-letter ethics rule condemning biased behavior as lawyer misconduct, thereby promoting equal access to justice and respect for the rule of law by all participants in the legal process.

(Endnotes)

[1] Several states (e.g. New York, Minnesota) and the District of Columbia have ethics rules condemning manifest lawyer bias as ethical misconduct. In the District of Columbia, Rule 9.1 prohibits employment discrimination by lawyers.

[2] *See In re* Williams, 414 N.W.2d 394, 397 (Minn. 1987.

[3] *In re* Kavanaugh, 597 N.Y.S.2d 24, 25 (N.Y. App. Div. 1993).

[4] Sonksen v. Legal Services Corp., 389 N.W.2d 386, 388-89 (Iowa 1986).

[5] Otis' Case, 609 A.2d 1199, 1200-01 (N.H. 1992). The attorney had also made sexually inappropriate remarks to five other clients. *Id.* Four of the five sought divorces, so were "vulnerable." *Id.* at 1202. All but one of the five dismissed the attorney, as a result of the remarks, before obtaining the result for which the attorney was hired. *Id.* In reciting the rules and violations, however, the court concentrated on the attorney's behavior toward the secretary/client. *See id.* at 1202-03.

[6] In re Adams, 428 N.E. 2d 786, 787 (Ind. 1981).

[7] May 24, 1999 BNA Employment Discrimination Reporter.

[8] The San Francisco jury heard that Mr. Greenstein grabbed one secretary's breast while dropping M&M candies into the pocketof her blouse. The allegations described a second secretary's situation when he allegedly held her arms back, thrust her chest forward, and demanded to know which breast was larger. The jury's award of $50,000 in compensatory damages, and more than $7 Million in punitive damages, was followed by an award of attorney's fees exceeding $1.8 Million.

[9] Here in Maryland, the Court of Appeals reminded us, in Chief Judge Robert Murphy's 1996 opinion in *Molesworth v. Brandon*[4], that at least 34 Maryland statutes, one executive order, and one constitutional amendment, prohibit discrimination on the basis of sex; the primary employment discrimination statute in the state also expresses in its preamble "the policy of the State of Maryland...to assure all persons equal opportunity in receiving employment...."

GREATER PROTECTIONS OR BREAK FOR BUSINESSES? STATUS OF DOL'S PROPOSED CHANGES TO OVERTIME REGULATIONS

by Deborah Eisenberg
Brown, Goldstein & Levy, LLP

The Bush Administration claims its proposed regulatory changes to the definitions of "bona fide executive, administrative and professional" employees exempt from overtime under the Fair Labor Standards Act ("FLSA") will increase overtime protections for 1.3 million low-wage workers. *See* Summary of proposed regulations at www.dol.gov.

Workers' rights advocates decry the proposed regulations as yet another break for big business that will make it easier for employers to require employees to work longer hours without paying overtime compensation, and that 8 million employees could lose their eligibility for overtime. *See* Economic Policy Institute, Briefing Paper, *Eliminating the Right to Overtime Pay: Department of Labor Proposal Means Lower Pay, Longer Hours for Millions of Workers* (2003) (available at www.epinet.org).

On November 21, 2003, Senator Arlen Specter, the chief Republican opponent of the new rules, agreed to drop a provision in an appropriations bill that would have killed the regulations. Although opponents to the proposed rules say the battle is not yet over, the DOL may issue a final version of the proposed rules as early as December 2003.

Although the final outcome of this heated battle may be months or years away, some changes to the current definitions of exempt "executive, administrative and professional" employees appear to be only a matter of time.

Summary of Proposed Changes

Under current law, qualifying for exempt "executive, professional or administrative" status generally requires three factors: 1) the employee's salary must meet a minimum salary threshold; 2) the employee must be paid a fixed salary, not an hourly wage; and 3) the employee's job duties must primarily involve managerial, administrative, or professional duties (the "duties test").

Salary Tests

One change applauded by all is the proposed increase in the minimum salary threshold from $155 to $425 per week ($22,100 per year). Employees who earn below this amount are automatically entitled to overtime pay. Workers' advocates say the increase does not go far enough because the last time the salary threshold was changed was in 1975. Adjusted for inflation, the 1975 minimum threshold of

$250 today equals $774 per week – nearly twice as high as the proposed threshold.

The new rules also provide a new exemption for "highly compensated employees" – salaried employees who earn $65,000 a year or more generally would be exempt from overtime.

Professional Employees

The key changes to the "professional" exemption from overtime include:

· Substitution of work experience for academic education: The rules eliminate the requirement that professionals have a prolonged course of scientific or specialized intellectual education, and permit work experience, presently undefined, to qualify an employee as a professional.

· Expansion of the kinds of occupations considered "professions": Some occupations that previously were not considered "learned professions" or "creative professions" have been identified as such under the new rule. For example, the rule defines writers for newspapers, news magazines, television news programs as exempt creative professionals.

· No Discretion Required: The proposed rules eliminate any requirement that professionals exercise discretion or independent judgment in their work.

Administrative Employees

The key changes in the exemption for "administrative" employees include:

· Weakened duties test: The proposed regulations eliminate the requirement that the work be of "substantial importance" and eliminate the requirement that the employee exercise "discretion and independent judgment."

· "Position of Responsibility" test: The proposed rules create a new "position of responsibility" test, defined broadly as: (1) performing work of substantial importance *or* (2) performing work requiring a high level of skill or training, which can be satisfied by on-the-job training.

· Insurance Adjusters Singled Out: The proposed rules single out insurance claims adjusters as exempt administrative employees. Under the old rules, some courts had found insurance claims adjusters to be routine production workers entitled to overtime pay.

Executive Employees

The proposed changes for "executive employees" include:

· No Discretion Required: The rules eliminate the requirement that the employee exercise independent judgment or discretion;

· Elimination of 20% Primary Duty Test: The proposed rules broadly define "supervisor" to include those who spend most of their time performing manual tasks and routine sales work, so long as they also spend some time directing the work of others. The old rules required that an employee perform non-exempt duties no more than 20% of the time.

· "Set-Up" Work: The rules add manufacturing "set-up" work as an exempt supervisory duty.

In sum, although an increase in the minimum salary threshold is long overdue, the other changes in the proposed regulations will make it easier for employers to classify certain employees presently entitled to overtime pay as bona fide executive, professional or administrative employees as exempt from overtime pay.

Employment lawyers should stay alert for the final resolution of this battle and be prepared for questions from clients about how the new regulations affect them, not to mention a new landscape of litigation arising from disputes about the applicability and scope of the new rules.

It also remains to be seen whether the Maryland regulations – which presently mirror the current federal definitions for executive, professional and administrative exemptions – will similarly be changed. If the Maryland regulations remain the same, Maryland employers will still be required to comply with the old definitions.

MICPEL, GOLOMB ANNOUNCE NEW PUBLICATION:

"DRAFTING EMPLOYMENT DOCUMENTS IN MARYLAND"

Anticipating publication early in 2004, Editor and co-author George E. Golomb has assembled a group of leading Maryland employment lawyers to write a dozen chapters and representative documents on a range of employment subjects. Summaries of their submissions are featured below.

Baltimore-based George Golomb describes certain of his editing challenges in excerpts from his Introduction to the new volume:

> There is a substantial amount of case law, statutory law, and regulations which apply to the employment relationship. It would be impossible to fit all of this within the covers of one reference work. As a result, the editor of any book dealing with employment law is bound to be highly selective in what is included. Hopefully, this book will give lawyers and employers a good starting place in considering what language to consider and include in employment law documents. Like a high school or college graduation, this book is truly a Commencement, a beginning which will hopefully lead to good and thoughtful work to follow by those who use the book.

Employment Agreements

This chapter provides guidance, philosophical and legal, on drafting employment agreements in Maryland, where the employment relationship is governed by the 'at-will' employment doctrine. The chapter discusses generally the parameters of the 'at-will' doctrine and how the drafting of an employment contract relates to that doctrine.

Employment Applications and Drug Testing

This chapter reviews the items that should be considered for inclusion in an Employment Application. There are very specific requirements within the State of Maryland regarding what can and cannot appear on an employment application.

Employee Recordkeeping in Maryland

Employers are required to maintain various records under a variety of state and federal laws. The purpose of these laws is to protect employees, to provide the government with information about the American workplace, and to ensure employers' compliance with the law. The chapter titled Employee Recordkeeping – Federal and Maryland Compliance, provides a summary of the sources of these requirements and the basic record keeping requirements under Federal and state law.

Sensitive Records

The chapter offers practitioners in the area of Labor and Employment a look at various state and federal legal authorities on the disclosure of sensitive records. The chapter provides an illustrative look at some of the more important state and federal statutes protecting the privacy of private individuals.

Employee Handbooks: What to Include?

The chapter on "Employee Handbooks" reviews the items that should be considered for inclusion in an employee handbook. With regard to employee handbooks, it is not legally required, nor necessarily appropriate for every employer to have an employee handbook. Whether an employer should develop a handbook may depend on such factors as the size of the company, the type of company, and whether a union represents the company's employees. Assuming an employer decides it should have a handbook, this chapter discusses the many choices to make as to what should be included.

Separation and Settlement Agreements

The chapter focusing on Severance and Settlement Agreements is a must-read for any attorney who handles the tricky area of employee departures. The chapter discusses terms that are frequently found in settlement and severance agreements, and provides negotiating and drafting practice pointers for both employers' and employees' attorneys.

Drafting Mandatory Arbitration Agreements

In today's litigious society, employers have increasingly turned to the implementation of mandatory arbitration programs in their non-union workplaces. This chapter examines reasons why an employer might find it beneficial to implement a mandatory arbitration program in its workplace, and also explores certain potential disadvantages to doing so. Further, this chapter discusses important issues for employers and practitioners to consider when drafting a mandatory arbitration agreement, in order to attempt to insulate the agreement from future attacks on its enforceability.

Resolving Sexual Harassment Complaints

Employee complaints of sexual harassment remain a large area of concern and confusion for employers. Trying to determine if employee misconduct constitutes sexual harassment, resulting in employer liability, can be a difficult exercise as the line moves between playful office banter and offensive conduct of a sexual nature. This chapter discusses the various concerns and dilemmas employers are confronted with in this evolving area of the law.

Employer Liability for Workplace Violence

From hiring employees to electronic surveillance in the workplace, this chapter contains insightful information on causes of action arising from workplace violence and the best methods for preventing workplace violence before it happens. The chapter addresses employer liability for workplace violence, ways to reduce liability, and the legal consequences in assuring a safe working environment.

Leave Issues

The Family and Medical Leave Act (FMLA) sample policies are extremely important for Maryland lawyers because any employer who has a written policy regarding attendance or absenteeism must include in that policy information regarding its employees' rights under FMLA. This chapter discusses the required FMLA policies, and includes both a brief FMLA policy that can be included in an employee handbook as well as a more detailed version.

THE MARYLAND JUDICIAL TASK FORCE ON PROFESSIONALISM REPORT AND RECOMMENDATIONS

EXECUTIVE SUMMARY

On April 25, 2002, in response to a recommendation by the Maryland State Bar Association that all licensed Maryland attorneys be required to complete a mandatory continuing legal education course on professionalism, Chief Judge Robert M. Bell of the Maryland Court of Appeals established the Maryland Judicial Task Force on Professionalism. The Task Force is composed of twenty-four Maryland lawyers, one from each Maryland jurisdiction, and a lawyer reporter.

After an initial organizational meeting, the Task Force, lead by Court of Appeal Judge Lynne A. Battaglia, embarked upon a statewide "self study" of the concept of professionalism. This was accomplished through a series of town meetings held in each Maryland jurisdiction. The first meeting was held in September, 2002, in Howard County and the last in July, 2003, in Cecil County. Chief Judge Bell was present at each town meeting, along with Judge Battaglia, task force reporter Norman Smith, and Jacqueline Lee, assistant to Judge Battaglia. Along with local lawyers, many District, Circuit, and Appellate judges participated.

Chief Judge Bell greeted participants at each town meeting and explained the purpose of the Task Force — to learn from lawyers about their perception of the state of professionalism among attorneys and to investigate the potential need for expansion of the professionalism course (mandatory for new bar admittees) to experienced attorneys. Judge Battaglia chaired each meeting and facilitated the discussion.

At each town meeting, attendees filled out questionnaires calculated to give the Task Force feedback on the subject of professionalism from the point of view of each individual participant. Although the questionnaires were anonymous, participants provided information about their jurisdiction of residence, and identified themselves by race, gender, and as an experienced or new attorney. After the questionnaires were completed, Judge Battaglia began each discussion by asking the group to define the concept and meaning of professionalism. Typically, participants identified professionalism with such traits as compliance with the Rules of Professional Conduct, civility, courtesy and respect for colleagues, trust among colleagues, competence as attorneys, dignity, punctuality, concern for client welfare, candor with the court, honesty, integrity, and fairness with both court and counsel.

To guide the discussions, Judge Battaglia asked the participants to keep in mind the indicia of professionalism identified, and by those standards, to contrast the state of professionalism in past years with today. In many jurisdictions, the group heard from lawyers with as many as fifty years experience at the bar. Without exception, these senior practitioners opined that professionalism has declined over the years. The decline is marked by rancorous discovery disputes; a loss of trust between lawyers (resulting in an increase in "defensive practices," for instance, the perceived need to memorialize every discussion with a confirmatory letter); a breakdown of the traditional mentoring of new lawyers; an increase in the unauthorized practice of law; a lack of civility in and out of the courtroom; the failure of courtroom attorneys to treat witnesses and each other with respect; and an increase in lawyer advertising.

In addition, town meeting participants noted a decline in the number of attorneys participating in bar-related activities, observing that when attorneys do not see one another in these settings, the need to get along declines. In this respect, it is worth noting that almost all attendees in rural jurisdictions felt that, among their colleagues, professionalism is at a high level. This was attributed

to the fact that in small towns, judges and lawyers know and interact with one another, professionally and socially. In these jurisdictions, there is a near unanimous perception that out of town lawyers lack the courtesy and civility that local practitioners accord each other and the judges. In sum, most lawyers agreed that the smaller the bar and the greater involvement of the judges, the greater the civility and professionalism among its members.

Clients' unrealistic expectations were another identified contributor to unprofessional behavior. Clients often expect that lawyers will prosecute their cases with the same degree of animus toward opposing counsel that the litigants feel for one another. As a result, lawyers often identify too closely with their clients' causes, losing the ability to act as problem solvers. Many town meeting participants who were experienced lawyers recalled that in an earlier time, lawyers were able to differentiate between their respective clients' feelings and their own relationship with opposing counsel. As a result, many cases were worked out in the early stages, for the benefit of all.

Judges also came under criticism oftentimes for high-handed, arrogant behavior toward lawyers. By way of illustration, lawyers cited seemingly small matters such as scheduling a docket to begin at a certain time and then taking the bench an hour later. Participants also felt that some judges themselves fail to adhere to the highest levels of professionalism in the courtroom and to hold attorneys practicing before them to the same high standard. Many participants expressed frustration with the reluctance of local judges to sanction bad behavior. On the other hand, participating judges noted that the State's appellate courts often reverse the imposition of sanctions, signaling to them a distaste for this type of discipline.

At the conclusion of all town meetings, Judge Battaglia convened the entire Task Force to consider the results of the town meetings and to formulate recommendations to the Court of Appeals. The Task Force agreed that professionalism is an important core value that must be advanced throughout the legal process. Toward this end, the Task Force recommends that a Professionalism Commission be established and that the Commission, drawing on the findings of the Professionalism Task Force, identify indicia of professionalism and develop standards of professional conduct to be published to the bench and bar throughout the State.

The Task Force strongly believes that judges must foster the expectation that lawyers will behave appropriately in the litigation of both criminal and civil actions and in nonlitigation contexts, and must take firm action against unprofessional conduct. Realizing that the judiciary is reluctant to act on ill defined standards, the Task Force also recommends the development and formal definition of appropriate sanctions for adoption by the judicial conference.

Notably, the Task Force does not recommend a mandatory course in professionalism for all licensed Maryland attorneys. The Task Force does, however, recommend that the Commission, in conjunction with the MSBA, develop an appropriate professionalism course to be used as a referral tool for judges who identify unprofessional behavior.

The Task Force recognizes the natural tension between our duty as lawyers to zealously represent our clients and the emerging duty to act in a professional and civil manner in our representation. But, as one participant put it, zealous representation does not mean that one must become a zealot. The Task Force is convinced that effective representation of our clients is not only compatible with a high level of professionalism, but that our clients are best served by a professional, problem solving approach to the practice of law.

RECOMMENDATIONS

The major premise underpinning the following recommendations is that professionalism is an important core value that has been prioritized by the Chief Judge and the Court of Appeals of Maryland in the appointment of a Professionalism Task Force and now must be manifested throughout the litigation process and its institutions. Professionalism is a joint concern of the Bench and Bar, and it is imperative that the Chief Judge be a highly visible actor in the process.

Recommendation 1:
A Professionalism Commission should be established made up of the following members: a lawyer representative from each Maryland County and Baltimore City; representatives from all levels of the Maryland judiciary; the president of the Maryland State Bar Association or the president's designee; a representative from the Attorney Grievance Commission; a representative from the Rules Committee; a representative from the Judicial Disabilities Commission, and a representative from the University of Maryland and the University of Baltimore Law Schools.

Recommendation 2:
Judges on all levels must become effective role models by adhering to the highest levels of professionalism in the courtroom and community and by holding all attorneys practicing before them to the same high standard. Judges' active participation with the Bar and as involved members of their respective communities will foster a better public image for the legal profession and alleviate unnecessary isolation and tension between the Bench and Bar.

Recommendation 3:
Drawing on the findings of the Professionalism Task Force, the Professionalism Commission should, as its first task, identify in-

dicia of professionalism and develop standards of professional conduct to guide its work in the areas that it will explore and shall publish these standards to the Bench and Bar throughout the State.

Recommendation 4:
The Professionalism Commission shall develop professionalism guidelines and sanctions for adoption by the judiciary, reflecting the expectation that lawyers will behave appropriately in the litigation of both criminal and civil actions and in non-litigation contexts.

Recommendation 5:
The Professionalism Commission shall submit its findings and recommendations, for comment and suggestion, to the Rules Committee, the Maryland State Bar Association, the Attorney Grievance Commission, the Judicial Disabilities Commission, and to any other entities that the Professionalism Commission deems appropriate.

Recommendation 6:
To raise the level of professionalism in the litigation process, the Professionalism Commission should consider and promulgate recommendations to alleviate what lawyers throughout the state identified as a major problem: discovery abuse. In this regard, the Professionalism Task Force believes that previously issued Discovery Guidelines publication should be updated and reissued throughout the State to guide the Bench and Bar and to encourage consistency in the resolution of disputes.

Recommendation 7:
The Professionalism Task Force also recommends the appointment of Discovery Masters, perhaps from the ranks of retired judges or lawyers, to address discovery disputes and to recommend solutions on a real-time basis. Judges, statewide, should also encourage lawyers in each case, especially cases in Circuit Court, to confer early in the litigation process, to develop a pretrial schedule, and to expedite and manage the litigation process.

Recommendation 8:
The Professionalism Task Force believes that unprofessional behavior should be sanctioned formally or by informal intervention. Realizing that the judiciary is reluctant to act on ill defined standards, the Task Force recommends the development and formal definition of appropriate sanctions for adoption by the judicial conference.

Recommendation 9:
The Task Force does not recommend a mandatory course in professionalism for all licensed Maryland attorneys. The Task Force does, however, recommend that the Professionalism Commission, in conjunction with the MSBA, develop an appropriate professionalism course to be used as a referral tool for judges who identify unprofessional behavior.

(Recommendations 10 and 11 ommitted.)

Recommendation 12:
Attorneys attending town meetings in every jurisdiction identified a rise in the unauthorized practice of law as a contributor to the decline in professionalism. Therefore, the Task Force recommends that the Professionalism Commission work with the legislature and Attorney Grievance Commission to better define the unauthorized practice of law in order to better enforce sanctions against it.

Recommendation 13:
In each town meeting, attorneys identified a breakdown of the traditional mentoring of new lawyers as another contributor to the decline in professionalism. The Task Force feels that there are many mentoring programs available that have been underutilized, perhaps because they are not well known. The Task force recommends that information about these programs be given wider dissemination and that participation in existing programs for mentoring of inexperienced lawyers be encouraged by the Bench and Bar.

NLRB DEVELOPMENTS

By: Edward J. Gutman
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Can Employers Sue NLRB if the Board Files a Complaint and Loses?

This is a question that employers often ask when the government files an unfair labor practice Complaint but fails to prove its case. The Equal Access to Justice Act ('EAJA") is a federal law that permits awards of attorneys' fees and expenses against the NLRB in such cases if the Board cannot show that the underlying unfair labor practice case was substantially justified in the first place.

The difficulty in ever getting the Board to hand over an employer's costs of defending itself was shown in a recent case in which the company was charged with an unfair labor practice for firing an employee who had solicited a fellow employee to take a job with another company - a union contractor. The Board dismissed the Complaint and said that the employer was justified in firing a disloyal employee because the employee had no right to recruit the fellow employee to work for another employer. The employer then filed an EAJA claim to recoup the money that it was forced to spend to defend against this unsubstantiated claim arguing that

there was no substantial justification for the Labor Board to prosecute the underlying unfair labor practice case.

In denying the employer's claim, the Board explained that substantial justification does not mean substantial probability of prevailing on the merits, and that a government agency such as the NLRB should not be deterred from litigating "close questions or new theories of law." On this basis, even though the Board had ruled that the employee's disloyalty justified his dismissal and dismissed the Complaint, it refused to reimburse the employer for its costs, paradoxically holding that there was substantial justification for the allegation that the employee could not be fired for his conduct even though it harmed his employer. Abell Engineering & Manufacturing, Inc. (25-CA-25966(E), 26263(E); 340 NLRB No. 19)

Can an Employer Forbid Employees from Discussing their Wages?

Many employers are so uneasy about allowing their employees to discuss their wages that they may adopt policies making it a disciplinary offense. However, despite what may seem like a perfectly reasonable policy for an employer to adopt, the NLRB finds rules which restrict employees from discussing earnings among themselves unlawful. According to the Board, employees have a protected interest in discussing their wages with co-workers and to discourage them from doing violates their rights under the National Labor Relations Act.

This was the Board's holding in a case decided in September 2003. There an employer promulgated a rule forbidding employees from discussing wages and threatened discharge and other reprisals should they violate this policy. In addition, this employer announced that it would not discuss wages with employees, even in their probationary period. The Board held that the employer violated employees' rights to engage in activity that is protected under the National Labor Relations Act by directing them not to discuss their wages among themselves and telling them that the company would not discuss wages with them. Custom Cut, Inc., 340 NLRB No. 17 (September 11, 2003).

If You Fire an Employee for Misconduct, You Better be Able to Prove it

The extent of an employer's risk in firing an employee who had engaged in union activities was demonstrated in a case decided by the NLRB in September 2003. In this case, the employer issued a verbal warning to an employee who the employer genuinely believed had engaged in misconduct in the course of his union solicitation activities. When the employer was charged with firing the employee for his union activities, it claimed that the employee was fired for a legitimate non-discriminatory reason - his misconduct. The problem was while the employer thought that the employee had engaged in misconduct, it could not provide credible evidence that the employee had actually engaged in the alleged misconduct. The Board cited the Supreme Court's decision in NLRB v. Burnup & Sims, 379 U.S. 21 (1964), in which the Supreme Court affirmed a Board rule that an employer commits an unfair labor practice by discharging or disciplining an employee based on its good-faith, but mistaken, belief that the employee engaged in misconduct in the course of engaging in union activity. La-Z-Boy, Midwest, a Div.of La-Z-Boy Inc., 340 NLRB No. 10 (September 9, 2003)

Questioning Employees About a Pending Lawsuit can be Risky Business

The Board made this clear in a recent case in which the employer interrogated employees about a private lawsuit that had been filed against it. The lawsuit pertained to protected activities of the potential employee witnesses who were interviewed. The Board found that the same rules applied to this interrogation of employees as when an employer questions employees about a pending NLRB case. In such cases, the employer is required to comply with the interview standards that the NLRB set in Johnnie's Poultry, 146 NLRB 770, 775 in 1964, enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). Those rules permit an employer to interrogate employees about pending NLRB litigation but the employer must first tell them that the interview is voluntary and that there will be no discrimination or retaliation against them if they refuse to be questioned or because of any answers they give. Here the employer did not give these notices and the Board said that it was guilty of an unfair labor practice. Observer & Eccentric Newspapers, Inc., (7-CA-44695; 340 NLRB No. 18) Detroit, MI Sept. 11, 2003.

Can An Employer Give Different Benefits to Union Employees than to Non-union?

The Board so held in a recent case when an employer offered less severance pay to its union employees than it offered to other employees. When the Respondent divested itself of its marine transport business, it applied a severance package to terminated unrepresented employees which provided, among other benefits, two weeks of severance pay for each year of service up to 20 years, and offered the represented employees one week of severance pay per year of service. The severance package was rejected and the employees represented by the Union received no severance pay. They claimed that the company offered them less than their non-union colleagues in retaliation against the union's past bargaining positions.

Since a case decided in 1948, the NLRB has held that employers may offer different benefits to represented and unrepresented groups of employees as part of its bargaining strategy. Shell Oil Co., 77 NLRB 1306, 1310 (1948). The Board wrote: "the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, . . . the record does not establish that the Respondent engaged in such conduct here." In this case, the Board held that there was no evidence that the company was motivated by antiunion animus when it offered lower severance pay to employees represented by the union. Sun Transport, Inc., a wholly owned subsidiary of Marine Investment Corp., et al., (4-CA-26705; 340 NLRB No. 8) Philadelphia, PA Sept. 8, 2003.

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