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the Checkoff

The Florida Bar
Vol. XLV, No.1
October/November 2005

The Labor & Employment Law Section

INSIDE:

Blowing the Corporate Whistle: The Sarbanes-Oxley Act Not Your Garden-Variety Discrimination Claim

By ©Kathleen M. Bonczyk, M.B.A., Esq.

Employees of publicly-traded companies have been given a powerful weapon against retaliation: § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, codified at 18 U.S.C. § 1514A. This statute, also known as the whistleblower provision of the Sarbanes-Oxley Act, provides a civil remedy for employees of publicly-traded companies and their wholly-owned subsidiaries.

While businesses have instituted changes in their accounting models to comply with Sarbanes-Oxley, it is important that they implement best practices in the human resources function. This is not only because of the stigma associated with a whistleblower alleging wrongdoing involving Sarbanes-Oxley, a statute that is intended to protect shareholders from fraud in the wake of recent corporate scandals,[1] but also because the legal standard relative to Section 1514A claims is different from that of the general body of employment discrimination law.[2] The statute provides its own

See "Sarbanes-Oxley Act" page 7

Chair's Message

As the new Section Chair, I am pleased to report that our Section continues to do quite well. Currently, our membership is above 2,250 and our CLE programs have earned respectable profits. Consequently, I want to express my sincere gratitude to Past Chair, Susan Dolin, all of last year's Officers, Committee and Program Chairs, as well as our Program Administrator, Angela Froelich, for all of their hard work and dedication.

Despite this good news, I regret to announce that there are some foreboding developments looming on the horizon for our Section. These developments, although not of our making, will be both unpopular and imposed against us despite our protests. Specifically, I am speaking of recent budget amendments that are being imposed by The Florida Bar's Board of Governors ("BOG") and which will take effect in 2006. Although both our Section, and the Bar's Council of Sections, vigorously resisted these budget amendments, they were adopted by the BOG at the June 23, 2005, Annual Meeting. These amendments are briefly outlined below.

As most of you know, our current Section dues are $25 per year. We are pleased to report that while other Sections have raised their dues to as high as $50 per year, our

See "Chair's Report" page 12

Guidelines For An Effective Cross-Examination: The Science Behind The Art

By Gregory A. Hearing and Brian C. Ussery

Cross-examination is a demanding skill for even the most seasoned trial attorneys. The importance of a trial attorney's ability to dissect a witness' direct testimony, and expose its weaknesses in a manner in which a jury can understand cannot be underestimated, and is often the difference between a favorable and an unfavorable verdict. Although cross-examination is often viewed as an art, rather than a science, the following guidelines can assist even novice trial attorneys in conducting an effective cross examination.

1. Preparation is Key: As is true in nearly all efforts in the legal profession, proper preparation is the key to success in cross-examination. Effective cross-examiners are "quick on their feet" and are able to lead their witness down a pre-selected path to obtain the information that is vital to their case or defense. Such skills are only possible through thorough knowledge of the facts of the case, as well as the law upon which the case is based. In an ideal world, the examining attorney will already know all the information he or she elicits from a witness during cross-examination. Preparation allows the trial attorney to clearly lay out that information for the jury. However, in many cases, unexpected responses arise. In those circumstances, preparation is the key to quickly devising a strategy for the use of such unexpected information. As Louis Pasteur said, "chance favors the prepared mind."

2. Cross-Examination is Not Always Necessary: Preparedness also allows a trial attorney to determine perhaps the most important issue with regards to cross-examination - whether or not to cross-examine the witness at all. If the potential benefits of a cross-examination are outweighed by the potential detriments, or the potential for allowing the witness to redeem a poor direct testimony, the cross-examination may not be necessary or even desired. A trial attorney must examine whether the direct testimony has helped or hurt his or her case, whether a cross-examination will help his or her case, whether the cross-examination will allow the witness to redeem or clarify poor testimony or include omitted testimony, and/or whether cross-examination may allow a witness to resurrect credibility lost during direct examination. The decision to stand up and say "no questions" after direct is very difficult but may be the best choice.

3. Have a Goal for Your Effective Cross-Examination: Effective cross-examinations accomplish a goal to the benefit of a trial attorney's case or defense. The specific goal will be dictated by the specific knowledge each individual has or is expected to have. The following are common goals of cross examination:

a) Highlight inconsistencies with other witnesses' testimony;

b) Demonstrate bias on the part of the witness;

c) Attack the witness' credibility through impeachment or other means;

d) Highlight errors or confusion in the witness' testimony (but be careful not to allow the witness to correct or clarify);

e) Identify the portions of your own case that the witness can corroborate;

f) Identify and highlight portions of the witness' testimony that bolster your own case or defense.

4. Have a Plan for Your Effective Cross-Examination: The most effective method in reaching the determined goal is by formulating a plan to elicit relevant knowledge from the witness. Prepare for an ideal cross-examination by establishing the basic points which must be established through your questioning. A trial attorney may find it helpful to construct an outline detailing the plan of action for the cross-examination of each witness, creating bullet point lists of topics to be discussed and 2-3 word summaries for each question to be asked. Identify the potential areas for impeachment prior to the examination, and make a reference list for each witness of exhibits and deposition testimony that may be used for impeachment. In short, plan and organize for an ideal cross-examination.

5. K.I.S.S. (Keep It Simple, Stupid): When devising the plan for your cross-examination, remember to keep it simple. Even the most intricate and complicated cases can be summarized into simple points which will ultimately determine the outcome. Cross-examination is no different. A complicated series of questions can not only confuse the jury, but also the examining attorney. Determine your goals, develop a plan to obtain those goals, and determine the simplest means of executing that plan.

6. Learn the Intricacies of Impeachment: Nothing can taint a witness' direct testimony like the loss of credibility that occurs through a

The CHECKOFF

The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

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proper impeachment. On the flip side, nothing can ruin a trial attorney's professional credibility like an admonition from the court after a botched impeachment attempt. The rules and techniques for impeachment are a seminar unto themselves. Suffice it to say, a trial attorney should become proficient with them in order to use them as his or her weapon, and to avoid the pitfalls that come from their improper use. See Fed. R. Evid. 607 (governing who may impeach a witness); Fed. R. Evid. 608 (governing impeachment based on evidence of character and/or specific instances of conduct); Fed. R. Evid. 609 (governing impeachment based on evidence of conviction of a crime); and Fed. R. Evid. 610 (governing impeachment based on religious beliefs or opinions).

7. Learn the Intricacies of Attacking Credibility Through Means Other Than Impeachment: Impeachment is not the only mechanism for attacking a witness' credibility. Some witnesses destroy their own credibility through evasive and unresponsive answers. A skillful trial attorney need only let the witness do the work for him or her in those circumstances. Other witnesses may give seemingly bullet-proof testimony on direct, only to be discredited based on the financial arrangements which secured their testimony, their personal, professional, or financial interest in the outcome of a case, the means by which they prepared for their testimony, their interaction with other witnesses prior to trial and since the event which led to trial, or their relationship to the opposing party. Even in circumstances where cross-examination seems unnecessary, it may be beneficial to conduct the examination for the simple purpose of eliciting these facts for the jury to consider.

8. Take Control of the Courtroom With Your Questions and Your Presence: During direct testimony, a trial attorney should remain in the background and focus the spotlight on the witness. To the contrary, cross-examination is the time for the attorney to step to the forefront, and focus the attention of the jury on what he or she has to say. Cross-examination is your opportunity to testify without being sworn or taking the witness chair. In fact, in conducting an effective cross-examination, a trial attorney can be his or her client's best witness. Here are some methods for accomplishing this goal:

a) Control the Witness With Leading Questions: Leading questions are those which suggest the answer. In other words, leading questions are simply veiled statements of fact, which request a simple "yes" or "no" response from the witness. Leading questions allow the trial attorney to emphasize the points he or she wants the jury to focus on. Those points can be deemphasized or explained away by a witness who is allowed to have a dialogue with a jury. As such, a trial attorney should ask questions in such a manner as to preclude a witness from expounding on his or her answer, or providing a narrative response. Think of it this way. A trial attorney should use questions on cross-examination as an opportunity to testify to the jury, and use the questions to place the witness in the position of simply agreeing or disagreeing with the trial attorney's statements. For example: Leading questions seem like a more effective means of cross-examining a witness, don't they?

b) Direct the Jury With Leading Questions: Just as a witness can be controlled through the use of leading questions, so can the jury. Since leading questions are simply "veiled statements of fact," they can be used to convey a message to the jury. Just as closing arguments can be used to convey the picture of the case to the jury, a cross-examination comprised of leading questions can be used to convey a witness' weaknesses and the strengths of your client's case or defense.

c) Control a Witness With Short, Concise Questions: Even questions that suggest the answer can cease to be effective leading questions when they become too complex. The complexity of a question can allow a witness wiggle room to deny a point the attorney wishes to affirm, or vice versa. A compound leading question can have multiple answers, and thus greater potential for a witness to disagree with the point you are attempting to make. Moreover, it will lead to an objection by your opponent. Keep the questions simple, and surprises are less likely to occur. In addition, a series of simple, seemingly harmless questions can be used to paint a witness into a corner where he or she cannot deny a major point of fact that has been established through his or her prior answers.

d) Control the Testimony With Introductory Topics: During the course of a cross-examination, it is important to let the witness, and the jury, know the direction in which the questions are going. Although the examining attorney may know exactly what it is that he or she wants to elicit from the testimony, those points can be lost on the witness, and more importantly on the jury, if they are not established by way of background introduction. When switching from one line of questioning to the next, it is important to guide the jury to the points you wish to make. Before switching to a new line of questioning, a trial attorney can make a simple statement such as "now I would like to talk about the incidents that took place on February 25, 2003." This is not a question, but it indicates to everyone in the courtroom what the focus of the next question will be, and is an effective tool for highlighting important information.

e) Control the Witness With the Law: Simple and concise leading questions are typically an effective mechanism for controlling the witness. However, witnesses will often try to short-circuit a trial attorney's attempts to control him or her by providing narrative or unresponsive answers to simple questions. The rules of evidence preclude such responses. When the witness attempts to reclaim control through such tactics, a trial attorney should move to strike the unresponsive responses, and ask the court to admonish a witness when necessary.

f) Control Your Own Emotions: The quickest way to lose control of a witness and the jury is to engage in an argument with a witness. Nothing demonstrates a loss of control like an inappropriate display of emotion or lack of courtroom decorum. An antagonistic witness will be readily apparent to the jury unless the trial attorney's own actions become even more noticeable.

g) Control the Witness With Your Ears: During the course of testimony, especially a long one, a witness may make numerous statements

continued, next page

that can be used to impeach his or her credibility, or otherwise bolster a trial attorney's case. Many times, trial attorneys focus on the next question rather than thoroughly listening to the witness' answers. The only way the trial attorney can take advantage of the opportunities presented by a witness is if he or she becomes aware of them. Listen to the witness' responses carefully!

h) Control the Witness With Your Eyes: It is more difficult to lie to someone else's face. Make sure that if a witness is going to tell a lie, he or she has to look you in the eye to do it.

i) Control the Courtroom With Your Presence: Remember, during cross-examination, the trial attorney controls the show. Your demeanor can make or break the case. The trial attorney's presence, style, and actual location in the courtroom can all have a significant effect on the jury's perception. While these traits are usually specific and unique to each attorney, the following suggestions may aid a trial attorney in finding his or her "style":

1) Engage the jury with your conversation. Although the witness is targeted for response, a trial attorney can focus the jury's attention with his or her questions. Remember, leading questions are really veiled statements of fact. Make those statements to the jury, and ask the witness to confirm them for you.

2) Engage the jury with eye contact. Just as it is difficult for a witness to lie to a trial attorney's face, it is hard for a jury member not to pay attention when the trial attorney is looking him or her in the eye. Engage the jury members individually with eye contact during the course of the examination.

3) Be natural with the jury. Forcing yourself to be something or someone you are not is a form of deception. If a jury senses this deception, the trial attorney's credibility is lost. Be yourself . . . .

4) BUT, learn to be a good actor when the situation arises. All trial attorneys will find themselves in a situation where the outcome looks bleak. If the jury senses that you think your case is weak, or that a witness' response or judge's ruling has ruined your case, then your case is ruined. Everyone loves a front-runner. Act the part, even when it feels like you are in last place.

9. Keep it Safe . . . . Most of the Time: The classic rule of thumb during cross-examination is "never ask a question unless you already know the answer." Surprise can destroy even the best of preparation. A trial attorney can avoid surprise by eliciting only those responses that he or she knows are coming. The exception to this rule occurs in circumstances when the chance of victory is bleak, and the attorney's case has a slim chance of winning. Some of the greatest victories are achieved through gambling on a slim chance. If there is nothing to lose, then the unexpected answer might be the answer needed to obtain victory. Put it this way, if the known facts will lead to certain defeat, the only chance for victory is to elicit unknown facts.

10. Start Strong and Finish on a High Note: A trial attorney should plan a cross-examination in such a way to ensure that the last question elicits a significant response. Jury members have short attention spans, so a rule of thumb is to start strong, since the jury's curiosity will be piqued at the introduction of a new examination, and finish strong, since a strong finish will leave a lasting impression for the entire examination. Once you have made the final significant point, end the examination. Too many trial attorneys make the mistake of trying to win the case with one extra question – trying to hit a homerun, so to speak – and the examination ends up ruined by an unexpected or unfavorable response to the last question the attorney asks. Make your last big point, and sit down. Remember, if you reach your predetermined goals for the cross-examination, you have already hit a homerun.

Cross-examination is an invaluable tool in the hands of a prepared trial attorney in that it can be used not only to bolster his or her own case or defense, but also to demonstrate the weaknesses of the opposition's case. While no substitute exists for the experience that comes from conducting numerous cross-examinations, the above guidelines can be a useful tool for those trial attorneys trying to develop their own style and techniques, or trying to fine tune those techniques developed through past experiences.

These guidelines, however, are by no means intended as an exhaustive authority on the subject of cross-examination. Numerous authorities are available to guide a trial attorney in developing styles and techniques for a proper and effective cross-examination. For those interested in learning more about cross-examination, the following books and articles represent a small sample of the available materials.

1. Wellman, Francis L., The Art of Cross Examination (4th Ed. 1997).

2. Haydock, Roger & Sonsteng, John, Examining Witnesses: Direct, Cross, and Expert Examinations (1994).

3. Brodsky, Stanley L., Coping With Cross-Examination and Other Pathways to Effective Testimony (1st Ed. 2004).

4. Babitsky, Steven & Mangraviti, James J., Jr., How to Excel During Cross-Examination: Techniques for Experts That Work (1997).

5. Mauet, Thomas A., Trial Techniques (6th Ed. 2002).

6. Kestler, Jeffrey L., Questioning Techniques and Tactics (2nd Ed 1992).

7. Aron, Roberto, Duffy, Kevin T. & Rosner, Jonathan L., Cross-Examination of Witnesses: the Litigant's Puzzle (1989).

8. McElhaney, James W., McElhaney's Trial Notebook (3rd Ed. 1994).

9. Pozner, Larry S. & Dodd, Roger D., Cross-Examination: Science & Techniques (1993).

10. Brown, Peter M., The Art of Questioning : Thirty Maxims of Cross-Examination (1988).

11. Ehrlich, J.W., The Lost Art of Cross-Examination (1988).

12. Davies, Leonard E., Anatomy of Cross-Examination (2nd Ed. 2004).

13. Stern, Herbert J., Trying Cases to Win: Cross-Examination (Trial Practice Library)(1993).

14. Bailey, F. Lee, Cross-Examination in Criminal Trials (1979).

15. 59 Am. Jur. Trials 1 (Persuasive Cross Examination)(2004)

16. 6 Am. Jur. Trial 201 (Cross-Examination of Plaintiff and Plaintiff's Witnesses)(2003).

17. Strong, John W., McCormick on Evidence, Section 19 (5th Ed. 1999).

Liability of Sponsoring School Boards For Charter Schools' Hiring and Retention Practices

By Diana Shumans

This article discusses the liability of supervising school boards of charter schools for negligent hiring, retention or supervision of charter school teachers. According to the Florida Department of Education, this year 301 charter schools are in operation in Florida. Charter Schools are public schools holding state or local agency contracts, commonly referred to as "charters." Charter schools are designed to meet specified student goals. A key purpose of charter schools is to stimulate continuing improvement within a school district by providing competition with non-charter schools.[1] Charter schools emphasize innovative teaching methods, focus on reading, and create opportunities for low performing students.[2]

Each charter school has a sponsor. The school board of the county where the charter school is located is often the charter school's sponsor.[3] The sponsor is charged with monitoring the charter school's compliance with statutory education guidelines and the goals set out in the charter.[4] The sponsoring entity's rules and policies do not apply to the charter school.[5]

Questions often arise concerning a sponsor's liability resulting from the negligent hiring or supervision of charter school teachers.

In a recent decision out of the United States District Court for the Southern District of Florida, the Broward County School Board was found not liable for the negligent hiring, training or supervision of other Defendant teacher, Gordon, in *P.J v. Gordon,* published May 13, 2005 FLW Federal.[6]

The facts of that case are as follows: A charter school student and parent brought an action against the Broward County School Board as the supervising entity of Smart School[7] for the negligent hiring, training or supervision of a teacher at the Smart School. Also named in the action, as a defendant, was the teacher, Gordon, who was criminally convicted of sexually abusing the student. The Plaintiff alleged that the School Board, as the sponsor for Smart School, a charter school, was liable for the monitoring, hiring, training or supervising the Smart School employees, pursuant to *Florida Statutes* § 1002. The Court disagreed.

The Court, in its holding, found that neither *Florida Statutes* § 1002, the Charter itself nor common law imposed a duty on the Broward County School Board to monitor, hire, train or supervise the Smart School employees. Further, the Court found the School Board had no duty to ensure the safety of the students enrolled at the charter school, since the School Board had no duty to manage the daily operations of the school.

The Court reasoned that *Florida Statutes* § 1002 specifically delineated the sponsoring board's duties. The statute does not include any provision addressing the day to day staffing responsibilities, charter school maintenance, or procedures for student safety. In support of the holding, the Court identified, specifically, the language in section 12(a) of the statute which permits the Charter schools to select and hire its own employees.[8] The Court interpreted the language of the statute to foreclose school board liability for actions of the charter school staff.

Additionally, under the common law, the Court found no liability on the part of the School Board. Ordinarily a school board will have a duty to exercise ordinary and reasonable care to protect others from the result of negligent hiring, supervision, or retention of a teacher at a school with in the school board's district. The duty of the board mirrors the duty of private employers whose employees' intentional or negligent acts can foreseeably cause injuries to third parties.[9]

Generally to establish an action against a school board for common law negligent hiring or retention of a teacher a plaintiff must prove that:

1. The defendant school board had a duty to exercise reasonable care in the hiring and retention of the teacher.

2. The defendant school board breached that duty by hiring or retaining a teacher who was incompetent or ether the school board had notice of the teacher's incompetence.

3. The defendant school board's hiring or retention of the teacher was the proximate cause of the injury sustained by the plaintiff.[10]

In this case the plaintiffs alleged that the School Board had a duty linked to the concept of foreseeability. The idea of foreseeability is based on the notion that because teachers assume a quasi-parental role, having a great deal of authority and control over the students, students are foreseeably endangered by negligent or intentionally tortuous conduct of teachers.[11] The Court rejected this argument, finding, based on the facts of the case, the Plaintiff failed to allege that the school board knew or

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WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the *Florida Bar Journal.* If you are interested in submitting an article for the Checkoff, contact either Scott Fisher (813/228-7411) (*sfisher@ fowlerwhite.com*) or Ray Poole (904/356-8900) (*rpoole@constangy.com*). If you are interested in submitting an article for the *Florida Bar Journal,* contact Frank Brown (813/273-4381) (*feb@macfar.com*) to confirm that your topic is available.

REWARD: $150*

[*For each published article, a $150 scholarship to any section CLE will be awarded.]

Article deadline for next *Checkoff* is December 15, 2005.

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should have known that the teacher, Gordon, was dangerous.[12]

In conclusion, the Courts decision in *P.J. v. Gordon* suggests it is unlikely that sponsoring school boards will be held liable for the negligent hiring, training and retention of charter school employees.

Diana Shumans *is an associate with Moyle, Flanigan, Katz, Raymond & Sheehan P.A. practicing in the areas of employment law, administrative law and business litigation. Moyle, Flanigan, Katz, Raymond & Sheehan P.A. is a full serivce law firm representing public sector clients, including school boards, and business interests. The firm has offices in West Palm Beach and Tallahassee Florida.*

Endnotes:

[1] *Florida Statutes* §1002.33 (2)(C)(3)

[2] *Florida Statutes* §1002.33 (2)(C)(2), (4)

[3] *Florida Statutes* §1002.33 (5)(a)(2) provides that state universities may also sponsor charter schools that are lab schools pursuant to §1002.32.

[4] *Florida Statutes* §1002.33 (5)(b) (1)-(6).

[5] *Florida Statutes* §1002.33 (5)(b) (4).

[6] *P.J. v Gordon*, U. S. District Court, Southern District of Florida, filed January 21, 2005.

[7] Charter schools are exempt from all state statutes except regarding civil rights, health, welfare and safety.

[8] *Florida Statues* § 1002.33 (12) (a) A charter school shall select its own employees.

[9] *School Board of Orange County v. Coffey*, 524 So2d 1052 (Fla App 1988)

[10] Restatement 2nd Torts, Agency § 213.

[11] *Kimberly M v. Los Angeles Unified Schoo District, 196 CalApp 3d 1506 (1987).*

[12] The Court did not address what the School Board's liability could have been if the factual allegations had included actual or imputed knowledge.

Section Bulletin Board

Mark Your Calendars For These Important Section Meeting & CLE Dates:

For more information contact: Angela Froelich @ 850-561-5633 / afroelic@flabar.org

February 23, 2006
Labor & Employment Law Executive Council
Meeting & Reception
(All Members Welcome)
5:00 p.m. Council Meeting / 6:00 p.m. Reception
Rosen Plaza Hotel, Orlando, FL

February 23 & 24, 2006
"**6th Annual Labor & Employment Law Certification Review**" CLE
"C #0298"
Hotel Reservations: 407/996-9700 / Group Rate: $112 / Group Rate Expires: January 27, 2006
Rosen Plaza Hotel, Orlando, FL

May 5, 2006
Labor & Employment Law Executive Council
Meeting & Reception / Dinner
(All Members Welcome)
5:00 p.m. Council Meeting / 6:00 p.m. Reception / 7:00 p.m. Dinner
Sawgrass Marriott Resort & Spa, Ponte Vedra Beach, FL

May 5 & 6, 2006
"**Advanced Labor Topics**" CLE
"C #0299
Hotel Reservations: 604/285-7777 / Group Rate: $195 / Group Rate Expires: April 4, 2005
Sawgrass Marriott Resort & Spa, Ponte Vedra Beach, FL

June 22, 2006
Labor & Employment Law Executive Council ANNUAL
Meeting & Reception
(All Members Welcome)
Boca Raton Resort & Club, Boca Raton, FL

First District Court of Appeal Reverses Commission on Successorship Issue

By Hearing Officer John G. Showalter

In *Florida Public Employees Council 79, AFSCME and United Faculty of Florida v. Florida State University Board of Trustees*, and *Florida Public Employees Council 79, AFSCME v. University of West Florida Board of Trustees*, 29 FPER ¶ 281 (2003), a majority of the Commission held that individual university boards of trustees are not successor employers to the Florida Board of Education (FBOE). The Commission and hearing officers applied *IBEW, Local 323 v. Lake Worth Utilities Authority and City of Lake Worth*, 11 FPER ¶ 16024 (1984), and concluded that there was not substantial continuity between the FBOE and the boards of trustees at FSU and UWF. As a result, in the *FSU* case, the Commission concluded that FSU did not commit an unfair labor practice by ceasing dues deduction and failing to process grievances, and in the *UWF* case, the UWF did not unlawfully cease the collection of union dues for AFSCME.

Commissioner Kossuth dissented. He reasoned that the application of *Lake Worth* to the facts of these cases demonstrated that FSU and UWF were successor employers and had an obligation to maintain the status quo as determined by the collective bargaining agreements.

AFSCME and UFF appealed the Commission's decision to the First District Court of Appeal. On February 14, 2005, the First DCA reversed the Commission and held that the UWF and FSU boards of trustees are successor employers to the FBOE. *United Faculty of Florida and Florida Public Employees Council 79, AFSCME v. Public Employees Relations Commission, Florida State University Board of Trustees, and University of West Florida Board of Trustees*, 30 Fla. L. Weekly D436 (Fla. 1st DCA 2005). The court determined that the Commission failed to properly apply the *Lake Worth* decision to the facts of these cases, and that FSU and UWF are successor employers because they continue to employ a majority, if not all, of the employees the FBOE employed at each institution, doing the same work and the same jobs, at the same locations, under the same immediate supervision, and under essentially the same working conditions as before the change. Therefore, the court remanded the cases for further proceedings consistent with its opinion.

FSU and UWF filed motions for rehearing, rehearing en banc, and certification. The motions were denied.

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specific evidentiary framework[3] and a heightened burden of proof is placed on defending employers who seek to evade liability. To establish a causal connection under a Section 1514A scenario, the plaintiff must show by a *preponderance of evidence standard* that the protected activity was a "contributing factor" - not a significant, or motivating or substantial or predominant factor - to the unfavorable personnel action.[4] Conversely, for the defendant to avoid liability necessitates a showing by a *clear and convincing evidentiary standard* that it would have taken the same unfavorable employment action, even in the absence of the protected behavior.[5] In a recent case where the Defendants' Motion for Summary Judgment was denied because they failed to meet this burden of proof, it was noted that the clear and convincing evidentiary standard is a tough standard for employers to meet.[6]

In light of this high burden, the employer who takes the position that it would have still demoted, transferred, or terminated the whistleblower because of poor performance must be armed with such evidence as signed employee warning notices and documented management coaching session, most particularly since the types of protected activities that could bring a whistleblower within the statute's zone of protection are more expansive than one might expect. Due to the "broad remedial purpose" that exists "behind Sarbanes-Oxley,"[7] a whistleblower need not make allegations that rise to the level of complaints made by Sherron Watkins at Enron.[8] Smoking-gun evidence of cooked accounting books, of cashed seven figure bonus checks to corporate executives, or of testimony provided to the Securities and Exchange Commission is not needed to assert a claim under the Act. What is required is a "reasonable belief" of impropriety, which induced the employee to blow the whistle on fraud and protect investors,[9] and the employee suffered an unfavorable employment action because of this.[10] Section 1514A whistleblowers have alleged such protected activities as complaining that a business plan paints too-rosy of a picture for the investing community,[11] that management was using a particular vendor based on a personal relationship between the two,[12] that higher commissions were being paid to sales agents who were personal friends of a decision-maker,[13] that kickbacks were changing hands in the purchase of supplies,[14] that certain company officials did not possess required NASD licenses,[15] and that a company failed to disclose material oral agreements entered into by a CEO with consultants on SEC reports and to shareholders.[16]

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Purpose of the Sarbanes-Oxley Act.

15 U.S.C. § 7201, *et seq.,* also known as the Sarbanes-Oxley Act,[17] is the landmark statute which was enacted in the wake of the securities fraud and financial scandals that rocked Wall Street and such companies as Enron, WorldCom, and Tyco. The government responded to these debacles with the Sarbanes-Oxley Bill, a piece of legislation that whipped through Congress "…so quickly…that the conference report consisted only of the legislation and did not have the typical commentary that accompanies a bill."[18] On July 30, 2002, four days after Congress passed the bill, it was signed into law by President Bush.

With that stroke of a presidential pen, the landscape relating to corporate governance was forever changed. Sarbanes-Oxley is designed to ensure that financial records and controls surrounding those records, such as corporate quarterly or annual reports that are filed with the Securities and Exchange Commission, are appropriate, thereby protecting the investing community. Since its enactment, shareholders have used Sarbanes-Oxley to sue the companies that they have invested in,[19] their directors and officers,[20] as well as brokerage houses[21] for fraudulent activities.

Of interest to labor and employment practitioners is the Act's whistleblower provision, which states:

1514A. Civil action to protect against retaliation in fraud cases

(a) Whistleblower protection for employees of publicly traded companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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 any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders

Remedies

Pursuant to the statutory language, available remedies include compensatory damages, back pay with interest, and compensation for special damages resulting from the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.[22]

(L-R) Robert Michael Eschenfelder, Esq. (2004-05 Chair of the Law School Liaison Committee for The Florida Bar Labor and Employment Section), Vicent Petty (May 2005 Stetson Graduate), and Dean Darby Dickerson (Dean and Vice President of Stetson University College of Law). Mr. Petty is receiving the Dean W. Gary Vause Award from The Florida Bar Labor and Employment Section.

The Act also entitles the prevailing employee to all relief necessary to make that employee whole. [23] One Court found that a plaintiff could seek loss of reputation damages to compensate for his diminished earnings capacity, as the whistleblower could not otherwise be made whole without receiving compensation for injuries to his professional reputation. [24] Elsewhere, a court ordered an employer to "immediately" reinstate two terminated whistleblowers into their former jobs pursuant to an administrative agency's preliminary order, and pay all salary, benefits and other compensation that they would have earned subsequent to the date of the order.[25]

The Applicable Legal Standard/Exhaustion of Administrative Remedies

To articulate a cause of action requires the whistleblower to assert by a preponderance of evidence, that (1) he or she engaged in protected activity; (2) the employer knew of the protected activity; (3) the employee suffered an unfavorable employment action, and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Proximity in time is sufficient to raise an inference of causation. [26] Avoiding liability requires a showing by the defendant at the clear and convincing evidentiary standard that it would have taken the same unfavorable personnel action in the absence of the activity.[27]

The greatest area of exposure for employers will likely relate to day-to-day grievances involving a Section 1514A(a)(1)(C) scenario, where a complaining party alleges discriminatory conduct after filing a complaint with a supervisor. But as with other employment laws, the employee must exhaust administrative remedies before instituting litigation.

There are several unique aspects associated with the Sarbanes-Oxley administrative process in comparison with such other employment statutes. First, interestingly, the Occupational Safety and Health Administration has been delegated with the responsibility of investigating these complaints by the Secretary of Labor. Described as judicial in nature and intended to resolve the controversy on its merits, the administrative regulations governing the handling of these complaints allow for an investigation, a hearing in front of an administrative law judge, an evaluation before an administrative review board, and an appeal procedure. [28]

Second, the window of opportunity for the whistleblower is relatively short, as he or she must file a complaint with OSHA within 90 days after the violation occurred.[29] Further, the administrative complaint must contain a comprehensive statement of the alleged acts and omissions with pertinent dates. Failure to do so with requisite specificity will bar the employee from proceeding with an action in court, even where an additional alleged retaliatory act occurs after the filing of the administrative complaint.[30]

Third, if the Secretary fails to render a final administrative decision within 180 days of the filing of the administrative complaint, absent a showing that any delay was due to the plaintiff's bad faith, then an action may be instituted in federal court for *de novo* review.[31] The plaintiff must provide the Department of Labor with 15 days notice before filing a lawsuit.[32] If, however, a final decision is made within this 180 day time period, the district court will lack jurisdiction to hear the case.[33]

There are two situations where a preliminary order may become final administrative decisions: (1) A plaintiff may appeal OSHA's preliminary findings to an Administrative Law Judge for a hearing. If the plaintiff loses in that hearing, he may then file a written petition for review by the Administrative Review Board, which has been delegated the authority to act for the Secretary of Labor and issue final decisions; (2) If no timely objection is filed relative to the preliminary order, the preliminary order becomes the final decision of the Secretary of Labor, and not subject to judicial review.[34]

Additionally, one Court observed that while Section 1514A allows the Court to hear the case under its federal question jurisdiction, it does not specifically limit the remedies available once it exercises jurisdiction. For instance, in situations where the Department of Labor has expended significant resources adjudicating the administrative dispute, the Court might choose to exercise its discretion and issue a write of *mandamus* compelling the Secretary of Labor to complete the administrative proceeding.[35] Another Court, however, refused to grant the defendants' motion to stay to provide the Secretary with additional time beyond that 180 window to complete its investigation. Finding that the plaintiff's "complaint appears to have fallen through the proverbial cracks," the court held that nothing in the statute suggested that the employee's access to the federal courts should be postponed if the Secretary did not render a final ruling within 180 days.[36]

Section 1514A Allegations/ Need for Best Practices

Two recent cases shed light on the prospective impact of Sarbanes-Oxley on a firm's human resources function.

The plaintiff in the case of *Hanna v. WCI Communities, Inc., et al.,* 348 F.Supp.2d 1322, 1324 (S.D. Fla. 2004), was employed as a division president for the defendant at the time of his termination. The protected activity occurred while *Hanna* was preparing *WCI*'s fiscal year 2003 business plan, a plan which he felt was neither reasonable or realistic and posed a significant threat of misleading the investing public. *Hanna* alleged that he met with one of the named defendants to express concerns about the plan and the false impression that the company was knowingly projecting to the investor community. Two weeks later, *Hanna* was fired without notice and told that WCI desired a "coaching change." After filing an administrative complaint, *Hanna* filed a court action. The Complaint survived various attacks brought by the defendants on a Motion to Dismiss, including that the plaintiff failed to properly exhaust his administrative remedies.[37]

Under *Hanna,* the packaging of a business plan in a way that sheds the best possible light on the company's financial future could potentially give rise to a Sarbanes-Oxley claim, where the whistleblower alleges retaliation after waving the red flag about perceived wrongdoings associated with company forecasts. But where does mere "puffing" end and

continued, next page

illegal activity begin? Further, what if the flag-waver is a person who lacks business acumen and savvy, and because of this, misconstrues a financial forecast? The statute does not require the employee to possess skill, knowledge and expertise in the field of business or accounting. Such was probably not the case in *Hanna* because the plaintiff was *WCI*'s division president and had been involved in the development of the business plan that he himself questioned. Suppose, however, the complaining party lacks any degree of training or experience to properly evaluate the business practice he or she is questioning. These sorts of issues invoke questions of witness credibility and weight of evidence - issues which create jury questions.[38]

Moreover, what if the employee is a poor performer who is subsequently disciplined for those performance deficiencies? All the employee needs to do to assert a Sarbanes-Oxley claim is show by a preponderance of the evidence that the protected activity, i.e. the complaint to management regarding a particular accounting practice, was *a contributing factor* in the discipline that he or she received. Rebutting the plaintiff's allegation, however, requires a showing of clear and convincing evidence. This high burden calls for covered employers to institute efficient personnel management practices, including management training, published performance standards, and an effective progressive discipline system. Personnel-related problems should be thoroughly documented and brought to the employee's attention in a timely manner. The employee should be told, in clear and unambiguous terms, of the performance deficiency or failure to comply with an employment standard or rule. Moreover, the possible ramifications associated with any continued shortcomings must be explained to the employee. The personnel management system should include also include forms, signed by the employee and manager, of all coaching sessions to establish a paper trail. Then, if that employee is terminated and lodges a Section 1514A complaint, the written documentation will help the employer meet the clear and convincing evidentiary burden of proving that the termination was directly related to the performance deficiency, and that the alleged protected activity was not a contributing factor in the decision to fire the employee.

The case of *Collins v. Beazer Homes, USA, Inc., et al.,* 334 F.Supp. 1365 (N.D. Ga. 2004) drives home the need for strong personnel management practices, beginning at the hiring stage of the employment relationship. The *Collins* Court observed that the Plaintiff began experiencing conflicts shortly after her employment commenced on June 10, 2002. By the time of her termination on August 19, 2002, *Collins* had lodged numerous complaints to at least four high-ranking company officials regarding various issues, including an email to the Chief Executive Officer alleging a "cover-up/corruption" without provided no supporting details *Collins* also met separately with two different Vice Presidents, and tape recorded one of these meetings. She spoke out about her supervisor's management style, the manner in which costs were being categorized, the types of homes that were being built by the company. She complained that the company was doing business with an advertising agency based on a personal relationship with a company official. She wrote a four page email, claiming that she was told to pay the agency irrespective of the amount of the invoice. She made allegations of kickbacks in lumber purchases, that bills were being paid that should not have been, and that a company official was paying higher commissions to agents that were her friends. Finally, after meeting with the President of the Jacksonville division, her employment was terminated.

Collins responded by asserting a Section 1514A claim, and the Defendants moved for summary judgment. Although it was a close call and the Court felt that the connection of *Collins'* complaints to the substantive law protected by Sarbanes-Oxley was "less than direct," the Court also stated that her allegations included "violations of the company's internal accounting controls in favor of preferential treatment based on personal relationships."[39] The Court found that there is a genuine issue of material fact as to whether Defendants "established by clear and convincing evidence that they would have fired Plaintiff absent her protected activity."[40]

Collins is notable for several reasons, including showing what a high burden employers will have to rebut a Section 1514A allegation. Since it was a close call, if *Collins* had sought relief under a statute such as Title VII, the Defendants' would have likely won on summary judgment because they would have only been required to establish by a preponderance of the evidence that they would have taken the adverse action against the complaining party. But beyond showing just how difficult it may be for employers to meet the clear and convincing standard, *Collins* also showcases the need for strong recruiting practices. After all, *Collins,* had not even made it past the initial 90 day introductory period when she was terminated. In finding a genuine issue of material fact, the *Court* itself noted that "the short history of Plaintiff's employment only makes it more difficult to discern whether the problems that Plaintiff had would have ultimately resulted in her termination" anyway.[41]

The holding in the *Collins* case is particularly alarming since the Court found a genuine issue of material fact based, in part, on Collins' assertion that the company was channeling business to an advertising agency based on a personal relationship that a decision-maker had with that agency. This notion is potentially troublesome, because so much business is dependent on networking-related activities and operates on the trust and confidence that is developed through professional associations, relationships that ultimately benefit the corporation. It is difficult to place a dollar figure on the benefit of an outside contractor who can be depended on in crunch periods to deliver the goods and properly perform the task that has been outsourced to them. A person who lacks an appreciation of the advantage of this non-quantifiable asset may not understand that another vendor can actually cost the company more money if they cannot deliver what they promise they will, even if they offer a low-cost pricing strategy. In

such cases, it is ultimately more cost-effective for the company to do business with the *proven* vendor whose has come through for the corporation in the past. *Collins,* however, suggests that an brand new employee who enters a corporation could view the intangible benefits that accrues over time between a corporation and an outside contractor as improper conduct, which may give ultimately provide the basis for protected activity under Section 1514A.

In light of her brief yet tumultuous tenure, it could be argued that *Collin*s was an individual who, after immediately observed all manner of corporate waste and decided to speak out against these wrongdoings in an effort to protect shareholder assets. On the other hand, she might be the type of troubled, disgruntled employee who walked in the door, made wrong assumptions about company operations, and then launched into a no-holds barred avalanche of grievances to anyone who would listen to her. If the latter scenario is correct, the case stands as a lesson for the critical need for heightened management controls in the hiring stage of the employment life cycle. Unfortunately, however, when faced with staffing shortages, company officials will sometimes cut corners in the pre-hiring phase and not properly screen applicants for position and conduct thorough yet time-consuming background checks, and then wind up paying dearly in the long run.

Conclusion

As with any new statute, only time will tell how the Courts will construe Section1514A, most particularly in light of Sarbanes-Oxley's history and intent, and its impact on covered employers.

Perhaps the biggest question at this point relates to how OSHA will handle the administrative process. In comparison to the EEOC, an administrative agency with three decades of experience in investigating discrimination claims, OSHA is a newcomer to this field of employment law. OSHA's expertise lies in the realm of ensuring workplace safety, not investigating and assessing retaliation claims. In light of the 180 day window for the issuance of the final administrative ruling, it will be interesting to see the percentage of claims that end up being resolved on the merits through the administrative process instead of in the federal court system.

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Endnotes:

[1] Note: Evidence of the Congressional intent to protect shareholders and provide them with a remedy where fraud has been demonstrated can be observed through the thoughts of Senator Leahy of Vermont, who, on July 10, 2002, stated: "Florida lost $335 million because of Enron; the University of California, $144 million-all the way down to Vermont; we lost millions of dollars… I am here to try to protect people and give them an opportunity-when there has been such enormous fraud and all the pension funds have been lost, and all the people who have lost their life-savings —— *give them at least some chance to recover something,* especially as the executives of these companies walk off with tens of millions of dollars." 148 Cong. Rec. S6524-02, * S6534-35 (emphasis added).

[2] *Collins v. Beazer Homes USA, Inc.,* 334 F.Supp.2d 1365, 1374 (N.D. Ga. 2004)

[3] *Id.* at 1375 (citing 18 U.S.C. § 1514A(b)(2)(C))

[4] *Id.* at 1375. See also *Willis v. Vie Financial Group, Inc.,* 2004 WL 1774575 at *3 (E.D. Pa. 2004)

[5] *Id.*

[6] *Collins,* Supra. At 1380 (citing *Stone & Webster Engineering Corp. v. Herman,,* 115 F.3d 1568, 1572 (11th Cir. 1997)

[7] *Id.* at 1377

[8] *Id.* (While rejecting the Defendants' claim that the Plaintiff failed to assert disclosures that brought her within the coverage of Section 1514A(a), the Court referenced complaints raised by Watkins, the former Enron Vice President and commented that "the mere fact that the severity or specificity of her (Plaintiff's) complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her.")

[9] *Id.* (citing Legislative history at S7420 and 18 U.S.C. § 1514A(a).

[10] *Id.* (see also 18 U.S.C. § 1514A(a)(1)(c)

[11] *Hanna v. WCI Communities, Inc., et al.,* 348 F.Supp. 2d 1322, 1324 (S.D. Fla. 2004).

[12] *Collins,* Supra. at 1376-1377

[13] *Collins,* Supra.

[14] *Id.*

[15] *Vie Financial Group, Inc.,* 2004 WL 1774575 (E.D. Pa. 2004).

[16] *Bechtel v. Competitive Technologies, Inc.,* 2005 WL 1138790 at *1

[17] *Edelson v.* Ch'ien, 405 F.3d 620, 622-623 (7th Cir. 2005)

[18] See *Roberts v. Dean Witter Reynolds, Inc.,* 2003 WL 1936116 at *1 (M.D. Fla. 2003) (quoting John J. Huber, Thomas J. Kim, Latham & Watkins, *The Response t Enron: The Sarbanes-Oxley Act of 2002 and Commission Rule-making,* 1348 *Practicing Law Inst. / Corp. Law and Practice Course Handbook Series,* PLI Order No. B0-01VY, 641, 647 (Dec. 2003).

[19] See *Ballard v. Tyco Intern. Ltd., et al.,* 2005 WL 928537 at *1(D. N.H. 2005) (Alleging that "Tyco and its former officers and directors misled investors into believing that the company was experiencing continuous, organic growth when, in fact, Tyco's apparent success was instead a result of fraudulent accounting.")

[20] *Id.*

[21] *Roberts,* Supra. (Alleging that the Defendants "unsuitable and unauthorized trades")

[22] 18 U.S.C. § 1514A(c)(2)(A)-(C)

[23] 18 U.S.C. § 1514A(c)(1)

[24] *Hanna v. WCI Communities, Inc., et al.,* 348 F.Supp.2d 1332, 1333 (S.D. Fla. 2004).

[25] *Bechtel,* Supra. at*4.

[26] *Collins,* Supra. at 1376-1377.

[27] *Id.* at 1377.

[28] *Collins, Supra.* at 1373

[29] 18 U.S.C. § 1514A(b)(2)(D). See also *Collins,* Supra. at 1373

[30] *Willis,* Supra. at *3 (Holding that despite the fact that the plaintiff argued OSHA knew that he was terminated after filing his administrative complaint which stated that the employer threatened to terminate him, he never claimed to OSHA that he considered the termination itself to be improper or illegal in any way. Because this claim of retaliation was never presented to the administrative agency for investigation, plaintiff was precluded from for the first time in district court).

[31] 18 U.S.C. § 1514A(b)(1)(B) See also *Hanna,* Supra. at 1327; *Murray v. TXU Corp., et al.,* 279 F.Supp.2d 799, 803 (N.D. Tex. 2003).

[32] *Hanna*, Supra. at 1331 (citing 29 C.F.R. § 1980.114)

[33] *Murray,* Supra. at 802

[34] *Hanna,* Supra. at 1327 (citing 29 C.F.R. §§ 1980.110(a), 1980.106(b)(2)

[35] *Stone v. Duke Energy Corp.*, 2004 WL 1834597 at *1 (W.D. N.C. 2004).

[36] *Murray,* Supra. At 805

[37] *Hanna* at 1331

[38] Note: Although *Hanna* demanded a jury trial, the court observed that 1514A was silent with regard to the Plaintiff 's entitlement to a trial by jury. Rather than addressing that issue on the Defendant's Motion to Strike, given the scarcity of case law on that issue, the court denied the motion without prejudice.

[39] *Collins* at 1377-1378

[40] *Id.* at 1381

[41] *Id.*

CHAIR'S REPORT
from page 1

Section has maintained its dues at $25 since 1993. What many members may not realize is that half of that dues amount (i.e., $12.50), has always gone straight to the BOG. Accordingly, for the last 13 years, our Section has been operating on the remaining $12.50 it received from each member during the year. Effective in 2006, however, the BOG will be taking an additional $5 from the dues paid by each member (or $17.50), leaving the Section with only $7.50 per member in which to operate. To complicate matters further, the BOG has announced that in 2006, it will abolish the printing rebate that it had previously provided to the Sections. In the past, the BOG has rebated all monies the Sections have incurred in printing costs, except the costs of ink and paper. According to BOG estimates, our Section will lose $2,318 in 2006 due to the abolishment of the printing rebate.

As a consequence of the BOG's elimination of the printing rebate and its increased allocation of the membership dues, we are unfortunately forced to raise Section dues in 2006 from $25 to $40 per year. Although this may sound like a drastic increase to some, we should all bear in mind that due to the effects of inflation, our Section has been overdue for a dues increase for quite some time. We should additionally recognize that all of the other Sections of the Bar (many of which are already charging their members dues well in excess of $25 per year) are also being confronted with the same dilemma. Consequently, considering all the services and resources our Section provides, I strongly feel that membership is still a bargain at $40 per year.

Another big change being imposed by the BOG involves our CLE programs. In the past, the Section and the BOG split the profits derived by our Section's CLE programs; however, if a program was not profitable, the BOG bore all of the expenses. Starting in 2006, the BOG will be implementing a new scheme in which both it and the Sections will share in both the profits and losses incurred by CLE programs. Ultimately, under this scheme, the Section will be responsible for 80% of the profits or losses of its CLE programs; however, this new scheme will not be fully phased in until 2008. In 2006, our Section will be responsible for 90% of its CLE program profits and losses, whereas in 2007, that percentage will drop to 85%.

Historically, our Section has had profitable CLE programs. However, under the BOG's new scheme, a few unprofitable programs could seriously erode our Section's financial reserves. Thus, the Executive Council is currently exploring ways to ensure the profitability of our CLE programs, in order to protect against such an occurrence. One idea currently being successfully employed by other Sections of the Bar involves the recruitment of private sponsorships. Although the Executive Council wants to thoroughly explore the pros and cons of all such ideas, we will keep you posted on this issue throughout the year.

Although the BOG's budget amendments may come as a surprise to many, I am pleased to report that compared to others, our Section has fared quite well. We are one of only three Sections that does not owe the BOG money. Some Sections currently owe the BOG tens of thousands of dollars. I am also pleased to report that I have a great group of officers and committee chairs working with me this year and that the CLE programs our Section will produce in the coming months will rival any in the nation. In closing, I invite each member to get more involved in the Section and to attend both our CLE programs and Executive Council Meetings throughout the year. After all, this Section belongs to you.

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