THE PRACTICAL ESTATE PLANNER

In practice since 1987, Certified Elder Law Attorney **EVAN FARR** is widely recognized as one of the leading Elder Law, Estate Planning, and Specials Needs attorneys in Virginia, Maryland, and the District of Columbia, and one of foremost experts in the country in the field of Medicaid asset protection and related trusts. He has been quoted or cited as an expert by numerous sources, including: the Washington Post, Newsweek Magazine, Northern Virginia Magazine, Trusts & Estates Magazine, The American Institute of Certified Public Accountants, and The American Bar Association.

Evan has also been featured as a guest speaker on numerous radio shows, including WTOP and Washington Post Radio. Evan has been named by SuperLawyers.com as one of the top five percent of Elder Law and Estate Planning attorneys in Virginia every year since 2007, and in the Washington, DC Metro Area every year since 2008. In 2011, Evan was named by Washingtonian Magazine as one of the top attorneys in the DC Metropolitan area, by Northern Virginia Magazine as one of the top attorneys in the Northern Virginia area, and by Newsweek Magazine as one of the top attorneys in the country. Evan is a nationally renowned author and frequent educator of attorneys across the U.S. As an expert to the experts, Evan has educated tens of thousands of attorneys across the country through speaking and writing for numerous national legal organizations such as the National Academy of Elder Law Attorneys, ALI CLE, the National Constitution Center, myLaw CLE, the National Business Institute, the Virginia Academy of Elder Law Attorneys, the Virginia Bar Association, Virginia Continuing Legal Education, and the District of Columbia Bar Association.

COMMON MISCONCEPTIONS ABOUT IRREVOCABLE TRUSTS (PART 1)

It is a common misconception among laypersons and many attorneys that an irrevocable trust can never be modified or terminated. The reality is that the term irrevocable means only one thing—that the trust cannot unilaterally be revoked by the settlor.

Misconception 1: An Irrevocable Trust Can't Be Modified or Terminated

Under common law and under Section 103 (the Definitions Section) of the Uniform Trust Code, the word "revocable," as applied to a trust, means "revocable by the settlor without the consent of the trustee or a person holding an adverse interest."

Although under common law the settlor of an irrevocable trust traditionally had no continuing rights over the trust, some common law was to the contrary,[1] and Section 411(A) of the Uniform Trust Code states that a non-charitable irrevocable trust can be modified or terminated upon consent of the settlor and all trust beneficiaries "even if the modification or termination is inconsistent with a material purpose of the trust."

> "A. If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court *shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust* [emphasis added]. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

Please note that the court's role is nominal in this situation, because the statute makes it mandatory for the Court to enter an order approving the modification or termination so long as the settlor and all beneficiaries consent to the modification or termination.

Also, under Section 411(B) of the Uniform Trust Code, a non-charitable irrevocable trust can be terminated or modified just by the beneficiaries under certain circumstances:

> B. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

The Uniform Trust Code is of vital importance in our country because as of January 1, 2020, the UTC will have been enacted in 35 jurisdictions:

1. Alabama (Ala. Code §§ 19-3B-101, et seq.)
2. Arizona (Ariz. Rev. Stat. §§ 14-10101, et seq.)
3. Arkansas (Ark. Code Ann. §§ 28-73-101, et seq.)
4. Colorado (C.R.S. 15-5-101, et seq)
5. Connecticut (HB 7104, Law effective Jan. 1, 2020)
6. District of Columbia (D.C. Code §§ 19-1301.01, et seq.)
7. Florida (Fla. Stat. §§ 736.0101, et seq.)
8. Illinois (HB 1471, effective January 1, 2020)
9. Kansas (Kan. Stat. Ann. §§ 58a-101, et seq.)
10. Kentucky (Ken. Rev. Stat. §§ 386B.1-010, et seq.)
11. Maine (Me. Rev. Stat. Ann. Tit. 18-B, §§ 101–1104, et seq.)
12. Maryland (MD Est & Trusts Code §§ 14.5-101, et seq.)
13. Massachusetts (Mass. Gen. Law Chapter 203E)
14. Michigan (Mich. Compiled Laws §§ 700.7101 et seq.)
15. Minnesota (Chapter 5 of the 2015 Minnesota Session Laws, effective Jan. 1, 2016)
16. Mississippi (MS Code §§ 91-8-101, et seq.)
17. Missouri (Mo. Rev. Stat. §§ 456.1-101, et seq.)
18. Montana (Mont. Code. Ann. §§ 72-38-101, et seq.)
19. Nebraska (Neb. Rev. Stat. §§ 30-3801, et seq.)
20. New Hampshire (N.H. Rev. Stat. Ann. §§ 564-B-101, et seq.)
21. New Jersey (N.J.S. 3B:31-1, et seq.)
22. New Mexico (N.M. Stat. Ann. §§ 46A-1-101, et seq.)
23. North Carolina (N.C. Gen. Stat. §§ 36C-1-101, et seq.)
24. North Dakota (N.D. Cent. Code §§ 59-09-01, et seq.)
25. Ohio (Ohio Rev. Code Ann. §§ 5801.01, et seq.)
26. Oregon (Or. Rev. Stat. §§ 130.001, et seq.)
27. Pennsylvania (20 Pa. Cons. Stat §§ 7701, et seq.)
28. South Carolina (S.C. Code Ann. §§ 62-7-101, et seq.)
29. Tennessee (Tenn. Code Ann §§ 35-15-101, et seq.)
30. Utah (Utah Code Ann §§ 75-7-101, et seq.)
31. Vermont (Verm. Stat. §§ 14.A-101, et seq.)
32. Virginia (Va. Code Ann. §§ 55-541.01, et seq.)
33. West Virginia (W. Va. Code §§ 44D-1-101, et seq.)
34. Wisconsin (Wis. Stats. §§ 701.0101, et seq.)
35. Wyoming (Wyo. Stat. Ann. §§ 4-10-101, et seq.)

Although Section 411(A) of the UTC requires court approval to modify or terminate an irrevocable trust, the UTC gives us another way to modify or terminate an irrevocable trust—via a nonjudicial settlement agreement (NJSA) pursuant to Section 111 of the Uniform Trust Code, which states:

> (a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
>
> (b) Except as otherwise provided in subsection (c), interested persons may enter into a

binding nonjudicial settlement agreement with respect to *any matter involving a trust* [emphasis added[2]].

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.[3]

Misconception 2: The Settlor Can't Serve as Trustee of an Irreovocable Trust

Another common misconception is that settlor(s) of an irrevocable trust can't also act as the trustee(s) of the trust. There is no legal support for this conclusion in connection with many properly drafted irrevocable trusts. It may be better from a practical standpoint for the settlor to not serve as trustee, but there is no legal prohibition against the settlor serving as trustee. It is basic hornbook trust law that a trustee stands in a fiduciary position with reference to the trust assets and cannot derive personal benefit from acting as trustee.[4] The trustee's creditors therefore have no claim to the trust assets to satisfy personal claims of the trustee. Creditors can reach any interest retained by the settlor (such as the right to receive trust income) pursuant to Section 505(a)(2) of the Uniform Trust Code, which states that "with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit," but creditors cannot otherwise reach assets under the control of the trustee even if the settlor is acting as trustee, because the settlor has no ownership over the trust assets merely because the settlor is acting as trustee, which is a ministerial position.

Misconception 3: The Settlor Can't Remove and Replace a Trustee

Just as a settlor can serve as the trustee of his own irrevocable trust, so can the settlor retain the right to remove and replace someone else acting as trustee of the settlor's irrevocable trust. The exact same logic applies—if the settlor can serve as trustee, then the settlor retains the right to remove and replace trustees.

Source of Misconception: It is this author's belief that the reason many attorneys avoid naming the settlor as a Trustee of an irrevocable trust is because many experienced estate planning authors and commentators are most familiar with dealing with high net worth clients who are using irrevocable trusts to hold life insurance, where the tax goal is to structure the trust so that the transfer to the trust is a completed gift so that the insurance proceeds are not brought into the settlor's estate pursuant to I.R.C. § 2042.[5] Attorneys drafting irrevocable life insurance trusts typically do not allow the settlor to serve as the Trustee, based on the lingering fear that serving as trustee will be deemed by the IRS to constitute "incidents of ownership" over the life insurance policy, thereby bring the policy proceeds into the settlor's gross estate pursuant to I.R.C. § 2042, which would defeat the purpose of the irrevocable life insurance trust.[6] With most irrevocable trusts these days being Medicaid Asset Protection Trusts given the enormous exemption equivalent amount, there is no concern in any event about the settlor having "incidents of ownership" over any of the trust assets, because the trust is intentionally designed so that the contents of the trust are brought back into the settlor's estate for tax purposes.

Notes

1 See, e.g., Schroeder v. Woodward, 82 S.E. 192, 199 (Va. 1914), which says that a trust "once created and accepted without power of revocation expressly reserved, can only be revoked by the consent of all the parties in interest." See also Minot v. Tillon, 10 Atl. 682 (N.H. 1887); Hellman v. McWilliams, 11 P. 659 (Cal 1886); Ewing v. Jones, 29 N.E. 1057 (Ind. 1892)

2 The phrase "any matter matter involving a trust" presumably includes termination of an irrevocable trust.

3 The most common type of irrevocable trust drafted by estate planning and elder law attorneys is a Mediciad Asset Protection Trust, and termination is sometimes desirable if the Settlor needs nursing home care well prior the expiration of Medicaid's five-year lookback period. In that the purpose of a Mediciad Asset Protection Trust is to help

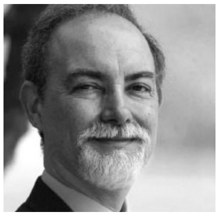
qualify the Settlor for Medicaid, termination of such a trust so that the assets can be returned to the Settlor and protected using other Medicaid Asset Protection strategies clearly does not violate a material purpose of the trust.

4 See, e.g., Rev. Rul. 77-285, 1977-2 CB 213 (the trust instrument in question provided that the grantor could remove the trustee for any reason and substitute any other person—including the grantor—as trustee; held that even if the grantor becomes trustee, there would be nothing he could do to alter the amounts paid to recipients).

5 This bias is reflected by the rampant use of the pejorative term "defective" in referring to "Grantor Trusts" as "Intentionally Defective Grantor Trusts" when in fact there is nothing "defective" about these trusts at all.

6 This fear, however, seems to be ungrounded; since PLR 200123034 (6/11/2001), attorneys have been drafting self-trusteed ILITs. In PLR 200123034, a Grantor›s transfer of assets into a self-trusteed irrevocable life insurance trust with Crummey provisions was determined by the IRS to be a completed transfer. The IRS found that Grantor had no right, title or interest in or power, privilege or incident of ownership in regard to any trust property, even though the Grantor was serving as the trustee of the trust and the Grantor retained the right to remove a trustee during Grantor›s lifetime.

THE WEB-WISE LAWYER



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This column is derived from a paper delivered at the Southern Academy of Legal Studies in Business in San Antonio, Texas on March 1, 2019.

THRUST AND PARRY: THE ESG SAGA CONTINUES

"As it became clear that the job of fixing society was too big for any individual company to accomplish, the focus changed. Instead of making it a management concern, turn it into an investing concept. Instead of allowing individual companies to find their own ways to act responsibly, guidance could be handed down from higher authority — the owners. While the U.N. called for voluntary and aspirational standards, could this really work? The shareholders could force the boards and management to improve their behavior."

— From the August Column

ESG, which stands for environment, social, and governance, is the movement to get corporations to act more responsibly by using the economic clout of the investment community. The movement is an offshoot of the CSR, or corporate social responsibility movement, which was directed at the officers and boards of directors to act more in the interests of society. Last time we went through the United Nation's efforts in the ESG area, all of which were repeatedly described as voluntary and aspirational. This column will look at a recent petition filed with the SEC by some ESG heavyweights seeking to make ESG reporting by listed companies mandatory.

Last October, a petition was filed with the Securities and Exchange Commission (SEC) by two distinguished law professors, Cynthia A. Williams of Osgoode Hall Law School, the law school of York University in Toronto, Canada, and Jill E. Fisch of the University of Pennsylvania Law School. Sixteen additional "Securities law specialists" added their signatures, along with 50 other individuals and organizations. Among those 50 were some of the biggest heavyweights in investing, including PRI, Morningstar, and the California Public Employee Retirement System (CalPERS). The Comptroller for New York State and the Treasurer of were also among the 50. The introduction to the Petition states:

> Today, investors, including retail investors, are demanding and using a wide range of information designed to understand the long-term performance and risk management strategies of public-reporting companies. In response to changing business norms and pressure from investors, most of America's largest public companies are attempting to provide additional information to meet these changing needs and to address worldwide investor preferences and regulatory requirements. Without adequate standards, more and more public companies are voluntarily producing "sustainability reports" designed to explain how they are creating long-term value. There are substantial problems with the nature, timing, and extent of these voluntary disclosures, however. Thus, we respectfully ask the Commission to engage in notice and comment rule-making to develop a comprehensive framework for clearer, more consistent, more complete, and more easily comparable information relevant to companies' long-term risks and performance. Such a framework would better inform investors, and would provide clarity to America's public companies

> on providing relevant, auditable, and decision-useful information to investors

The Conclusion to this 16-page petition, clearly states that the goal of the petition is to cause the SEC "to promptly initiate rulemaking to develop *mandatory* rules for public companies to disclose high-quality, comparable, decision-useful environmental, social, and governance information" (emphasis added).

Pushback

Some commentators are suspicious of the ESG Movement and see it as an instrument of the extreme left-wing of American politics.[1] State officials from New York, Illinois, and California signing on to the petition fortifies these suspicions. The PRI's joinder, with its connection to the UN, potentially has the makings for a veritable right-wing meltdown. It is not surprising, then, that the Trump Administration has instructed various officials to look into ESG with an eye toward reining it in on the basis that it may violate the fiduciary duties of money managers in charge of pension plans subject to ERISA. Enter Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," issued on April 15, 2019. This EO extols the virtues and importance of the energy industry, particularly petrochemical companies, a huge target for environmental activists.

The Purpose section to the EO makes it obvious that this is not a continuation of the Obama-era environmental approach:

> Section 1. Purpose. The United States is blessed with plentiful energy resources, including abundant supplies of coal, oil, and natural gas. Producers in America have demonstrated a remarkable ability to harness innovation and to cost-effectively unlock new energy supplies, making our country a dominant energy force. In fact, last year the United States surpassed production records set nearly 5 decades ago and is in all likelihood now the largest producer of crude oil in the world. We are also the world's leading producer of natural gas, and we became a net exporter in 2017 for the first time since 1957. The United States will continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future.

The ESG-related language is found in Section 5(b):

> b) To advance the principles of objective materiality and fiduciary duty, and to achieve the policies set forth in subsections 2(c), (d), and (f) of this order, the Secretary of Labor shall, within 180 days of the date of this order, complete a review of available data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) in order to identify whether there are discernible trends with respect to such plans' investments in the energy sector. Within 180 days of the date of this order, the Secretary shall provide an update to the Assistant to the President for Economic Policy on any discernable trends in energy investments by such plans. The Secretary of Labor shall also, within 180 days of the date of this order, complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets.

CONCLUSION

By the time this column is in print, the 180-day time period granted to the Secretary of Labor should just about be up. Whether that deadline is met is anyone's guess. It will be interesting to see if this saga plays out along the same lines as the Obama-era fiduciary standards regulations for pension fund money managers, also justified by ERISA, that were shot down by the Fifth Circuit Court of Appeals (two to one) with no appeal from the Trump Administration. For background on the Fifth Circuit opinion see my column from August, 2018, "Staying Up to Date on the Fiduciary Rule(s)."

RESOURCES

The Petition is online at https://www.sec.gov/rules/petitions/2018/petn4-730.pdf

EO 13868 is online at https://www.federalregister.gov/documents/2019/04/15/2019-07656/promoting-energy-infrastructure-and-economic-growth

These and related links are available at the Sustainability Accounting Resource Center link found on the front page of the Web-Wise Lawyer Web site (www.webwiselawyer.com).

Notes

1 See, Blackmon, David, "Illinois Is Going Broke, But The ESG Movement Is Here To ‹Help›," Forbes Magazine Online. Retrieved from https://www.forbes.com/sites/davidblackmon/2018/03/02/illinois-is-going-broke-but-the-esg-movement-is-here-to-help/#19df88b854b1: "[T]his approach to investing based on social issues rather than return on capital has worked so well in California and New York that it has played a significant role in pushing state and local retirement systems in those states to massive deficit situations."

PRACTICAL SUCCESS

ERIC FLETCHER. With more than 25 years of experience, spanning broadcasting, advertising, marketing and professional services business development, Eric Fletcher is a seasoned connector—of ideas, people and strategic growth-oriented solutions. For the past dozen years he has managed and directed teams focused on targeted business development and client service in the legal industry.

A RECESSION IS COMING — PROACTIVE BUSINESS DEVELOPMENT IS THE ONLY WAY TO PREPARE

You've seen the articles. Many knowledgeable observers believe a recession is inevitable; some are predicting a severe slow-down as early as Spring 2020, based on certain indicators.

I do my best to avoid trafficking in fear and doom, but it is difficult to find a serious economic observer that doesn't believe a downturn is coming.

If it occurs, law firms (and other professional service providers) that are not doing the strategic planning today to prepare for whatever happens in the market over the next six to 12 to 24 months are likely to find themselves reliving the dark days of 2008, and following.

Roger Hayse, a colleague and consultant to law firms in transition—particularly those dealing with crisis—just authored a terrific piece on this topic.

With his article as a jumping-off point, here are two ways firms can become proactive with business development efforts today, and be better prepared for whatever the market at large has in store.

Talk To Your Clients

Your best clients are constantly looking at projections for the coming months. If you don't know what their concerns are—first, why not? And second, you should assume someone is having this conversation with them. If it's a relationship you value, that someone should be you.

There are a number of outstanding professionals who can help you construct a client feedback program that will do three things:

- Let you know what your client's most significant business concerns are—for the near-and-long term. Your job, should you choose to engage in the proactive pursuit of trusted advisor status, is to become valuable to your client in this specific area. You're going to have to resist the temptation to disregard something just because it doesn't appear connected to the service you provide.
- Shine some light on just how loyal your best clients might actually be. Regular, strategic conversation is the key to improving your score here.
- And as a bonus, you should uncover any existing immediate opportunities and any threats to the relationship that you're unaware of.

Build Allied Relationships

Unless you are a unicorn, the core of your practice lands on your desk either by virtue of a direct or indirect relationship—those who know and trust you, or those connected to those who know you. We refer to these as allied professionals.

One of the most valuable assets for business development professionals is a robust pipeline of these allies.

Consider the example of an estate planning consultant who, rather than waiting for families in need of his specific brand of counsel, proactively built relationships with CPAs, bank trust officers, and others directly connected to those who would benefit from his practice.

By becoming a valued and indispensable resource to the professionals serving his target market in related ways, the estate planning advisor built a pipeline of relationships that, overtime, delivered a steady flow of the work he sought.

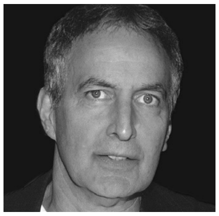
The Key is to Become Proactive

We've made just two suggestions here. There are certainly other important and productive ways in which your business development efforts should be intentional, and proactive.

The firms and service providers that elect to count on the flow of work historically enjoyed from sources that have been there for years will find themselves making decisions about who and where to cut, when and how to maintain stability, and how to survive what appears inevitable.

Firms who muster what it takes to become proactive in a strategic way have a much better shot at being prepared for the recession when it rears its head.

THE BALANCED LAWYER



JEFF DAVIDSON, MBA, CMC, on the web at www.BreathingSpace.com, holds the registered trademark as "The Work-Life Balance Expert®." Jeff is the leading personal brand in speaking, writing, and reflecting on work-life balance, harmony, and integration, and he has a passion for speaking to law firms that want to help their professional staff members make rapid progress in this arena. Jeff is the author of Everyday Project Management, Breathing Space, and Simpler Living. Jeff's books have been published in 18 languages including Arabic, Chinese, French, Japanese, Malay, Spanish, Turkish, and Russian.

WHAT REALLY MATTERS IN YOUR LIFE?

You devote considerable time and energy to your career in law, but what about to your family? It's been well-established that children grow up with the best chance of succeeding in life when they have two loving, caring parents. Notwithstanding, a single parent raising children can do a wonderful job. Many single parents perform everyday acts of heroism when you consider all that they do.

Suppose you are married and have children, or are married and will have children, were married and have children, or will be married and contemplate having children sometime in the future. With that in mind, what kind of family goals do you have, and what type of goals might be appropriate for the whole family, i.e., where every member gets to offer input?

An Interrelationship

Many of the goals you have for your family life are likely to be interrelated with the other major goal areas of your life. For example, one of your goals might be to provide for your children's education, buy a new home, and be able to retire with grace and ease when the time comes.

Any financial goals you choose to pursue for you and your family need to be initiated as early as possible. All benefits, including compound interest, accumulating principal, even the discipline to start saving and investing in this manner, are all facilitated when you begin at the youngest age possible.

If your child is in grade school now, and you want to be able to send him to college, it will be much easier if you start early. If your child is 13 years old and you have five years to save, in order to accumulate a given sum you'll have to put away three times or more the amount than you would if you had started when your child was age three. Hey, it's just the way time and money work.

A More Active Interest

Suppose your goal is to take a more active interest in your family's activities. This means spending more time with them, actually conveying your interest, and being a good listener. Many people say they want to be more involved with their family; they want to spend more time with their son; they want to attend their daughter's recital. The reality for too many people, however, is much different.

If they're lucky, they catch the last 10 minutes of the recital, spend a scant three minutes per day actually listening to their spouse, barely know their son, and so on. Is any of this slightly familiar to you?

The key to pursuing goals in a variety of areas is a balance. Nowhere is this clearer than in pursuit of family goals, because your family members are more likely than others to let you know when you're not upholding your word.

Another common goal area is family vacations. How often would you like to go away with your family? Once a year, twice a year, quarterly, monthly, perhaps even biweekly? Suppose your goal is to take an extended vacation of between three days and six days quarterly. Perhaps during each of the eight other months in which this time away is not taken, you also seek to go on at least one weekend venture.

Reaching this goal would involve a good deal of planning, making reservations, coordinating schedules, allocating funds, ensuring that projects and tasks at work are taken care of well in advance of departure dates, and coordinating your children's academic schedules and other responsibilities accordingly.

Your Family, Your Life

In many respects, how your family operates is representative of how your life operates. Do you want your children to greet you enthusiastically when they come back from visiting friends or some after-school activity? If they don't regularly do this, then you might want to set a goal of greeting them daily, or at some other interval, with open arms when you return from work or time away.

LONG-TERM CARE LITIGATION: BACKGROUND AND RESOURCES

KIPPY WROTEN, CHC, Board Certified in Trial and Pre-Trial Practices (NBTA). As the founder of Wroten & Associates, Kippy Wroten's legal experience covers a broad spectrum of complex litigation that encompasses all areas of healthcare liability including high exposure and class action claims of elder abuse, fraud, and corporate unfair business practices. Ms. Wroten's experience includes the successful defense of individual healthcare providers, independent long term care facilities, ancillary service providers, as well as related corporate enterprises and their executives. Ms. Wroten has been awarded the "AV" peer review rating by Martindale-Hubbell which represents the highest level of professional skill and personal ethics. She is a Certified in Healthcare Compliance (CHC) and is certified by the National Board of Trial Advocacy in both trial and pre-trial practices. Ms. Wroten has been recognized as a "Super Lawyer" for several years and has been a highly regarded speaker in both local and national forums.

In California, the Elder Abuse and Dependent Adult Civil Protection Act laid the foundation for elder abuse claims which ignited a new era of civil litigation that has evolved into a complex, professionally aggressive, and emotionally charged area for litigators to navigate. Consumer Attorneys of California, a professional organization of plaintiff attorneys, asserts that more than 225,000 seniors in California are victims of elder abuse in nursing homes every year.[1] This is a number they contend represents only one in five actual cases of abuse. Although almost 90 percent of reported elder neglect and abuse incidents involve a perpetrator who is a family member, in litigation misconduct is largely attributed to long-term health care providers. While society continues to grapple with the need to create a more efficient and affordable program to deliver health care to our growing population of elderly citizens, in our courtrooms our struggle is to fairly define the parameters of what is, and is not, neglect and abuse. Regardless of whether you stand on the side of plaintiff attorneys or those representing care providers, an understanding of the underlying history, reform, and the accepted interpretation of laws and related regulations will provide an important foundation to support a fair and balanced inquiry.

DEVELOPMENT OF THE LONG-TERM CARE INDUSTRY AND REGULATORY OVERSIGHT

The Social Security Act was initially enacted in 1935 to provide old-age assistance to aged needy individuals. Medicare and Medicaid were subsequently adopted in 1965 as Title XVIII and XIX of the Social Security Act. These 1965 enactments extended Social Security services to include healthcare coverage to all Americans aged 65 and older (Medicare) and healthcare services to low-income families and individuals with disabilities (Medicaid). Initially, the Department of Health, Education, and Welfare (HEW) maintained oversight over both the Medicare and Medicaid programs through the Social Security Administration (SSA) and the Social and Rehabilitative Service Administration (SRS), respectively. Today, the Centers for Medicare & Medicaid Services administer both of these federal programs. Over the decades there have been many changes to these programs as the world of long-term healthcare has continued to grow and evolve.

Advent of Government Programs for the Elderly

The enactment of the Social Security Act spurred the development of a complex hierarchy of statutes and regulatory rules which today are applied to licensed long-term healthcare providers. From the roots of common law has evolved a system that begins with the enactment of statutes by federal and state legislators and culminates in the adoption of interpretive regulatory rules created by administrative agencies established to oversee legal compliance. These same administrative agencies that create the regulations are then called upon to interpret and enforce these laws. Oftentimes this cornucopia of statutes and administrative rules provide the gravamen for claims made in civil litigation.

The Social Security Act

In 1935 Franklin D. Roosevelt signed into law the original Social Security Act. The Social Security Act as initially legislated did not contain any provisions for healthcare, let alone the expansive entitlement program in place today. Although lacking any provision for healthcare, the Social Security Act did establish a federal-state public assistance program for the elderly through the Old Age Assistance program (OAA). Although created to provide assistance to the elderly, OAA specifically prohibited the distribution of any funds to residents living in public institutions. As a result of this prohibition, the seed for the growth of private proprietary nursing homes was planted.

Fifteen years later, in 1950, the Social Security Act was amended wherein direct payment of OAA funds to healthcare providers was allowed for the first time. To monitor this new payment system and the need for participation rules, the amended law included a "standard setting amendment" which mandated the creation of state licensing programs for nursing facilities.

In 1956 the availability of OAA funding was significantly expanded. By 1960 OAA payments had skyrocketed from $35.9 million (1950) to $280.3 million (1960), thereby setting the stage for today's broader healthcare entitlement programs.

The Medicare Act (Creation of Medicare and Medicaid)

On July 30, 1965 another round of amendments to the Social Security Act were signed into law by President Lyndon Johnson. Through these 1965 amendments, Medicare (healthcare for the elderly) and Medicaid (healthcare for the poor) were established. The Medicare Act specifically established a cooperative financial program between the federal government and states to pay for medical services provided to the elderly and poor. The Act created a joint enterprise of sorts that made federal funds available to states agreeing to participation mandates established by the federal government.[2] The Centers for Medicare and Medicaid Services (CMS) is the federal agency charged with determining whether any state is qualified to receive Federal Financial Participation (FFP) dollars.

State Plans Create Cooperative Agreements to Support Receipt of Federal Participation Dollars

Independent state legislative action is required to authorize a state's agreement to comply with participation mandates established under the Medicare Act. State compliance with federal participation requirements seeded the need for the creation of state agencies to oversee the administration of federal healthcare dollars received under the Act.

In California, the Medicaid State Plan sets forth the requirements of Title XIX of the Social Security Act. This state plan is a comprehensive written document created by California legislators that describes the nature and scope of California's Medicaid (MediCal) program and serves as a contractual agreement between the State of California and the federal government for the use and administration of federal dollars. Requirements include conformity with Title XIX of the Social Security Act and regulations outlined in Chapter IV of the Code of Federal Regulations.

Federal Regulations

In addition to funding, the 1965 Medicare Act also provided the Department of Health Education and Welfare (HEW) authority to establish program participation standards for healthcare providers. In 1967 this authority was expanded to include development of nationwide regulations designed to create uniformity between independently developed state standards.

In 1971 President Nixon published his eight-point plan to improve nursing homes and in 1972 Congress passed laws which for the first time provided full funding for state nursing facility certification programs. Regulations setting certification standards were published in 1973 (interim) and finalized in January 1974.

Through the years there were many failed efforts to institute changes in the provider certification process. Ultimately, in 1982 the Health Care Financing Administration (HCFA) announced planned changes to facility participation certification designed to ease the certification process. Under pressure from state and public groups however, HCFA's plan was shelved, and in 1983 HCFA contracted with the Institute of Medicine (IoM) for a study designed to "serve as a basis for adjusting federal policies and regulations governing the certification of nursing homes so as to make those policies and regulations as appropriate and effective as possible." The IoM thereafter stated their goal was "to ensure that any person requiring nursing home care be able to enter any certified nursing home and receive appropriate care, be treated with courtesy, and enjoy continued civil and legal rights." This base line goal set the bar for the provision of adequate healthcare services funded by the government.

When regulations are utilized to support claims in civil litigation it is important to determine the appropriateness of their use as per se evidence establishing liability. By design, regulations establish administrative department rules that are not required to meet more stringent constitutional evidentiary standards that apply in civil and criminal courts. Therefore, regulations do not necessarily carry the same force and effect of statutes when applied to civil and criminal claims. In the event that evidentiary rules do not support their use as per se evidence of liability, they still may be considered as being instructive for the purpose of evaluating the reasonableness of conduct under review. The determination of the appropriate use of regulations as well as all other aspects of the government's administrative oversight of healthcare participation requirements is therefore an important consideration when managing civil or criminal actions.

INSTITUTE OF MEDICINE REPORT SPURS DEVELOPMENT OF THE REGULATORY FRAMEWORK IN PLACE TODAY

The IoM is an independent, nonprofit organization that serves as the health arm of the National Academy of Sciences which was originally chartered by President Abraham Lincoln in 1863. The Academies collectively include the National Academy of Sciences, the National Academy of Engineering, the National Research Council, and the Institute of Medicine. The Institute of Medicine works "outside of government to provide unbiased and authoritative advice to decision makers and the public" about "the nation's most pressing questions about health and health care."

In 1983 the Institute of Medicine contracted to conduct a study of the then-current system of enforcing nursing home regulatory policies and procedures in a manner to assure the provision of "satisfactory" care. Their report "Improving the Quality of Care in Nursing Homes" was released on January 1, 1986 and concluded that an overhaul of the regulatory system was needed. The IoM criticized federal policies that required surveyors to consult with facility operators in an effort to return them to regulatory compliance and the limitation of formal sanctions to cases where violations remained uncorrected beyond deadlines set by surveyors. To assure regulatory compliance it was determined that surveyors required enforcement authority that allowed them to impose punishment for regulatory violations.

Prompted by the 1986 IoM report, legislators began working on the Federal Nursing Home Reform Act which was ultimately adopted as part of the more comprehensive Omnibus Budget Reconciliation Act of 1987 (OBRA), signed into law by President Ronald Reagan. OBRA revised the standards by which nursing homes are evaluated for Medicare and Medicaid funding participation and created the minimum expectation that care would be sufficient to support the ability of patients to "attain and maintain the highest practicable physical, mental, and psychosocial well-being." Enforcing the OBRA provisions required the evolution of federal and state regulations which today establish the rules on which federal Medicare and Medicaid dollars are funded. OBRA requirements are codified in the Code of Federal Regulations, Title 42 (Public Health), Part 483 (Requirements for States and Long term Care Facilities).

Omnibus Budget Reconciliation Act of 1987

On December 22, 1987 President Ronald Reagan (11th Congress) signed into law the Omnibus Budget Reconciliation Act otherwise known as OBRA '87. The Federal Nursing Home Reform Act was integrated as part of the broader OBRA legislation. The following outlines the progression of this federal nursing home legislative reform.

Federal Nursing Home Reform Act

The Federal Nursing Home Reform Act[3] (FNHRA) was enacted as part of OBRA '87 to address the concerns of the federal government regarding the distribution of public funds to nursing facilities that participated in the Medicaid program and to improve the quality of care for Medicare and Medicaid eligible nursing home residents. To accomplish its aim, the FNHRA established requirements geared toward achieving elaborate oversight and inspection of nursing homes participating in Medicare and Medicaid programs.[4]

The enactment of the OBRA '87 provided a comprehensive set of nursing home reforms, applicable to facilities which have provider agreements under either Medicare or Medicaid funded programs. These reforms were phased in gradually and took full effect on October 1, 1990.[5]

Reforms included the implementation of a standardized assessment and care planning tool (Resident Assessment Instrument or RAI). Reforms also required that each nursing home participating in Medicare and/or Medicaid funded programs provide care for its residents so as to promote maintenance or enhancement of each resident's quality of life. 42 U.S.C. § 1395i-3(b)(1).[6] Specifically, under the reformed rules, a skilled nursing facility must provide services designed to attain and maintain the highest practicable[7] physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care which describes the medical, nursing and psychosocial needs of the resident and how these needs will be met. 42 U.S.C. § 1395i-3(b)(2).[8]

Federal Quality Assurance Programs and Confidentiality Protections

In order to facilitate the new FNHRA mandate that every skilled nursing facility accepting Medicaid or Medicare funding "must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." 42 U.S.C. § 1395i-3 (b)(1)(A). The reformed rules require that a nursing home maintain a quality assessment and assurance committee designed to identify and develop plans to correct deficiencies in the quality of care provided to residents. See 42 U.S.C. § 1396r (b) (1) (B); § 1395i-3 (b) (1) (B).[9]

In 1990, to strengthen quality assurance procedures, Congress amended the quality assurance requirements to provide:

> [a] State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph. (42 U.S.C. §§ 1396r (b)(1)(B) [ii]; 1395i-3 (b)(1)(B) (ii).)

Thereafter, quality assurance committees were officially considered "key internal mechanisms that allow nursing homes opportunities to deal with quality concerns in a confidential manner and can help them sustain a culture of quality improvement." Park Assocs. v. N.Y. AG (In re Subpoena Duces Tecum to Jane Doe) (2003) 99 N.Y.2d 434.

In discussion of the purpose and goal of the Federal Quality Assurance procedures, the Park Assocs. court held:

> [T]he purpose of hospital-based quality assurance committees is similar to that of quality assurance committees functioning in nursing homes—to ensure the proper delivery of

services and the maintenance and improvement in quality of care. We noted that the State Education Law privilege which attaches to the proceedings and work product of hospital quality assurance committees "promote[s] the quality of care through self-review without fear of legal reprisal" Katherine F. v. State of New York, 94 N.Y.2d 200, 205 (1999) [discussing Education Law Section 6527(3)]. Furthermore, such protections "enhance the objectivity of the review process" and ensure that the committees "may frankly and objectively analyze the quality of health services rendered" Logue v. Velez, 92 N.Y.2d 13, 17 (1998) [quoting Mem of Assembly Rules Comm, Bill Jacket, L 1971, ch 990, at 6, pertaining to the privilege amendment to Education Law Section 6527 (3)]. The cloak of confidentiality covering quality assurance procedures and materials "is designed to encourage thorough and candid peer review … and thereby improve the quality of … care" Park Assocs. at 439.

Federal regulations also require skilled nursing facilities to maintain a quality assurance committee. Quality Assurance Committees are to meet quarterly for the purpose of identifying quality assurance issues and to develop and implement plans of action to correct identified quality deficiencies. See 42 C.F.R. § 483.75 (o)(1) and (2).[10]

California Quality Assurance Programs and Confidentiality Protections

Originally enacted in 1968, the statutory privilege provided under California Evidence Code section 1157 was restricted to committees of medical staff in hospitals or local medical societies.[11] Following various amendments the privilege provided under the statute was enlarged to include classes of caregivers whose records were protected from disclosure in conformity with OBRA '87 and other federal rules. In 1990 the Legislature extended this privilege to peer review bodies as defined in the Business & Professions Code to include the medical or professional staff of any health care facility or clinic licensed under Division 2 commencing with section 1200 of the Health & Safety Code or of a facility certified to participate in the federal Medicare Program as an ambulatory surgical center.[12] Skilled Nursing Facilities are licensed pursuant to Division 2, Section 1250 of the Health & Safety Code.[13]

Regulatory Administration Historical Milestones

1972

The Federal Supplemental Security Income program (SSI) which is funded through U.S. Treasury general funds was enacted. Through this program Medicare eligibility was expanded to cover individuals under the age of 65 with long-term disabilities as well as individuals with end-stage renal disease. Eligibility is linked to Medicaid low-income thresholds and is available for the elderly, blind, and disabled U.S. residents.

1977

The Health Care Financing Administration (HCFA) was established within the Department of Health, Education and Welfare (HEW) to administer Medicare and Medicaid programs. HEW was renamed in 1979 and those agencies providing public health services were placed into the Department of Health and Human Services (HHS).

1985

The Emergency Medical Treatment and Labor Act (EMTALA) was enacted. EMTALA requires Medicare participating hospitals having emergency rooms to provide appropriate medical screenings and stabilizing care.

1987

The Omnibus Budget Reconciliation Act of 1987 (OBRA '87) adopted nursing home reforms.

1995

The Social Security Administration is made an independent agency of the executive branch of the United States federal government.

1996

Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted establishing (1) the requirement for creation of rules to improve continuity of healthcare coverage, (2) the Medicare Integrity Program, (3) national administrative simplification standards for electronic healthcare transactions, and (4) a mandate to adopt privacy regulations.

2001

HHS announced the renaming of HCFA to the Centers for Medicare & Medicaid Services (CMS).

2009

The Affordable Care Act (ACA) is enacted. Amongst the provisions of the ACA are new rules designed to combat healthcare fraud, waste, and abuse. Increased sentencing rules and state-of-the-art technology utilizing advanced predictive modeling technology is touted by HHS as providing powerful tools for combating healthcare fraud, waste, and abuse.

The Health Care Fraud Prevention and Enforcement Action Team (HEAT) was created through a joint effort by HHS and the Department of Justice (DOJ). HEAT is directed by the Secretary of HHS and the U.S. Attorney General.

The Health Information Technology for Economic and Clinical Health Act (HITECH) was enacted to address privacy and security concerns related to electronic transmission of protected health information. HITECH strengthens HIPAA protections.

2013

Final regulations to support enhanced HIPAA privacy and security protections and enforce HITECH were adopted.

The Growth of Regulatory Oversight

Compliance with the constellation of complex rules and regulations that apply to long-term care operations is overseen by both federal and state administrative agencies granted quasi executive branch authority to interpret and enforce legislatively enacted statutory mandates through the respective agency's adoption of administrative regulations. At the federal level, the Department of Health and Human Services maintains oversight of long-term care operations. In California, the Department of Public Health, Licensing and Certification, maintains oversight over skilled nursing facilities while the California Department of Social Services, Community Care Licensing Division, oversees Residential Care Facilities for the Elderly.[14]

Federal Administrative Agencies

The Health Care Financing Administration (HCFA) was established in 1977 as part of HEW to coordinate Medicare and Medicaid programs.

HCFA's responsibility included oversight of medical provider standards that require compliance with healthcare provider certification rules. In 2001 HCFA was renamed the Centers for Medicare & Medicaid Services (CMS). CMS is an agency of the US Department of Health and Human Services (DHHS) and continues to have responsibility for the administration of Medicare and Medicaid's health financing program.

HHS Organization

CMS, the Centers for Disease Control and Prevention (CDC), and the National Institutes of Health (NIH) fall under the oversight of the HHS Secretary. Additional federal offices include the Office for Civil Rights (OCR), the Departmental Appeals Board (DAB), and the Office of Inspector General (OIG). CMS has its headquarters in Woodlawn, Maryland and hosts ten regional offices located throughout the United States. Following a summary of the organization chart published by the Department of Health and Human Services.

- Region I: Boston, Massachusetts serves Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island and Vermont.

- Region II: New York City, New York serves New Jersey, New York, the U.S. Virgin Islands and Puerto Rico.

- Region III: Philadelphia, Pennsylvania serves Delaware, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia.
- Region IV: Atlanta, Georgia serves Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.
- Region V: Chicago, Illinois serves Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.
- Region VI: Dallas, Texas serves Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
- Region VII: Kansas City, Missouri serves Iowa, Kansas, Missouri, and Nebraska.
- Region VIII: Denver, Colorado serves Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
- Region IX: San Francisco, California serves Arizona, California, Hawaii, Nevada, the Territories of American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.
- Region X: Seattle, Washington serves Alaska, Idaho, Oregon, and Washington

California Administrative Agencies

In 2007 the California Department of Health Services (CDHS) reorganized to create two related agencies: the Department of Health Care Services (DHCS) which finances and administers the California Medical Assistance Program (Medi-Cal) and the California Department of Public Health (CDPH) which oversees the Licensing and Certification Program for health care facilities. Licensing and Certification is responsible for monitoring the compliance of health care facilities with state laws and regulations. In addition, Licensing and Certification cooperates with CMS in monitoring Medicare and Medi-Cal (in California Medicaid is referred to as Medi-Cal) payments which must meet federal requirements. Licensing and Certification also oversees the certification of nurse assistants, home health aides, hemodialysis technicians, and the licensing of nursing home administrators.[15]

Assisted Living communities in California are referred to as licensed Residential Care Facilities for the Elderly (RCFEs) and are regulated by the California Department of Social Services. RCFEs operate under laws specific to assisted living. Although Medi-Cal does not generally cover assisted living expenses, state inspections, staff training and certification requirements unique to RCFEs are in force.[16]

Assisted Living is a licensed residential setting that provides 24-hour care and supervision to seniors who need assistance, but do not require around the clock nursing care. Assisted Living communities provide assistance with activities of daily living, medication management, social activities, housekeeping, meals, transportation, and may offer dementia care programs and health- related services.

HEIGHTENED PROTECTIONS FOR ELDERLY AND DEPENDENT ADULTS

California Penal Code Section 368

Amendments to California Penal Code section 368 were enacted in 1986 which added provisions specifically to address three categories of crimes committed against the elderly and dependent adults (theft, neglect, and physical abuse).[17] Penal Code Section 368 is a “wobbler” statute, meaning that it can be prosecuted as either a misdemeanor or felony. Sentencing for misdemeanors includes up to one year in county jail and a $2,000 fine. Sentencing for felony convictions ranges between two and four years in state prison. Sentencing enhancements for actions that cause great bodily injury or death can add three to seven years in state prison. Probate Code sections 250 and 259 prevent convicted abusers from receiving an inheritance from the abused.

The Elder Abuse and Dependent Adult Civil Protection Act (The Elder Abuse Act)

In 1992 the California Legislature passed the Elder Abuse and Dependent Adult Civil Protection Act (The Elder Abuse Act), found in Welfare & Institutions

Code, Division 9 (Public Social Services) at Chapter 11 commencing at Section 15600. The specific provisions of The Elder Abuse Act are found commencing at California Welfare & Institutions Code Section 15600. Article One contains the Legislative Findings and Intent wherein the Legislature specifically recognized the responsibility of the State of California to foster and promote the personal well-being of its citizens noting that elders and dependent adults are subject to the risks of abuse, neglect, and abandonment. Additionally, the Legislature recognized that those elders and dependent adults who are at greatest risk for mistreatment are those with physical impairments and poor health that create greater vulnerability. Welfare & Institutions Code Section 15657 was enacted to enable interested persons to engage attorneys in order to advance the cause of abused elderly or dependent adults.

The key Legislative findings that pave the road to an elder abuse claim include an affirmative statement of legislative intent to encourage civil litigation for the purpose of protecting the elderly who are identified as a vulnerable and disadvantaged class for whom the government has a duty to protect. Following are the related legislative findings.

Welfare & Institutions Code Section 15600

(a) The Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons.

(b) …that a significant number of these persons are elderly…recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment.

(c) …that most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position.

(d) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.

(e) Therefore, it is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety. (f) It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15667) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.

17 Penal Code Section 368

(a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

(b)(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or in the state prison for two, three, or four years.

(2) If in the commission of an offense described in paragraph (1), the victim suffers great bodily injury, as defined in subdivision (e) of Section 12022.7, the defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.

(B) Five years if the victim is 70 years of age or older.

(3) If in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim, the defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.

(B) Seven years if the victim is 70 years of age or older.

(c) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor….

(g) As used in this section, "elder" means any person who is 65 years of age or older.

(h) As used in this section, "dependent adult" means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(i) As used in this section, "caretaker" means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult.

ADDITIONAL PROTECTIONS FOR ELDERLY AND DEPENDENT ADULTS

Additional protections are in place with a design to protect the vulnerable elderly and dependent adult from neglect and abuse. Whenever there is a legal claim made asserting abuse or neglect, compliance or noncompliance with the following may provide legal support to litigants.

Mandated Reporters

Welfare & Institutions Code Section 15630 sets forth the duties held by any person who has "assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives compensation…" as a mandated reporter. The manner required for reporting is dependent on the location where the abuse occurred, the credentials of the mandated reporter, and the type of injury sustained. In general, mandated reporters must report known or suspected abuse by telephone or through a confidential internet reporting tool within two working days. The "suspicion" of abuse is an objective standard that requires a report whenever a person knows or reasonably suspects, based on objective criteria, that abuse has occurred.[18]

Physical Abuse

Instances of observed or suspected physical abuse involving serious bodily injury require an immediate telephonic report to local law enforcement. A written report must also be submitted to the local ombudsman, appropriate licensing agency, and law enforcement within two working days.

Where serious bodily injury is not involved, a telephonic report is required within 24 hours. A written report must also be provided to the local ombudsman, the licensing agency, and law enforcement within the same 24-hour period.

Physical Abuse Initiated By Dementia Patient

When suspected abuse is allegedly caused by an individual who has been diagnosed with dementia and there is no serious bodily injury, a telephonic report to the local ombudsman or law enforcement is to be made immediately or as soon as practicably possible. A written report must be submitted to the same authority within 24 hours.

Abuse Other Than Physical Abuse in Long-Term Care Facility

A written report to either the local ombudsman or the local law enforcement agency is required.

Adult Protective Services, Ombudsman, and Law Enforcement Requirements

An adult protective services agency that receives a report of abuse alleged to have occurred in a long-term care facility, shall immediately inform the reporter that he or she is required to make the report to the long-term care ombudsman program or a local law enforcement agency.[19] If the known or suspected elder or dependent adult abuse reported to adult protective services, local law enforcement, or ombudsman program is being committed by a health practitioner licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, or any related initiative act, or by a person purporting to be a licensee, the adult protective services agency, local law enforcement, or ombudsman program shall immediately, or as soon as practically possible, report this information to the appropriate professional licensing agency.[20] The licensing agency shall investigate the report of abuse in light of the potential for physical harm.[21]

A local law enforcement agency shall immediately, or as soon as practically possible, report by telephone to the long-term care ombudsman program when the abuse is alleged to have occurred in a long-term care facility and send a written report thereof within two working days to any agency to which it is required to make a telephone report.[22] A long-term care ombudsman coordinator may report the instance of abuse to the county adult protective services agency or to the local law enforcement agency for assistance in the investigation of the abuse if the victim consents.[23] A long-term care ombudsman program and the Licensing and Certification Division of the State Department of Public Health shall immediately report by telephone and in writing within two working days to the bureau any instance of neglect occurring in a health care facility, that has seriously harmed any patient or reasonably appears to present a serious threat to the health or physical well-being of a patient in that facility.[24]

When a county adult protective services agency, a long-term care ombudsman program, or a local law enforcement agency receives a report of abuse, neglect, or abandonment of an elder or dependent adult alleged to have occurred in a long-term care facility, that county adult protective services agency, long-term care ombudsman coordinator, or local law enforcement agency shall report the incident to the licensing agency by telephone as soon as possible.[25] The local ombudsman and the local law enforcement agency may coordinate their investigation.

Physicians, Surgeons, Registered Nurse, Psychotherapist Exception

Physicians, surgeons, registered nurses, and psychotherapists are not required to report abuse or neglect when all of the following conditions exist:

- The mandated reporter has been told by an elder or dependent adult that he or she has experienced abuse.
- The mandated reporter is not aware of any independent evidence that corroborates a statement that abuse has occurred.
- The reporting elder or dependent adult has been diagnosed with a mental illness, dementia, or is the subject of a court-ordered conservatorship because of mental illness or dementia.
- In the exercise of clinical judgment, the professional clinician reasonable believes that the abuse did not occur.[26]

Long-Term Care Facility Exception

A mandated reporter in a long-term care facility is not required to report a suspected incident of abuse if all of the following conditions exist.

- The mandated reporter is aware that there is a proper plan of care in place.
- The mandated reporter is aware that the plan of care was properly provided or executed.
- A physical, mental, or medical injury occurred as a result of care provided.
- The mandated reporter reasonably believes that the injury was not the result of abuse.[27]

The long-term care mandated reported may report suspected abuse to the long-term care ombudsman.

Multiple Mandated Reporters

If two or more mandated reporters jointly have knowledge or reasonably suspect abuse, a report may be made by a member of the team selected by mutual agreement so that a single report may be made as is required.[28]

Report Content

The content of mandated reports is to include the following, if known:

- Name of reporting person.
- Name and age of elder or dependent adult affected.
- The present location of the affected elder or dependent adult.
- Names and addresses of family members or other responsible adult designated for the affected elder or dependent adult.
- Nature and extent of the elder or dependent adult's condition.
- Date of incident.
- Information that led to the suspicion of abuse.[29]

Internal Procedures

Procedures adopted to facilitate mandated reporting, to ensure confidentiality, and to apprise supervisors and administrators of reports may be established.

Punishment for Failure To Report

Failure to report suspected abuse is a misdemeanor that is punishable by not more than six months in the county jail and a fine of not more than $1,000.[30]

Failure to report suspected abuse that results in great bodily injury or death is punishable by not more than one year in county jail and a fine of not more than $5,000.[31]

Statute of Limitations

The failure to report suspected abuse is a continuing offense until the date law enforcement discovers the offense.

Training Requirements Related to Elder or Dependent Adult Abuse

Long-term care facilities that care for adults shall provide training in recognizing and reporting elder and dependent adult abuse, as prescribed by the Department of Justice.[32] Certified nursing assistant training programs must include six hours of instruction on preventing, recognizing, and reporting instances of resident abuse.[33] Following certification, ongoing in-service training requirements include four hours of instruction to include the prevention, recognition, and reporting of violations of resident rights. California Title 22 Section 72517 provides a list of additional areas of ongoing education required to be provided by Skilled Nursing Facilities.

THE PARTIES

Plaintiff Standing

Standing refers to the legal right to initiate a lawsuit. To do so, a person must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. "Special standing rules apply in certain circumstances for actions under the Elder Abuse Act."[35]

Standing: Real Party In Interest

In general, every action must be prosecuted in the name of the real party in interest.[36] The real party in interest is the person who owns the right, thereby the standing, to sue by law. They are the person who has suffered "an injury of sufficient magnitude reasonably to assure that all relevant facts and issues will be adequately presented."[37] Real parties in interest are beneficially interested in the controversy and must have "some special interest to be served or some particular right to be preserved or protected."[38]

A litigant's standing to sue is a "threshold issue to be resolved before the matter can be reached on the merits.[39]

"As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator."[40]

To have standing, a party must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large."[41] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical."[42]

Personal Representative

It is a general rule that an action must be prosecuted in the name of the real party in interest.[43] At times however, "considerations of necessity, convenience and justice" may require that the real party in interest be represented by another person or entity.[44]

Capacity

"Capacity" is often confused with "standing." The distinction between capacity and standing is that capacity generally depends on the personal characteristics of the party and is divorced from the merits of the proceedings or the nature of the question in issue.

The capacity to sue, one of many legal rights, is a technical requirement distinguishable from the independent element of standing. In general, any person or entity has the requisite capacity to come to court, including natural and artificial persons such as a corporation.[45] Alternatively, standing to obtain relief in court is an independent element of any cause of action which refers to an individual's right to receive relief in a court.[46]

Lacking the capacity to sue is an absence or legal disability which would deprive a party of the right to come to court.[47] This is in contrast to "standing" which requires an entity to have sufficient interest in the outcome of litigation to warrant the court's consideration of its position.[48]

Minors, insane or incompetent persons, and persons for whom a conservator has been appointed, for example, lack capacity to sue in that they are generally required to sue through a guardian or conservator of their estate or a guardian ad litem appointed by the court.[49]

Federal Rules of Civil Procedure, Rule 17 provides, in part, that an individual's capacity to sue or be sued is determined by the law of the individual's domicile if they are not acting in a representative capacity. For all other parties, capacity is determined by the law of the state where the court is located.

Those who suffer legal disabilities include mentally ill persons, mentally retarded persons, and persons who are judged mentally incompetent because of illness, age, or infirmity. Legal disability does not mean, however, that persons in these categories are removed from civil actions. The claims or defenses of a person who is non sui juris usually can be asserted by a legal representative, such as a guardian, trustee, or executor. In long term care cases it is common to find individuals who lack the mental capacity to bring litigation, therefore the appointment of a representative may be necessary.

California Probate Code Section 811 clearly states the elements used in the determination of legal mental capacity in California. Pursuant to Section 812 "a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant the rights, duties, and responsibilities created by, or affected by the decision."

The Elder Abuse Act authorizes an action to be brought by the elder or their "personal representative" when the living elder lacks capacity under Probate Code section 812, or is of unsound mind, but not entirely without understanding, pursuant to Civil Code section 38.[50] Civil Code section 38 provides, "A person entirely without understanding has no power to make a contract of any kind, but the person is liable for the reasonable value of things furnished to the person necessary for the support of the person or the person's family."

"Personal representative" is defined as "a person or entity that is either" "(1) [a] conservator, trustee, or other representative of the estate of an elder or dependent adult" or "(2) [a]n attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney."[51]

Guardian Ad Litem – Appointed by Court

When a person involved in a suit cannot adequately represent his or her own interest, the court may appoint a guardian ad litem to protect the person's interests. A guardian may be appointed for an incompetent adult.[52] An Application and Order for Appointment of Guardian Ad Litem (Judicial Council form CIV-010) is required. Appointment of a guardian ad litem requires either consent or, alternatively, notice and hearing.[53] A previously executed Durable Power of Attorney should be reviewed to determine whether the incompetent adult has previously identified the individual of choice to handle their interests. Otherwise, it is most common to select a close relative who may have an independent cause of action that is aligned with the interests of the incompetent adult.

Unlike typical guardians or conservators, guardians ad litem only protect their wards' interest in a single suit.

Generally, guardians ad litem are regulated by state and local laws. Jurisdictions differ not only on when to appoint guardians ad litem, but also on the guardians' minimum qualifications, training, compensation, and duties. Due to differences in local rules and funding availability, the quality and effectiveness of guardians ad litem can vary greatly not only between different states, but also between different areas within the same state. Because guardians exercise considerable control over their wards' lives and assets, they are subject to continuing court oversight after their appointment.

Conservator

A conservatorship is a court case where a judge appoints a responsible person or organization (called the "conservator") to care for another adult (called the "conservatee") who cannot care for himself or herself or manage his or her own finances. These conservatees are often older people with limitations caused by aging, but they also may be younger people who have been seriously impaired.

California law on conservatorships can be found in the Probate Code beginning at Section 1800. There are two types of conservatorships. A General Probate Conservatorship is for all adults who are unable to provide for their personal needs due to conditions rendering them incapable of caring for themselves or making them subject to undue influence. A Limited Probate Conservatorship applies when the person is developmentally disabled.

The probate court is given concurrent jurisdiction over any civil matter raised in an elder abuse claim if a conservatorship proceeding was filed before the abuse claim.[54] Persons found liable under the Elder Abuse Act are responsible for payment of reasonable fees incurred for conservator services related to the claim.

If the process seems a little daunting, there may be legal alternatives to conservatorship. If the person is able to understand and is willing to sign a Power of Attorney or Advanced Health Care Directive, these may be all that is needed for the person to be well cared for.

Successor in Interest

The term successor in interest means a successor to another's interest in property. A successor is a person or entity who takes over and continues the role or position of another. A "decedent's successor in interest" is the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action.[55] A successor in interest retains the same rights as the original owner, with no change in substance.

Although a probate is not necessary to designate a successor in interest, the successor in interest must execute and file a declaration in compliance with Code of Civil Procedure Section 377.32.

Survivor Cause of Action

A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.[56]

A survivor cause of action brought by a decedent's successor-in-interest for a violation of the Elder Abuse Act is a separate and distinct claim, to be differentiated from a wrongful death cause of action. The injuries to be compensated by these two claims are different and are asserted by technically different plaintiffs.[57]

If a person dies due to the fault of another, a suit may be brought to recover damages that the statutory beneficiaries sustained as a result of the death.[58]

A survival cause of action can only be brought if the decedent did not immediately die from his injuries. The damages recoverable by a personal representative or successor in interest on a decedent's cause of action are limited by statute. Damages recoverable under the statute include "the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Essentially, the survival statute allows one to "step into the shoes" of the deceased and recover the damages the deceased person would have been entitled to had they lived, including medical expenses and lost wages, as well as penalties, punitive or exemplary damages.

The purpose of a wrongful death statute is to compensate certain enumerated relatives of the deceased for the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived.[59] The right of action for wrongful death is purely statutory and no right of action for wrongful death exists at common law. Therefore, because wrongful death actions are purely statutory, they exist only in the form and with the limitations chosen by the legislature.

An action for wrongful death must be brought within two years of the death. However, if at the time of death a negligence action, based on the injuries that led to the death, would have been time barred, the wrongful death action is also time barred.

The Elder Abuse Act

But there is at least one exception to the rule that damages for the decedent's pre- death pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met. Under the Elder Abuse Act, where neglect or abuse of an elder or dependent adult is reckless or done with oppression, fraud, or malice such that the statutory prerequisites are satisfied, damages for the victim's pre-death pain, suffering, or disfigurement are recoverable in a survivor action pursued by the victim's personal representative or successor in interest, notwithstanding the usual prohibition on such recovery under Code of Civil Procedure Section 377.34.

The ability of the decedent's successor-in-interest to recover damages for the decedent's pre-death pain, suffering, or disfigurement under this section specifically overrides the general prohibition on such recovery provided at Code of Civil Procedure Section 377.34.[60] It is also expressly subject to the dollar amount limitation of Civil Code Section 3333.2 maximum of $250,000 for noneconomic losses in an action for injury against a health care provider based on professional negligence.[61]

Under circumstances where the individual liable for the misconduct is the same person that is entitled to bring an action under the Elder Abuse Act, then other individuals identified in Welfare & Institutions Code Section 15657.3 shall have standing to bring a claim in their place.

Claims for abuse and neglect of an elder or dependent adult survive the individual's death. Welfare & Institutions Code Section 15657.3(c)(d) provides that following the death of an elder or dependent adult, the right to commence or maintain an action shall pass to the representative of the decedent. If no personal representative exists then the right commences to an intestate heir "whose interest is affected by the action,"[62] the decedent's successor in interest, or an interested person as defined in Probate Code Section 48.

Statutory Standing

The prerequisites for standing to assert statutorily-based causes of action are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute.[63]

In California, a person may have standing when they can show a personal interest in the litigation's outcome regardless of whether or not such a person can satisfy the more rigorous federal Article III standing.[64]

Federal Standing

In circumstances where healthcare litigation relies on Federal statutory violations to establish its claims, an evaluation should be made as to whether a matter should be filed in federal court rather than state court. This occurs when a federal statute's preemptive force may be so extraordinary and all-encompassing that it converts an ordinary state common-complaint rule into one stating a federal claim. The federal laws, in effect, displace that state-law claims and the complaint is re-characterized as arising under federal law.

To establish standing under Federal Law a plaintiff must show (1) the challenged conduct has caused the Plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.[65]

Standing is one of the initial hurdles of any would-be plaintiff, and the first element of standing is injury-in-fact. In the developing area of consumer privacy litigation, recent cases reflect uncertainty in the federal courts as to what constitutes injury-in- fact sufficient to confer standing.[66]

There are three requirements for Article III standing: (1) injury-in-fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.[67]

Standing for Injunctive Relief

Someone who seeks injunctive or declaratory relief "must show a very significant possibility" of future harm in order to have standing to bring suit.[68]

APPENDIX

Assisted Living State Agency Contact and Licensure Types

ALABAMA

AGENCY: Department of Public Health and Bureau of Health Provider Standards

LICENSURE TYPES: Assisted Living Facilities, Specialty CareAssisted Living Facilities

WEBSITE: www.adph.org

PHONE: (334) 206-5575

ALASKA

AGENCY: Division of Health Care Services, Department of Administration and Department of Health and Social Services

LICENSURE TYPES: Assisted Living Homes

WEBSITE: http://dhss.alaska.gov/dhcs

PHONE: (907) 334-2493

ARIZONA

AGENCY: Arizona Department of Health Services, Division of Assurance and Licensure, Office of Assisted Living

LICENSURE TYPES: Assisted Living Facilities

WEBSITE: www.azdhs.gov/licensing

PHONE: (602) 364-2639

ARKANSAS

AGENCY: Department of Human Services, Office of Long term Care Licensure

TYPES: Assisted Living Facilities, Level I and Level II

WEBSITE: http://www.daas.ar.gov/

PHONE: (501) 682-8468

CALIFORNIA

AGENCY: Department of Social Services, Community Care Licensing Division

LICENSURE TYPES: Residential Care Facilities for the Elderly

WEBSITE: www.ccld.ca.gov

PHONE: (916) 651-8848

COLORADO

AGENCY: Department of Public Health & Environment

LICENSURE TYPE: Assisted Living Residence

WEBSITE: https://www.colorado.gov/pacific/cdphe/assisted-living-provider- resources

PHONE: (303) 692-2000

CONNECTICUT

AGENCY: Department of Public Health, Facility Licensing & Investigations Section

LICENSURE TYPE: Assisted Living Services Agency, Residential Care Homes

WEBSITE: www.ct.gov/dph/site/default.asp

PHONE: (860) 509-7400

DELAWARE

AGENCY: Department of Health & Social Services, Division of Long term Care Residents Protection

LICENSURE TYPE: Assisted Living Facilities

WEBSITE: http://www.dhss.delaware.gov/dhss/dltcrp/

PHONE: (302) 421-7400

DISTRICT OF COLUMBIA

AGENCY: Department of Health, Health Regulation and Licensing Administration

LICENSURE TYPE: Community Residence Facility and Assisted Living Residencies

WEBSITE: http://doh.dc.gov

PHONE: (202) 724-8471

FLORIDA

AGENCY: Agency for Health Care Administration Licensure

LICENSURE TYPE: Assisted Living Facilities

WEBSITE: http://www.ahca.myflorida.com/assistedliving

PHONE: (850) 412-4304

GEORGIA

AGENCY: Georgia Department of Community Health, Healthcare Facility Regulation Division

LICENSURE TYPES: Personal Care Homes and Assisted Living Communities

WEBSITE: www.dch.ga.gov

PHONE: (404) 657-5700

HAWAII

AGENCY: Department of Health, Office of Health Care Assurance

LICENSURE TYPES: Assisted Living Facilities, Adult Residential Care Homes

WEBSITE: www.state.hi.us/doh/resource/ohca

PHONE: (808) 692-7400

IDAHO

AGENCY: Department of Health and Welfare

LICENSURE TYPES: Residential Care or Assisted Living Facilities

WEBSITE: www.healthandwelfare.idaho.gov/

PHONE: (208) 364-1962

ILLINOIS

AGENCY: Department of Public Health, Division of Assisted Living

LICENSURE TYPES: Assisted Living/Shared Housing Establishments

WEBSITE: http://www.dph.illinois.gov/

PHONE: (217) 782-2448

INDIANA

AGENCY: Indiana State Department of Health, Division of Long term Care (ISDH)

LICENSURE TYPE: Residential Care Facilities

WEBSITE: http://www.in.gov/isdh/20227.htm

PHONE: (317) 233-7442

IOWA

AGENCY: Department of Inspections and Appeals, Adult Services Bureau

LICENSURE TYPES: Assisted Living Programs and Residential Care Facility

WEBSITE: https://dia.iowa.gov/health-facilities

PHONE: (515) 281-4115

KANSAS

AGENCY: Department of Aging and Disability Services

LICENSURE TYPES: Assisted Living Facilities/Residential Health Care Facilities

WEBSITE: www.kdads.ks.gov

PHONE: (785) 296-4986

KENTUCKY

AGENCY: Cabinet for Health & Family Services, Department for Aging & Independent Living

LICENSURE TYPES: Certified Assisted Living Communities, Licensed Personal Care Homes

WEBSITE: http://chfs.ky.gov/dail/default.htm

PHONE: (502) 564-6930

LOUISIANA

AGENCY: Department of Health and Hospitals Health Standards Section

LICENSURE TYPE: Adult Residential Care Providers

WEBSITE: http://new.dhh.louisiana.gov/index.cfm/directory/detail/702

PHONE: (225) 342-3402

MAINE

AGENCY: Department of Health and Human Services, Division of Licensing and Regulatory Services, Medical Facilities Unit

LICENSURE TYPES: Assisted Housing Programs (including Assisted Living Programs and Residential Care Facilities)

WEBSITE: http://www.maine.gov/dhhs/mecdc/dlrs/medical_facilities/home.html

PHONE: (207) 287-9300

MARYLAND

AGENCY: Department of Health and Mental Hygiene, Office of Health Care Quality

LICENSURE TYPE: Assisted Living Programs

WEBSITE: www.dhmh.state.md.us/ohcq

PHONE: (410) 767-6500

MASSACHUSETTS

AGENCY: Executive Office of Elder Affairs

LICENSURE TYPE: Assisted Living Residences

WEBSITE: www.state.ma.us/edler

PHONE: (617) 727-7750

MICHIGAN

AGENCY: Michigan Department of Human Services, Bureau of Children and Adult Licensing

LICENSURE TYPES: Home for the Aged; Adult Foster Care

WEBSITE: www.michigan.gov/afchfa

PHONE: (517) 373-1820

MINNESOTA

AGENCY: Department of Health

LICENSURE TYPES: Housingwith Services Establishment withAssistedLiving Designation, Boarding Care Home

WEBSITE: http://www.health.state.mn.us/divs/fpc/profinfo/licensure.html

PHONE: (651)201-4101

MISSISSIPPI

AGENCY: Department of Health, Health Facilities Licensure and Certification

LICENSURE TYPES: Personal Care Homes-Assisted Living, Personal Care Home-Residential Living

WEBSITE: www.msdh.state.ms.us

PHONE: (601) 364-1110

MISSOURI

AGENCY: Department of Health and Senior Services, Division of Regulation and Licensure, Section for Long term Care Regulation

LICENSURE TYPES: Assisted Living Facilities and Residential Care Facilities

WEBSITE: www.health.mo.gov/safety/index.php

PHONE: (573) 526-8524

MONTANA

AGENCY: Department of Public Health and Human Services, Quality Assurance Division

LICENSURE TYPE: Assisted Living Facilities

WEBSITE: www.dphhs.mt.gov

PHONE: (406) 444-2676

NEBRASKA

AGENCY: Office of Long term Care Facilities, Licensure Unit, Division of Public Health, Nebraska Department of Health and Human Services

LICENSURE TYPE: Assisted-Living Facilities

WEBSITE: www.hhs.state.ne.us/reg/regindex.htm

PHONE: (402) 471-3121

NEVADA

AGENCY: Division of Health, Bureau of Health Care Quality and Compliance

LICENSURE TYPE: Residential Facilities for Groups

WEBSITE: http://dhhs.nv.gov/Health/HCQC.htm

PHONE: (775) 687-4475

NEW HAMPSHIRE

AGENCY: Department of Health and Human Services, Division of Community Based Services, Bureau of Elderly & Adult Services

LICENSURE TYPE: Assisted Living Residence-Supported Residential Health Care and Assisted Living Residence-Residential Care

WEBSITE: www.dhhs.nh.gov

PHONE: (603) 271-9203

NEW JERSEY

AGENCY: Department of Health, Health Facilities

LICENSURE TYPES: Assisted Living Residences/Comprehensive Personal Care Homes and Assisted Living Programs

WEBSITE: www.state.nj.us/health

PHONE: (609) 633-9042

NEW MEXICO

AGENCY: Department of Health, Health Facility Licensing and Certification Bureau

LICENSURE TYPE: Assisted Living Facilities for Adults

WEBSITE: https://nmhealth.org/about/dhi/

PHONE: (505) 476-9025

NEW YORK

AGENCY: Department of Health, Bureau of Licensure and Certification

LICENSURE TYPES: Adult Care Facilities/Assisted Living Residences

WEBSITE: www.health.state.ny.us

PHONE: (518) 408-1624

NORTH CAROLINA

AGENCY: Department of Health and Human Services, Division of Health Service Regulation

LICENSURE TYPE: Assisted Living Residences

WEBSITE: http://ncdhhs.gov/dhsr/acls

PHONE: (919) 855-3765

NORTH DAKOTA

AGENCY: Department of Human Services, Division of Medical Services, Department of Health

LICENSURE TYPES: Basic Care Facility (regulated by the Department of Health) Assisted Living Facility (regulated by the Department of Human Services and, for sanitation, by the Department of Health)

WEBSITE: http://www.ndhealth.gov/ http://www.nd.gov/dhs/

PHONE: (701) 328-2352

OHIO

AGENCY: Ohio Department of Health

LICENSURE TYPE: Residential Care Facilities / Assisted Living

WEBSITE: www.odh.ohio.gov

PHONE: (614) 752-9524

OKLAHOMA

AGENCY: Department of Health, Health Facility Systems

LICENSURE TYPES: Assisted Living Centers, Residential Care Home

WEBSITE: www.health.ok.us

PHONE: (405) 271-6868

OREGON

AGENCY: Department of Human Services

LICENSURE TYPES: Residential Care and Assisted Living

WEBSITE: www.oregon.gov/DHS/spd/Pages/provtools/cbc/index.aspx

PHONE: (503) 373-2227

PENNSYLVANIA

AGENCY: Department of Aging (Assisted Living Residences); Department of Public Welfare (Personal Care Homes)

LICENSURE TYPES: Personal Care Homes and Assisted Living Residences

WEBSITE: http://dhs.pa.gov/

PHONE: (717) 783-3670

RHODE ISLAND

AGENCY: Department of Health

LICENSURE TYPE: Assisted Living Residences

WEBSITE: www.HEALTH.ri.gov

PHONE: (401) 222-5960

SOUTH CAROLINA

AGENCY: Department of Health and Environmental Control, Division of Health Licensing

LICENSURE TYPE: Community Residential Care Facilities

WEBSITE: www.scdhec.gov/health/licen/

PHONE: (803) 545-4370

SOUTH DAKOTA

AGENCY: Department of Health, Office of Health Care Facilities Licensure and Certification

LICENSURE TYPE: Assisted Living Centers

WEBSITE: https://doh.sd.gov/providers/licensure/assisted-living.aspx

PHONE: (605) 773-3356

TENNESSEE

AGENCY: Department of Health, Board for Licensing Health Care Facilities

LICENSURE TYPES: Adult Care Homes, Assisted-Care Living Facilities, Residential Homes for the Aged

WEBSITE: https://tn.gov/health/section/hcf-main

PHONE: (615) 741-7221

TEXAS

AGENCY: Department of Aging and Disability Services

LICENSURE TYPES: Assisted Living and Residential Care

WEBSITE: https://hhs.texas.gov/

PHONE: (512) 438-3161

UTAH

AGENCY: Department of Health, Facility Licensing, Certification

LICENSURE TYPE: Assisted Living Facilities

WEBSITE: www.health.utah.gov/hflcra

PHONE: (801) 273-2994

VERMONT

AGENCY: Vermont Department of Disabilities, Aging, and Independent Living, Division of Licensing & Protection

LICENSURE TYPES: Assisted Living Residences, Residential Home Care

WEBSITE: http://www.dail.vermont.gov/

PHONE: (802) 241-0480

VIRGINIA

AGENCY: Department of Social Services, Division of Licensing Programs

LICENSURE TYPES: Assisted Living Facilities

WEBSITE: www.dss.state.va.us

PHONE: (804) 726-7157

WASHINGTON

AGENCY: Department of Social and Health Services, Residential Care Services

LICENSURE TYPES: Assisted Living Facilities

WEBSITE: http://www.adsa.dshs.wa.gov/professional/

PHONE: (360) 725-2400

WEST VIRGINIA

AGENCY: Department of Health and Human Resources, Bureau for Public Health, Office of Health Facilities Licensure and Certification

LICENSURE TYPES: Assisted Living (multiple variants)

WEBSITE: http://ohflac.wvdhhr.org

PHONE: (304) 558-0050

WISCONSIN

AGENCY: Department of Health Services, Division of Quality Assurance, Bureau of Assisted Living

LICENSURE TYPES: Community-Based Residential Facilities / Assisted Living

WEBSITE: www.dhs.wisconsin.gov

PHONE: (608) 266-8482

WYOMING

AGENCY: Department of Health, Office of Healthcare Licensing and Surveys

LICENSURE TYPE: Assisted Living Facilities

WEBSITE: https://health.wyo.gov/aging/hls/

PHONE: (307) 777-7123

Notes

1 "Elder Abuse" Consumer Attorneys of California, January 9, 2018, http://https://www.caoc.org. Consumer Attorneys of California is an association of plaintiff attorneys who reported that "[s]tudies also show that neglect and abuse of nursing home residents have reached epidemic proportions."

2 See Medicare Provision in Title XVIII, 42 U.S.C. 1935i-3(b)(4); and Medicaid Provision in Title XIX, 42 U.S.C. § 1396r(b)(4).

3 Pub. L. No. 100-203, §§ 4201-4218.

4 Park Assocs. V. N.Y. State Atty. Gen. (In re Subpoena Duces Tecum to Jane Doe), 99 N.Y.2d 434 (2003).

5 Codified at 42 U.S.C. § 1395i-3 (Medicare) and 42 U.S.C. § 1396r (Medicaid). Delays in issuing regulations delayed actual implementation until Spring 1991.

6 42 U.S.C. § 1395i-3 (b)(1) Requirements relating to provision of services. (1) Quality of life. (A) In general. A skilled nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.

7 "Practicable" is defined by Black's Law Dictionary as being "Any idea or project which can be brought to fruition or reality without any unreasonable demands." "Practicable" was held to be feasible in the circumstances, Frey v Security Ins. Co. of Hartford, 331 F.Supp. 140, 143 (W.D. Pa. 1971).

8 42 U.S.C. §1395i-3 (b)(2) Scope of services and activities under plan of care . A skilled nursing facility must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care which: (A) describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met;(B) is initially prepared, with the participation to the extent practicable of the resident or the resident's family or legal representative, by a team which includes the resident's attending physician and a registered professional nurse with responsibility for the resident; and (C) is periodically reviewed and revised by such team after each assessment under paragraph (3). See also Valdivia v. Cal Dep›t Of Health Services 1991 U.S. Dist. LEXIS 21816 (1991) and Park Assocs v. N.Y. AG (In re Subpoena Duces Tecum to Jane Doe) 99 N.Y.2d 434 (2003).

9 Pursuant to 42 U.S.C. section 1396r(b)(1)(B) Quality assessment and assurance. A nursing facility must maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility›s staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.

10 42 C.F.R. § 483.75 (o)(1) and (2) Quality assessment and assurance.

> (1) A facility must maintain a quality assessment and assurance committee consisting of—(i) The director of nursing services; (ii) A physician designated by the facility; and (iii) At least 3 other members of the facility's staff. (2) The quality assessment and assurance committee— (i) Meets at least quarterly to identify

issues with respect to which quality assessment and assurance activities are necessary; and (ii) Develops and implements appropriate plans of action to correct identified quality deficiencies.

11 See stats. 1968, ch. 1122, Section 1, p. 2138; People v. Superior Court (Memorial Medical Center) (1991) 234 Cal. App. 3d 363, at p. 372.)

12 Bus.& Prof. Code § 805 (Stats. 1990, ch. 196, § 2. Section 805).

13 Alcott Rehabilitation Hospital v. Superior Court 93 Cal. App. 4th 94, 100 (2001).

14 In California, a Residential Care Facility for the Elderly (RCFE) is a voluntarily chosen housing arrangement where 75 percent of the residents are aged 60 or older. Varying levels of care and supervision are provided. RCFEs may also be known as assisted living communities, retirement homes, or board and care homes.

15 Please refer to the Nursing Home Administrators Act, California Health & Safety Code section 1416 for law relating to Administrator education, training, and certification.

16 A state by state compendium of state agencies having oversight over state assisted living facilities is located in Appendix A

17 Penal Code Section 368

(a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

(b) (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or in the state prison for two, three, or four years.

18 People v. Davis 126 Cal. App. 4th 1416 (2005).

19 Welf. & Instit. Code § 15640(a)(2).

20 Welf. & Instit. Code § 15640(b).

21 Id.

22 Welf. & Instit. Code § 15640(c).

23 Welf. & Instit. Code § 15640(d).

24 Id.

25 Id.

26 Welf. & Instit. Code § 15630(b)(3)(A).

27 Welf. & Instit. Code § 15630(b)(4)(A).

28 Welf. & Instit. Code § 15630(d).

29 Welf. & Instit. Code § 15630(d)

30 Welf. & Instit. Code § 15630(h).

31 Id.

32 Welf. & Instit. Code § 15655(a)(1).

33 Health & Safety Code § 1337.1.

34 Tepper v. Wilkins, 10 Cal.App.5th 1198, 1204 (2017).

35 Code of Civil Procedure § 367.

36 Iglesia Evangelica Latina, Inc. v. Southern Pac. Latin American Dist. of Assemblies of God, 173 CA4th 420, 445, 93 CR3d 75, 94 (2009).

37 Carsten v. Psychology Examining Com., 27 Cal.3d 793, 796 (1980).

38 Hernandez v. Atlantic Finance Co., 105 Cal.App.3d 65, 71 (1980).

39 Pacific Legal Foundation v. California Coastal Com. 33 Cal.3d 158, 169–172 (1982); Municipal Court v. Superior Court 202 Cal.App.3d 957, 960–964 (1988); California Water & Telephone Co. v. County of Los Angeles 253 Cal. App.2d 16, 22 (1967); 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §§ 73–74, pp. 132–135.

40 Carsten v. Psychology Examining Com., 27 Cal.3d 793, 796 (1980).

41 Holmes v. California Nat. Guard, 90 Cal.App.4th 297, 315 (2001).

42 Code of Civil Procedure § 367.

43 Salton City Area Prop. Owners Ass›n v M Penn Phillips Co. 75 CA3d 184, 191 (1977).

44 American Alternative Energy Partners II, 1985 v. Windridge, Inc., 42 CA4th 551, 559, 49 CR2d 686, 691 (1996).

45 Color-Vue, Inc., v. Abrams, 44 CA4th 1599, 1604, 52 CR2d 443 (1996).

46 59 Am.Jur.2d Parties § 312 (1971).

47 Keehn v. Joseph C. Mackey and Co., 420 So 2d 398 (Fla. App. 4 Dist. (1982).

48 Code Civ. Proc. § 372; see also Klopstock v. Superior Court 17 Cal. 2d 13, 18, (1941).

49 Tepper v. Wilkins 10 Cal.App.5th 1198, 1204 (2017).

50 Welfare and Institutions Code section 15610.30(d); see § 15657.6 [adopting definition of personal representative contained in section 15610.30, subdivision (d)].

51 Code of Civil Procedure §§372-373, 376. (For appointment of the successor in interest as a special administrator see Code of Civil Procedure § 377.33).

52 In re Jessica G., 93 CA4th 1180, 1187-1188 (2001).

53 Welfare & Institutions Code section 15657.3(a).

54 Code of Civil Procedure § 377.11.

55 Code of Civil Procedure § 377.30.

56 Quiroz v. Seventh Ave. Center, 140 Cal. App. 4th 1256 (2006).

57 Walls v. American Optical Corp., 740 So. 2d 1262 (La. Sept. 8, 1999).

58 Sunderland v. R.A. Barlow Homebuilders, 2002 PA Super 16 (Pa. Super. Ct. 2002).

59 Welf. & Inst. Code § 15657, subd. (b).

60 Quiroz, 140 Cal. App. 4th 1256 (2006).

61 See Lickter v Lickter, 189 CA 4th 712 (2010). Holding that an heir whose interest in the estate was a fixed dollar amount that had already been paid has no standing.

62 Surrey v. TrueBeginnings, LLC 168 Cal.App.4th 414, 417–418 (2008); Boorstein v. CBS Interactive, Inc. 222 CA4th 456, 466, 165 (2013).

63 Roos v. Honeywell International Inc., 241 Cal.App.4th 1472 (2015).

64 Baker v Carr, 369 U.S. 186, 204 (1962).

65 Clapper v. Amnesty International USA, 133 S.Ct. 1138 (2013).

66 Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

67 Nelsen v. King County, 895 F.2d 1248, 1250 (9th Cir. 1990), cert. denied, 112 S. Ct. 875 (1992).

68 Van Arsdale v. Hollinger 68 Cal.2d 245, 251 (1968) overruled on other grounds.

NAVIGATING THE NUANCES OF SARBANES-OXLEY AND DODD-FRANK WHISTLEBLOWER CLAIMS

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Twice in the last two decades, Congress has enacted sweeping reform legislation in response to major scandals and financial collapses that shook the financial markets and caused devastating harm to our nation's economy. The Sarbanes-Oxley Act of 2002 followed the revelation of huge financial frauds at multi-billion dollar publicly traded companies, such as Enron, Worldcom, and Tyco. The Dodd-Frank Act of 2010 was a massive overhaul of financial regulation that sought to address the causes of the market meltdown and financial crisis of 2008.

Although the two laws differed—Sarbanes-Oxley focused on corporate disclosure and accounting abuses, whereas Dodd-Frank crafted a broader range of regulatory reforms across the financial markets—both statutes sought to enhance protections and incentives for those who blew the whistle on wrongdoing in the financial markets. Sarbanes-Oxley Section 806 prohibited employers from retaliating against employees who provided evidence of corporate securities fraud and created a robust private right of action for victims of such retaliation. And in Dodd-Frank, Congress sought to further incentivize whistleblowing by creating a new SEC Whistleblower Program that not only strengthened anti-retaliation protections but also provided for the payment of sizable monetary awards to whistleblowers whose information led to successful SEC enforcement actions. In the ensuing years, that program has proved to be an extraordinarily successful public-private partnership; it has resulted in more than $1 billion in monetary sanctions levied by the SEC and has granted scores of individual whistleblowers monetary awards in excess of $380 million.

This article discusses both the Sarbanes-Oxley and Dodd-Frank whistleblower provisions and examine their key points, meaningful differences, and critical unresolved issues in need of further development.

WHISTLEBLOWER PROTECTION UNDER THE SARBANES-OXLEY ACT

Under Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. section 1514A, employees and agents of publicly traded companies and their subsidiaries have a civil cause of action if their employers retaliate against them because they engaged in certain types of protected whistleblowing activity. Employees must first file a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), but subsequently may pursue a case in federal court. To establish a claim under Section 806, an employee must establish:

- That a covered employee;
- Engaged in protected activity;
- That the employee suffered a materially adverse personnel action; and
- That the protected activity was a contributing factor in the unfavorable action. In the years since the enactment of SOX, the case law has elaborated further on many of these elements.

Who is Covered by Section 806?

Under the statute, Section 806's anti-retaliation protections apply to:

- Employees of any company that has a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of that Act (commonly referred to as "publicly traded companies");
- Employees of any subsidiary or affiliate of a publicly traded company whose financial information is included in the consolidated financial statements of the public company;
- Employees of a nationally recognized statistical rating organizations, as defined in Section 3(a) of the Securities Exchange Act; and
- Employees of a contractor or subcontractor of any of the above companies.

Although the Supreme Court did not limit its holding in Lawson v. FMR LLC, 571 U.S. 429 (2014), that Section 806 protects employees of contractors or subcontractors of a publicly traded company, several lower courts have ruled that the whistleblowing must relate to the contractor's provision of services to the public company and concern fraud by a public company.[1] Covered employees also include in-house counsel, outside lawyers, and accountants for public companies.[2] The courts generally have rejected claims that the rules of professional conduct per se preclude whistleblower-retaliation lawsuits by in-house counsel and that counsel may not rely upon attorney-client communications to prove their cases.[3]

What is Protected Activity?

SOX's anti-retaliation provision prohibits a covered employer from retaliating against an employee because the employee engaged in certain types of whistleblowing ("protected activity"). Section 806 defines protected activity as: (1) providing information to, causing information to be provided to, or otherwise assisting in an investigation, (2) regarding conduct the employee reasonably believes constitutes a violation of any (i) federal mail fraud, wire fraud, bank fraud, or securities fraud statute, (ii) SEC rule or regulation, or (iii) any federal law related to fraud against shareholders. Protected activity also includes filing, causing to be filed, participating in, or assisting in a proceeding related to alleged violations of the laws outlined above.

Section 806 encompasses both external complaints to federal regulatory and law enforcement agencies, Congress, and Congressional committees, and importantly, internal complaints to supervisors or other employees who are authorized to investigate misconduct. To constitute protected activity, the complaint must pertain to a violation of an SEC rule or regulation or fraud against shareholders, including mail fraud, wire fraud, bank fraud, or securities fraud.

It is important to emphasize several points about the scope of protected activity under SOX 806. First, the employee need not prove that an *actual* violation of law occurred but only that he had a reasonable belief that the employer engaged in illegal conduct. The employee must demonstrate both subjective reasonableness—that he actually believed the complained-about conduct constituted a legal violation—and objective reasonableness—"based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[4] Indeed, the "courts universally recognize that § 1514A protects employees who reasonably but mistakenly believe that the conduct at issue constitutes a violation of relevant law."[5] Of course, as a practical matter, attorneys representing whistleblowers should be prepared to point to a specific SEC rule or fraud statute and explain how the complained-about conduct can reasonably be seen to violate these provisions. Administrative law judges (ALJs) and the courts routinely dismiss retaliation claims when an employee asserts only vague, conclusory allegations about fraud.[6] Because it is difficult to predict when a factfinder will determine that an incorrect belief was "reasonable," to the extent possible, counsel should frame complained-about conduct as actual legal violations.

What Types of Retaliatory Conduct Does Section 806 Prohibit?

Section 806 applies to a broad range of materially adverse employment actions, including termination, demotion, suspension, other types of discipline, denial of benefits, denial of promotion, threats, intimidation or other harassment, and other acts that might dissuade a reasonable employee from whistleblowing. Termination can include "constructive discharge," which occurs when an employer subjects an employee to working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. In one case, the Fifth Circuit held that a company's disclosure of the identity of a whistleblower could constitute actionable retaliation, where the disclosure led to ostracism of the employee.[7]

What Connection is Required Between the Whistleblowing and the Retaliation?

Section 806 applies the burden-shifting framework set forth in the Federal Aviation Act Whistleblower Protection Program, another whistleblower statute. 18 U.S.C. § 1514A(b)(2)(C) (applying 49 U.S.C. § 42121(b)). Under this standard, an employee must prove by a preponderance of the evidence that his or her protected activity was a *contributing factor* to the adverse personnel action. The burden then shifts to the employer to prove by clear and convincing evidence that it would have taken the same personnel action absent the protected activity.

Most often, an employer's defense centers on its argument that a legitimate, non-retaliatory basis existed for the adverse action. However, close temporal proximity between a whistleblower's protected activity and the adverse action is a powerful factor which demonstrates retaliatory intent.

Litigating Section 806 Actions

Forum choice

OSHA administers SOX's anti-retaliation provision. Under the statute, a complainant must file as an administrative complaint with OSHA within 180 days of the date on which the retaliatory action occurred or on which the employee became aware of the employer's retaliation.

The statute also provides that, if the Department of Labor has not rendered a final decision within 180 days of filing, the employee may bring a de novo action in the appropriate federal district court and is entitled to a jury trial.

After an employee files an OSHA complaint, OSHA will investigate the complaint to determine whether the evidence provides "reasonable cause" to believe that the employer has violated Section 806. OSHA will issue a findings letter to the parties, either of which may object and require the parties to litigate the matter before an ALJ. Similarly, either party may appeal an ALJ's decision to the Department of Labor's Administrative Review Board (ARB).

Note that while a matter is pending, parties may settle through OSHA's Alternative Dispute Resolution program or through their own negotiated settlement. OSHA must approve any settlement agreement reached between an employer and employee while an employee's administrative SOX complaint remains pending at OSHA. OSHA prohibits settlement agreements which contain "gag" provisions that restrict or discourage an employee from openly communicating with the government about the employer's past or future legal violations. In particular, OSHA scrutinizes confidentiality and non-disparagement provisions to ensure that they do not restrict an employee from participating in a government investigation, require an employee to notify an employer before communicating with the government, insist that an employee affirm that he has not previously provided information to the government or that he has no knowledge of a legal violation, or bar an employee from collecting a monetary award.[8]

Between 2008 and 2018, the DOL docketed 1,978 SOX cases—approximately 180 per year. This demonstrates a recent downward trend from the mid-200s per year in earlier years. https://www.whistleblowers.gov/sites/default/files/3D-Charts-FY2008-FY2018.pdf. During fiscal years 2008 through 2018, between 15 percent and 26 percent of SOX cases filed with the DOL resulted in "positive outcomes" for complainants, meaning they settled or were decided favorably on the merits. In FY17, 23 percent of the cases had positive outcomes for complainants, while 50 percent were dismissed, and 26 percent were kicked out to federal court or withdrawn. In FY18, 21 percent resulted in positive outcomes for complainant, while 56 percent were dismissed, and 22 percent were kicked out or withdrawn.

Relief

SOX's antiretaliation provision authorizes "all relief necessary to make the employee whole," 18 U.S.C. § 1514A(c)(1)-(2), including back pay (with interest), reinstatement with the same seniority that the employee would have had but for the retaliation,[9] and uncapped special damages to compensate for harm suffered from the retaliation. Special damages include damages for reputational harm, diminution of future earning capacity, and mental anguish. An employee's remedies also include reasonable attorney's fees and litigation costs. Section 806 does not provide for punitive damages.

Extraterritoriality

The law governing the extraterritorial application of SOX is unsettled and continues to evolve. In a 2011 opinion, Villanueva v. Core Labs. NV, ARB Case No. 09-108 (ARB Dec. 22, 2011), the ARB held that Section 806 did not apply extraterritorially, based on the Morrison presumption against extraterritorial application of a statute.[10] However, following the U.S. Supreme Court's decision in RGR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016), in which it reasoned that a "clear indication" of extraterritoriality will suffice, and that an "express statement of extraterritoriality is not essential" in holding that the Racketeer Influenced and Corrupt Organizations Act applied extraterritorially, the ARB revised its analysis. In a 2017 opinion, Blanchard v. Exelis Sys. Corp./ Vectrus Sys. Corp., ARB Case No. 15-031 (ARB Aug. 29, 2017), the ARB stated that a SOX claim should not be dismissed solely because it involves overseas conduct because SOX, at least in some circumstances, applies to extraterritorial conduct. Specifically, the ARB reasoned that Section 806 applied extraterritorially to cover "*all* public[ ]ly-traded domestic and foreign companies and their employees regardless of the location of the affected employer/employee." Id. at 12. However, it explained that Section 806 covers the *foreign* conduct of foreign issuers and employers only if the misconduct "affect[s] in some significant way" the United States. Id. Regardless, the ARB concluded that because the case involved a U.S. national employed by a U.S. subsidiary of a U.S. publicly traded company on Bagram Air Force Base in Afghanistan (a U.S. Department of Defense facility), who reported potential violations of U.S. mail and wire fraud statutes, and was terminated by U.S. employees, the case did not require an extraterritorial application of SOX, because it involved a domestic application of the statute.

However, other courts have been reluctant to apply SOX to extraterritorial conduct. For example, in Ulrich v. Moody's Corp., 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sept 30, 2014), aff'd, 721 F. App'x 17 (2d Cir. 2018), the court dismissed a SOX anti-retaliation claim brought by a U.S. citizen who was an overseas permanent resident working for a foreign subsidiary of Moody's, who reported wrongdoing and engaged in protected activity outside the U.S. By contrast, in Prout v. Vladeck, 2018 U.S. Dist. LEXIS 97714 (S.D.N.Y. June 11, 2018), even though the plaintiff worked for the foreign subsidiary of a U.S. company, the court distinguished Ulrich and concluded that plaintiff had a viable claim under SOX because he was a U.S. citizen, the misconduct he reported took place in the U.S., and he was fired in the U.S.

Accordingly, in evaluating a retaliation claim with potential extraterritoriality issues, counsel should assess the following facts:

- The employee's citizenship and work location;
- The employer's domicile, and the employer's corporate relationship to U.S.-based parents;
- The location of the underlying misconduct and its connection to violation of U.S. law;
- Where the protected activity occurred—i.e., did the employee report the unlawful conduct to individuals or authorities in the U.S.; and
- Where the alleged retaliatory action occurred.

While not all of these facts necessarily must point toward the U.S., the courts have recognized the difficult nature of litigating "foreign cubed cases," that is, cases which involve foreign employees who sue foreign issuers in U.S. courts for violations of U.S. securities laws based on securities transactions in foreign countries.

Use of a Company's Confidential Documents

The Defend Trade Secrets Act of 2016 (DTSA), 18 U.S.C. § 1831 et seq., provides certain immunities and protections for whistleblowers' use of employers' trade secrets. Specifically, the DTSA provides that an individual may not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret: (1) made in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law; or (2) made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. 18 U.S.C. § 1833(b)(1).

Generally, the courts permit a whistleblower to use confidential employer information to substantiate his whistleblower claims, even if the employee entered into a non-disclosure and confidentiality agreement, due to public policy concerns and to advance SEC Rule 21F-17, which prohibits employers from taking action to impede an employee from communicating directly with the SEC about possible securities laws violations.

However, employees may subject themselves to sanctions if they engage in a "wholesale stripping of [an employer]'s confidential documents" or "vast and indiscriminate" appropriations. Erhart v. BofI Holding, Inc., No. 15-CV-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017). Instead, an employee should take and rely on only those documents: (1) "specifically related to one of the allegations of wrongdoing"; (2) which are "reasonably necessary" to support his allegations of wrongdoing; and (3) those to which he "had properly accessed in the course of performing [his] work[.]" Id. at *13. The district court in Erhart subsequently denied the employer's motion to dismiss and held that the employee was entitled to disclose the employer's confidential information to prove his case because the employer failed to show that the information had no bearing on the SOX retaliation claim. Erhart v. BofI Holding, Inc., 269 F. Supp. 1059, 1087-88 (S.D. Cal. 2017). The Erhart case is scheduled for jury trial on September 17, 2019.

Some other courts have interpreted an employee's right to rely upon proprietary information more narrowly. For example, in JDS Uniphase Corp. v. Jennings, the district court distinguished between employees who "*orally* disclos[ed] proprietary information to [their] counsel in preparation for suit against the employer," when such a disclosure was necessary to vindicate legal rights, from employees who "physically cart[ed] away stacks of documents, disks, or computers belonging to the business without authorization to do so and in contravention of a confidentiality agreement." 473 F. Supp. 2d 697, 703-04 (E.D. Va. 2007).

As a practical matter, employees' counsel should ascertain at the outset which documents a potential client has in his possession. To the extent a client possesses confidential documents which are not specifically related to, and necessary to prove, his claims, or if the client did not access those documents during the regular course of his employment, he should not rely upon them in asserting his claims. Rather, counsel should prepare an index of all such documents and return them to the employer, without further disclosure.

DODD-FRANK'S SEC WHISTLEBLOWER PROGRAM

As part of the Dodd-Frank Act's sweeping overhaul of financial regulation, Congress included a special statutory provision establishing a new SEC whistleblower program. This was largely in response to the SEC's well-publicized failure to respond promptly to whistleblower tips it had received about the massive fraud being perpetrated by Bernard Madoff. Dodd-Frank's new whistleblower program consists of three key elements: (1) a requirement that the SEC pay monetary awards to whistleblowers who provided original information leading to successful SEC enforcement actions; (2) confidentiality for whistleblowers; and (3) new anti-retaliation protections to strengthen those provided by SOX Section 806.

By any measure, the SEC Whistleblower Program has been a stunning success. Since implementation after final rules were adopted in 2011, the SEC has brought successful enforcement actions with over $1.7 billion in monetary sanctions (disgorgement and penalties) in cases based on whistleblower information. The SEC has awarded nearly $400 million to more than 60 individual whistleblowers since making its first award in 2012. The largest award paid, in March 2018, was $50 million to joint whistleblowers, with a total of $83 million being paid to all three whistleblowers in that matter. Moreover, the program has led to a steady increase in tips provided to the SEC—from just over 3,000 in 2012 to nearly 5,300 in 2018—and a growing awareness of wrongdoing in the workplace as well as an awareness of the SEC program's incentives for reporting that wrongdoing.

For the practitioner representing a potential SEC whistleblower, it is critical to understand several aspects of the Dodd-Frank whistleblower provision: what is required to provide a tip that is eligible for an SEC monetary award; what is particularly useful in making such a tip; and how the Dodd-Frank anti-retaliation protection enhances, but also differs from, the SOX retaliation protections.

Requirements for an Award-Eligible Tip

Under the statute and the SEC's implementing rules, the SEC will pay an award of between 10-30 percent of the amount of monetary sanctions collected to an individual who:

- voluntarily provides
- original information to the SEC
- that leads to a successful SEC enforcement action
- resulting in monetary sanctions exceeding $1,000,000.

It is important to understand what each of these elements requires.

"Voluntary" Provision of Information

To qualify for an award as a whistleblower, the individual must "voluntarily provide" the information to the SEC. Under SEC Rule 21F-4(a), an individual provides information voluntarily when he or she provides it "before a request, inquiry, or demand" for such information is directed to the individual: (i) by the SEC; (ii) by the Public Company Accounting Oversight Board or any self-regulatory organization in connection with an investigation, inspection or examination; or (iii) in connection with an investigation by Congress, the Federal Government, or a state Attorney General or securities regulatory authority. The submission is *not* be considered voluntary if the whistleblower was required to provide the information to the SEC as a result of a pre-existing legal duty to the Commission, a contractual duty owed to the Commission or to one of the other authorities enumerated in the previous sentence, or pursuant to a duty that arises out of a judicial or administrative order. For purposes of determining voluntariness, only a request, inquiry, or demand to an individual whistleblower (or his personal representative, such as counsel) matters—not a request or demand made to that individual's employer.

Thus, if an employee is aware that the SEC seeks information from his or her employer (whether by subpoena, in an examination, or otherwise) and provides the SEC with information about a possible securities violation, the submission still could be deemed voluntary. But an issue could arise if the employee provides the same information that the SEC already has received from the employer. In that case, the SEC still would need to determine whether the whistleblower had provided "original" information (as described below) and whether any additional or different information provided by the whistleblower led to a successful enforcement action.

Another important caveat is that a submission to the SEC may be deemed voluntary, even if made after receiving a request, inquiry, or demand from the SEC, if the information was voluntarily provided to another law enforcement or regulatory authority prior to the SEC's request or inquiry. For example, if OSHA shares information from an employee's SOX complaint with the SEC, resulting in SEC inquiries to the employee, the SEC still may deem the employee's provision of information in response to its demands voluntary.

Original information

In order to receive an SEC award, an individual also must provide "original information." To be considered original under SEC Rule 21F-4(b), the information must be:

- Derived from the whistleblower's independent knowledge or independent analysis;
- Not already known to the SEC from any other source;
- Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the media, unless the whistleblower was the original source for the information; and
- Provided to the SEC after July 21, 2010.

SEC Rule 21F-4(b)(2) defines "independent knowledge" as factual information in the individual's possession that is not derived from publicly available sources. Significantly, the whistleblower can learn of the information from experiences, communications, and observations in business or social interactions—in other words, from a third party. Rule 21F-4(b)(3) defines "independent analysis" as an individual's own examination and evaluation of information that may be publicly available, such as financial reports, but which reveals information that is not generally known or available to the public.

Several exclusions under the SEC rules exclude information from the definition of independent knowledge or analysis, particularly if the source of the information is a lawyer, consultant, or other third party who acquires information as part of his or her work on behalf of a client, or a company insider who learns of the information in connection with his or her role in internal investigations. The rules also exclude information acquired illegally. Specifically, under SEC Rule 21F-4(b)(4), information is not derived from "independent knowledge or analysis" if:

- It was obtained in violation of federal or state criminal law; it is subject to the attorney-client privilege, unless disclosure would otherwise be permitted by the SEC's attorney conduct rule, 17 C.F.R. § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise;
- It was obtained in connection with the legal representation of a client, and the lawyer seeks to make a whistleblower submission for his or her own benefit, unless disclosure would otherwise be permitted pursuant to 17 C.F.R. section 205.3(d)(2), the applicable state attorney conduct rules, or otherwise; or
- It was obtained because the individual was (a) an officer, director, trustee, or partner of an entity and was informed of the allegations by another person, or learned of the allegations in connection with the entity's internal process for identifying and reporting violations of law; (b) an employee whose duties involve compliance or internal audits, or an employee of a firm retained to perform compliance or internal audit; (c) employed by a firm retained to conduct an internal investigation; or (d) an employee of a public accounting firm and the information was obtained during an engagement.

There are three important exceptions to the last category of exclusion. In general, they prohibit employees who have sensitive legal, compliance, or governance responsibilities, or those involved in required audit engagements, from bypassing internal reporting or compliance processes without good reason. The exceptions allow these employees to become eligible whistleblowers: (1) if the whistleblower has a reasonable basis to believe disclosure is necessary to prevent the entity from engaging in conduct that will cause substantial injury to the entity or the investing public; (2) if the entity is engaging in conduct that will impede an investigation; or (3) if more than 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal or compliance officer, or his or her supervisor, and the entity took no remedial action. In short, if reporting to the SEC is necessary to stop substantial ongoing harm or obstruction of an investigation, or if the individual has already reported internally and more than 120 days have passed with no corrective action, then these individuals can provide information to the SEC and be considered eligible for whistleblower awards.

Original Source

The SEC will consider information original if it has not learned of it from any other source. There are two exceptions to this rule. First, the SEC will consider a whistleblower the original source of information that was previously received by the SEC from another source if that source obtained the information from the whistleblower. Second, the SEC will consider a whistleblower to be the original source of information if it derives from the whistleblower's independent knowledge or analysis, and materially adds to the information the SEC already knows.

Information that leads to successful enforcement action

The third requirement is that the whistleblower's information must "lead to" a successful enforcement action. SEC Rule 21F-4(c) sets forth three circumstances in which information will be considered to "lead to" a successful enforcement action:

- The information caused the Commission to commence an examination, open an investigation, reopen a previously closed investigation, or inquire about different conduct as part of a current investigation, and the Commission brings a successful action based in whole or in part on the original information provided;
- The original information relates to a conduct that is already under investigation by the Commission (or other federal authority) and significantly contributes to the success of an enforcement action; or
- The information is provided by an employee through his or her employer's internal reporting procedures before or at the same time the

> employee submits the information to the Commission, and the employer then provides the employee's information to the SEC, which leads to a successful enforcement action. In this situation the employee will get the full credit for providing the information to the SEC. The caveat to this provision is that the whistleblower must provide the information to the SEC within 120 days of providing it to his employer.

This last category was included in the SEC's rules to address the concern that whistleblowers would bypass organizations' internal reporting mechanisms to assure their eligibility for monetary awards. The addition of this provision, along with other incentives, was designed to encourage internal reporting by whistleblowers. That goal appears to have been successful, as statistics from the SEC's Office of the Whistleblower indicate that among whistleblowers who report information about wrongdoing in their own workplaces, 83 percent report their concerns internally before going to the SEC.[11]

Monetary Sanctions Exceeding $1 Million

Generally, the SEC may pay a whistleblower award only when the monetary sanctions exceed $1 million in a single judicial or administrative action. In some circumstances, however, the SEC will aggregate the sanctions collected in two or more proceedings arising out of a common nucleus of operative facts. In such cases, once this threshold is met, a whistleblower is eligible for a monetary award based upon all monetary sanctions collected in related enforcement actions—regardless of amount.

In addition, as long as there is an SEC action with monetary sanctions exceeding $1 million, the SEC will pay an award based on monetary sanctions obtained in certain "related actions." Under the SEC rules, a "related action" is one that is brought by the Department of Justice, an appropriate regulatory authority or self-regulatory organization, or a state attorney general in a criminal case, and that is based on the same information that led to the Commission's successful enforcement action. Frequently, criminal or other regulatory authorities bring actions parallel to SEC enforcement actions. It is important to be aware of the existence of any such actions and the possibility of whistleblower awards for those related actions.

Additional Eligibility Requirements

Apart from the basic requirements described above, SEC rules also specify other requirements for whistleblowers who seek monetary awards. First, the whistleblower must submit his or her information through the SEC's Form TCR by mail or fax, or through the website portal provided at sec.gov for submitting whistleblower tips. A whistleblower may file anonymously, but in that case, must be represented by counsel. Counsel for an anonymous whistleblower must verify the whistleblower's identity, review and obtain the whistleblower's signed Form TCR (signed under penalty of perjury), and consent to provide the signed Form TCR to the SEC within 7 days upon request.

Second, as a condition of eligibility for an award, the SEC may require a whistleblower to provide further assistance to assist the staff in evaluating the information provided. Among other things, the SEC may require the whistleblower to provide all information in his or her possession that is related to the submission in a complete and truthful manner; provide testimony or other evidence related to the individual's eligibility for an award; and enter into a confidentiality agreement with the Commission.

Finally, certain individuals simply are ineligible to receive a whistleblower award. For example, the SEC prohibits individuals from collecting an award if they were convicted of criminal violations related to SEC actions; are members of the SEC, DOJ, or any law-enforcement agency, are members of a foreign government, or they knowingly made false statements to the SEC in their whistleblower submissions.[12]

HOW TO SUCCEED AS AN SEC WHISTLEBLOWER

As the above discussion makes clear, a whistleblower must satisfy a number of basic requirements before he or she is eligible for a monetary award. Beyond these basic requirements, however, several other factors are important to maximize the likelihood that a whistleblower tip will result in a monetary award.

One fundamental issue is how to present the whistleblower's information in a manner that makes it most likely that SEC staff will pursue an investigation. Each year, the SEC receives thousands of tips and complaints—over 5,200 whistleblower tips in FY 2018 alone—but it lacks the resources to launch full-scale investigations of all of these complaints, let alone to bring enforcement actions in each case. Thus, a critical first task for counsel representing an SEC whistleblower is to catch the staff's attention by demonstrating the significance and credibility of the tip. To do so, counsel should provide a clear and credible presentation of the facts known to the whistleblower and a cogent explanation of why those facts suggest the likelihood of a significant underlying violation of the federal securities laws.

The SEC's Form TCR contains sections for providing a narrative description of facts known to the whistleblower, a description of supporting documentation, and a summary of the possible violations of securities law. However, counsel need not be restricted by the format of the Form TCR. As a supplement to the Form, it can be quite helpful to provide the SEC with a self-contained memorandum, marshalling the facts known to the whistleblower and outlining potential theories of legal liability. The written submission also can provide relevant documentary evidence. A credible and professional submission can help persuade the staff to investigate the claim and potentially can serve as a road map for the SEC's investigation, by suggesting new leads and additional sources of information. In some cases, it also can be useful to include expert accounting or financial analyses to support the whistleblower's allegations of misconduct.

In general, the whistleblower should provide additional assistance to the SEC as requested. If a whistleblower has concerns about confidentiality and possible retaliation if he or she cooperates, counsel should provide the whistleblower's responses to staff without compromising whistleblower confidentiality. And if the whistleblower is amenable to meeting with staff to take questions and provide further explanation, this can be a valuable way of advancing the staff's investigation and helping convince the staff of the whistleblower's credibility.

Providing the maximum amount of assistance to the staff investigation is important for several reasons. First, of course, by helping the staff conduct a successful investigation and bring a strong case, counsel increases the chances of the desired outcome: a successful SEC enforcement action resulting in an order of monetary sanctions exceeding $1 million. But in addition, assistance is one of the best ways to maximize the whistleblower's monetary award. Recall that the SEC has the discretion to pay awards in an amount between 10-30 percent of the monetary sanctions obtained in a case. Under the process set out in SEC rules, a whistleblower makes an application for a monetary award only after the SEC has completed its successful case and decides on the amount of the award.[13] One factor relevant to the amount of the award granted by the SEC is the degree of assistance provided to the SEC by the whistleblower.

In the award application, counsel must establish that the whistleblower meets the eligibility requirements for an award. But counsel also should take the opportunity to persuade the SEC why an award at a higher percentage level is warranted. In so doing, the award application should address the criteria set forth in SEC Rule 21F-6, which the Commission may consider in adjusting the amount of an award. Under that rule, the SEC will consider the following factors in determining whether to increase the amount of an award:

- The significance of the information provided by the whistleblower;
- The degree of assistance provided by the whistleblower;
- The programmatic law enforcement interest in the case at issue;
- Whether the whistleblower participated in, or assisted, internal compliance efforts.

The SEC will also consider the following factors in determining whether to decrease the amount of an award:

- The whistleblower's culpability or involvement in the matter at issue;
- Any unreasonable delay by the whistleblower in reporting the information to the SEC;
- Whether the whistleblower interfered with internal compliance efforts.

Dodd-Frank Anti-Retaliation Protections

In addition to its whistleblower award program, Dodd-Frank established additional anti-retaliation protections for whistleblowers, including a new private right of action for employees subjected to retaliation by their employer.[14] Under the Dodd-Frank retaliation provision, added as Securities Exchange Act Section 21F(h), an employer may not discharge, demote, suspend, threaten, harass, or take any other retaliatory action against an employee who:

- Provides information about his or her employer to the SEC in accordance with the whistleblower rules;
- Initiates, testifies in, or assists in an investigation or judicial or administrative action; or
- Makes disclosures that are required or protected under SOX, the Exchange Act, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

An employee has a private right of action in federal court, without the need to exhaust administrative remedies prior to filing. This immediate right to sue in federal court is a key difference from the Section 806 of SOX's requirement that a complainant first file with OSHA. The remedies available under Dodd-Frank include reinstatement to the same seniority, double back pay (Sarbanes-Oxley allows for only actual back pay), and litigation costs (including attorneys' fees and expert witness fees). An employee who files suit under Section 21F(h) must file the claim no later than six years from the retaliatory conduct or three years from when the employee knew, or reasonably should have known, of the retaliatory conduct, but in no event more than 10 years after the date of the violation.

There is one important way in which Dodd-Frank's retaliation provision affords less protection than Section 806. This difference arises from the recent Supreme Court decision in Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018). In the Digital Realty case, the Court held that under Dodd-Frank a whistleblower is protected by the statute only if he or she provides information *to the SEC*. Thus, unlike under Section 806, an employee who reports internally but does not report his or her information to the SEC is not covered by Dodd-Frank's anti-retaliatory protections.[15]

To qualify for Dodd-Frank's anti-retaliatory protections, the whistleblower must possess a "reasonable belief" that the information provided relates to a possible securities violation. As with Section 806, a "reasonable belief" is a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess. Furthermore, the information must demonstrate a "possible violation," which eliminates frivolous submissions from eligibility. It is important to note that a successful SEC enforcement action is not a prerequisite for Dodd-Frank anti-retaliation protections.

As a supplement to private rights of action by victims of retaliation, the SEC has brought its own enforcement actions based on wrongful retaliation by companies against whistleblowing employees. A notable example is the SEC action in Paradigm Capital Management, Inc., Rel. No. 34-72393 (June 16, 2014). Paradigm's head trader reported to the SEC that the firm and its owner had engaged in principal transactions that created an undisclosed conflict of interest with a client. After the firm learned of the whistleblowing, it reassigned the head trader to full-time compliance assistant, stripped him of his supervisory responsibilities, and otherwise marginalized him. The SEC's case against Paradigm included a charge that it had violated the anti-retaliation provision of the statute; Paradigm agreed to settle this case for $2.2 million, and following the resolution of the case, the whistleblower received the statutory maximum award.[16] In another important case, the SEC brought a stand-alone enforcement action against a company for violating Dodd-Frank's anti-retaliation provision without charging violations of any other securities laws—including those which were the subject of the whistleblower's reports.[17]

The SEC also has used both its rulemaking and enforcement powers to clamp down on companies' use of overbroad non-disclosure and severance agreements that prohibit or deter employees from reporting violations to regulators and law enforcement. As part of its rules implementing the Dodd-Frank Whistleblower program, the SEC adopted Rule 21F-17(a), which states that:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities violation, including enforcing, or threatening to enforce, a confidentiality agreement… with respect to such communications.

In recent years, the SEC has brought several enforcement cases against companies which have violated this rule. These include cases against companies that: required employees to sign overly broad confidentiality agreements;[18] used separation agreements to inhibit communications with the SEC;[19] and required employees in severance agreements to waive their rights to obtain monetary awards via the SEC whistleblower program.[20]

CONCLUSION

Although Congress significantly expanded the protections available to whistleblowers in the aftermath of the 2008 financial crisis, Sarbanes-Oxley and Dodd-Frank whistleblowers navigate a minefield replete with complex questions including where, when, and how to report malfeasance. A one-size-fits-all approach is impossible in this context, given the particulars of each case and the available whistleblower paradigms. Whistleblowers may be well served by collaborating with advocates early in the process to map out internal and external reporting strategies, prepare exit strategies when necessary, compile a persuasive prosecution package for regulators, and maximize potential recoveries, all while ensuring that they avoid potential pitfalls.

The impact of whistleblower disclosures on financial transparency and accountability, as well as regulators' ability to bring successful enforcement actions, cannot be overstated. As a country, we need to ensure that whistleblowers are rewarded, or otherwise made whole, for the risks they assume in reporting the illegal activities of their employers.

Notes

1 See Anthony v. Nw. Mutual Life Ins. Co., 130 F. Supp. 3d 644 (N.D.N.Y. 2015); Gibney v. Evolution Mktg Research, LLC, 25 F. Supp. 3d 741 (E.D. Pa. 2014).

2 Van Asdale v. Int'l Game Tech., 577 F.3d 989 (9th Cir. 2009).

3 Wadler v. Bio-Rad Labs., Inc., 212 F. Supp. 3d 829 (N.D. Cal. 2016); Jordan v. Sprint Nextel Corp., ARB Case No. 06-105, ALJ Case No. 2006-SOX-041 (ARB Sept. 30, 2009). In Wadler, the jury reached a verdict in the employee's favor, which the Ninth Circuit largely upheld on appeal. Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176 (9th Cir. 2019), reh'g denied, No. 17-16193 (9th Cir. Apr. 8, 2019).

4 Allen v. Admin. Rev. Bd., 514 F.3d 468, 477 (5th Cir. 2008).

5 Rhinehimer v. U.S. Bancorp Inv., Inc., 787 F.3d 797, 812 (6th Cir. 2015).

6 See, e.g., Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 216 (2d Cir. 2014) (affirming the dismissal of SOX retaliation claims where the employee pleaded generically that he "reasonably believed that defendants were committing fraud upon [their] shareholders and would likely continue violating the United States mail and wire fraud statutes by using telephone lines and emails in furtherance of the fraud").

7 Halliburton v. Admin. Rev. Bd., 771 F.3d 254 (5th Cir. 2014).

8 https://www.whistleblowers.gov/sites/default/files/2017-10/InterimGuidance-DeFactoGagOrderProvisions.pdf.

9 Although reinstatement is the preferred remedy to make an employee whole, in a case where reinstatement is not feasible a SOX whistleblower may be able to receive "front pay" as an alternative remedy.

10 See Morrison v. Nat'l Australian Bank, Ltd., 561 U.S. 247, 255 (2010).

11 2018 Annual Report of the SEC Office of the Whistleblower, at 17.

12 SEC Rule 21F-8(c).

13 Under SEC Rule 21F-10, an award application, on SEC Form WB-APP, must be submitted within 90 days after the SEC posts a "Notice of Covered Action," the notice that informs the public that it has completed a case for which it may pay an award.

14 Dodd-Frank also amended Section 806 of SOX to strengthen the existing anti-retaliation provision. The amendments have been discussed above, and include adding the right to jury trial, and specifying when employees of subsidiaries of public traded companies are protected.

15 Currently, legislation, H.R. 2515, is pending in the House of Representatives that would overturn Digital Realty by amending the statutory definition of "whistleblower" to include internal whistleblowers.

16 See SEC Press Release 2015-75 (April 28, 2015).

17 See In the Matter of Int'l Gaming Tech., Rel. No. 34-78991 (Sept. 29, 2016).

18 See, e.g., KBR, Inc., Rel. No. 34-74619 (Apr. 1, 2015).

19 See, e.g., Anhesuer-Busch Inbev SA/NV, Rel. No. 34-78957 (Sept. 28, 2016).

20 See, e.g., Blackrock, Inc., Rel. No. 34-79804 (Jan. 17, 2017).

THE 162 ESSENTIAL RULES FOR DEPONENTS AND THE IMPORTANCE OF PRACTICE

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As most lawyers will agree, rules are good. Rules bring order to chaos. Rules set standards. Rules communicate expectations. Rules clarify objectives. On the other hand, rules can be dangerous. They can substitute for thought, stifle creativity, and cause rigidity. You are about to be introduced to the 162 essential rules for deposition witnesses. Be careful with them.

There is no shortage of rules for witnesses. Books, articles, videos, audio presentations, seminar materials, and law firm training manuals listing witness preparation rules are many and manifold. These rules come in all forms: prose and checklists, "dos and don'ts," maxims and aphorisms, "war" stories, and fables. I gathered and tested thousands of these rules just so you don't have to sift through them at great cost in money, time, and effort. I have synthesized their sage advice into the 162 essential rules for deposition witnesses.

The essential rules are all here, from "tell the truth" (rule 1) to "don't be overwhelmed by the fact that I'm giving you 162 rules, some of which contradict others" (rule 157) to "don't screw up" (rule 162). Of course, each essential rule must be scrupulously and unswervingly followed on all occasions without exception, unless there is reason to disregard it (rule 158).

Before I place the 162 rules in your hands, however, I must provide you with three Miranda-type warnings about (1) the importance of practice to give life and context to the rules, (2) the collaborative nature of preparation, and (3) the impracticality of imposing 162 rules on hapless witnesses.

THE IMPORTANCE OF PRACTICE

Rules are good, but not enough. Witnesses need experience. That means practice. Learning to be an effective witness is like learning to ride a bicycle; rules only go so far. ("Remember to maintain your balance at all times.") Proficiency comes only after a few bruised knees, elbows, and egos. Understanding comes from experience. For example:

Lawyer: Pat, here are some basic rules for your deposition. Answer directly and narrowly. Don't volunteer. You don't have to explain unless and until you are asked to explain. Answer only the question asked, not the question that should have been asked. Don't help the opposition. Keep it simple. Don't give them anything for free. Understand these rules?

Client: Absolutely. No problem. Don't volunteer. I understand completely.

Lawyer: Hey, Pat, are you wearing a watch?

Client: Uh, yeah. Let's see. It's 3:15.

Lawyer: Pat you stepped in it. I asked you if you were wearing a watch and you told me the time. Don't volunteer. If you get asked at your deposition if you're wearing a watch, you say "yes" and wait for the next question: "What time is it?" You see?

Client: I see. You got me. Very clever, you lawyers. Okay, I understand. Don't volunteer.

Lawyer: Pat, listen to each question carefully. Concentrate. Pause and think before you answer. If there is a problem with the question, don't answer. Make the questioner correct it. For example, if a question has a false premise, point that out. You are in control. You don't have to answer questions that put words in your mouth. Let's try a classic. Pat, have you stopped beating your spouse, yes or no?

Client: Uh….I get it. I say I can't answer yes or no because I have never beaten my spouse. Okay, concentrate, pause and think about the question, and if it's flawed, tell them. Let's try some more. This might be fun if I wasn't paying you $500 an hour.

Effective practice requires instruction on the rules *and* experience putting the rules to work. This means "simulation" or "role play." Put the witness in the witness chair. Don't just talk *about* what will be asked, *ask*. Ask the questions that will be asked at the real thing, and have the witness answer, just like at the real thing.

Practice *before* the deposition, of course. Depositions are no place for on-the-job training. The place for your witnesses to talk too much, or not enough, and to first experience distraction, inattention, confusion, anger, carelessness, frustration, fatigue, and similar inevitabilities prompted by incessant questioning is in the privacy of your office, where, like the medical ideal, it will do no harm. Mistakes *will* be made by deposition witnesses, but most are benign if made first, and addressed, during practice.

The "literature" commonly recommends a team of lawyers at practice: the principal lawyer who runs the show; the cross-examiner, who plays the opposing lawyer; and the critics, who observe and constructively critique the witness' performance. This is a good plan—many objective heads are better than one—but every case can't support unlimited expenditure of resources. You likely often will have to play every practice role, switching between relentless simulated cross-examination and supportive critique and advice. Whatever the size of your budget and however many are on your team, your witness needs *both* practice and critique.

Video recording can be useful. The theory is that a witness viewing his own simulated cross-examination will see himself as others see him and experience an epiphany, enhancing his effectiveness as a witness under real cross-examination. Video recording should be used with care, however. Some people are uncomfortable watching themselves on a screen. This may create self-consciousness and unnecessary distraction and exacerbate performance anxiety. Beware on your own account, too; lawyers viewing themselves on video are also subject to epiphanies. If your witness is to be deposed on video, however, you must practice on video until your witness achieves TV sang-froid.

Homework is necessary to effective practice. Your homework is to plan the simulated cross-examination as if it were the real thing, as if you represented the other side. Put yourself in your opponent's mind. What are the weaknesses in your case? What are the soft spots in your witnesses? What are the hard questions that the other side should ask? Your simulated cross should cover all the important ground and rigorously test the witness.

Similarly, your witnesses must do homework. They also should prepare for simulated cross as if it were the real thing. That means reviewing the necessary documents and pleadings, sorting out the chronology, mastering the details, and doing whatever else needs to be done before facing the real opponent who has real hostile intent.

Give yourself and your witnesses adequate time to practice. Do it on a timetable that doesn't put you under the gun. Inevitably, your simulated cross-examination will reveal subjects that call for more review, thought, organization, and homework. If the stakes and resources warrant, allow time for multiple practices. If the stakes and resources don't warrant, the day before the day before is preferable to the day before, to allow for rest and the clarity and insight that often comes during reasonable "sink-in" periods of repose.

This brings us to Miranda-type warning one: mastery of the 162 essential rules notwithstanding, don't let your witness (1) learn to ride a bicycle without a helmet or (2) testify without sufficient practice.

COLLABORATION

Preparation should be a collaborative endeavor. It is not just another opportunity for you to lecture a captive audience. Involve the deponent. He's the one who will sit in the witness chair. Tell him what to anticipate from the opposition. Prepare him on the 162 essential rules. Show him and practice *with* him, but don't leave it at that. Get his input. Ask him to identify his concerns. His responses will reveal things about which he is anxious, even if he didn't know it before you asked, as well as unanticipated vulnerabilities and strengths, and almost assuredly will suggest additional preparation needs. Together you and the deponent can address what is on the deponent's mind. Ask:

- What do you think the other side will ask you?
- Are you concerned about anything that we haven't talked about?
- Do you have questions—about the deposition process, the facts, the law—anything?
- Have we covered everything?
- Are you confident? Do you feel ready?
- Anything more you want to discuss?

David M. Malone and Peter T. Hoffman identify "five important rules of witness preparation," grounded on scientific learning theory, for use by the lawyer seeking to maximize that the likelihood that the wisdom imparted to the prospective deponent during preparation will "stick." The five rules, with my comments and theirs:

1. **Interact** (discuss, collaborate, invite questions, use give and take, don't lecture, accommodate the Rule of Limited Attention Span).
2. **Confirm** (get feedback; "constantly check with the witness to make sure what is being said is understood").
3. **Repeat** (repetition reinforces learning; "give key instructions more than once… each time phrase the information differently but make the same point").
4. **Illustrate** ("If you're asked 'Was it at this point that the blue car *smashed* into the red car?' and you say yes, the questioner's phraseology becomes your sworn testimony. Don't say 'yes' unless the question is 100 percent accurate. If it's not, fix it. Answer something like: 'The blue car *bumped* the red car.' Understand? Any questions about this point?").
5. **Reinforce** (practice; critique; point out when the witness violates the rules and repeat your explanation of the rules violated; give positive reinforcement for following the rules).

That brings us to Miranda-type warning two: you have the right to remain silent—some of the time. Exercise it. Involve the deponent. Ask for the deponent's questions and concerns. Listen to the deponent. Respond. Interact, confirm, repeat, illustrate, and reinforce. Preparation should be collaborative.

THE IMPRACTICALITY OF 162 ESSENTIAL RULES FOR DEPONENTS

While the 162 essential rules are phrased as directions to witnesses, they really are for *you*. They provide a lawyer's checklist to stimulate *your* thoughts about how to best tailor preparation for each witness. Of course, most witnesses would profit from—and thoroughly enjoy—rote memorization of the 162 rules. Still, the rules can be hazardous for lay persons when taken out of the appropriate context and used without your guidance, as in "don't try this without proper supervision." Indeed, if you are tempted to just hand the rules to your witnesses ("Just read these carefully. Be at the deposition a few minutes early and I'll answer any questions then. I've got another appointment now, so…"), you should consider switching to a career in estate planning.

I know, too, that 162 rules are daunting for some witnesses, and even for some lawyers. Believe it or not, there are people who'd actually *rather* read the Cliff's Notes. So, if you can't memorize the 162 rules, or even if you do, consider what I call (with their permission) the Malone-Hoffman Seven-Answer Method.

Malone and Hoffman identify "seven answers that are the best response to ninety percent of the questions asked at deposition." Of course, they don't mean that literally. They mean that the essence of the witness' task can be distilled into practical advice easily communicated to prospective deponents in the form of the Seven-Answer Method, so even the witness who has not memorized the 162 essential rules has hope of acceptable performance. The Seven Answers are these:

1. Green. Two o'clock in the afternoon. In the basement.
2. Yes.
3. No.
4. I don't understand the question.
5. I don't know.
6. I don't remember.
7. I'd like to take a break.

The answers to Question number one respond to questions asking for facts, e.g., about the color of the car, what time the event occurred, and where the body is buried. There is some poetic license here, but the point is clear: when asked for facts, answer with facts. Only facts. Number one answers distill the rules about not volunteering and being succinct, clear, focused, strong, specific, narrow and factual. Most importantly, understanding number one answers provides witnesses with assurance that most of the time a deponent doesn't have to be concerned about divining the questioner's strategy or motivation or about sneaky lawyer tricks. The deponent can do her job by supplying the truth. This understanding alleviates anxiety, demonstrating that, mostly, the deponent's task is simple and straightforward. As Mark Twain wrote, "When in doubt, tell the truth."

Answers two, three, five, and six give added emphasis to the rules about not volunteering, answering only the question asked, and answering precisely. Again, they illustrate that the deponent's task is simple and straightforward: answer "yes" if the question's premise is true, "no" if it's not, "I don't remember" if you know (or once knew) the answer but don't recall now, and "I don't know" if you don't know the answer. Simple and straightforward.

Answers four and seven make the point that the witness has some measure of control. Answer four distills the rules on responding to questions that are flawed in content, form, or delivery and represents the deponent's power to ask the questioner to repeat, rephrase, and strive for intelligibility. Answer seven distills the rules on dealing with fatigue, bodily functions, and other matters of atmosphere and comfort, and emphasizes that the deponent is not totally under the questioner's thumb.

So, this brings us to Miranda-type warning three: when witnesses don't have the attention span, time, interest, discipline, or budget to master the 162 essential rules, streamline and prioritize, but prepare.

THE 162 ESSENTIAL RULES FOR DEPONENTS

Without further ado, here are the 162 essential rules for deponents, to be used only by qualified lawyers with appropriate respect for truth, collaboration and learning theory, the witness' limited attention span, and the need for practice.

1. Tell the truth.
2. Be prepared to answer who, what, where, when, why, why not, how, how much, what else, and is that everything.
3. *Listen* to the question. Listen *carefully*.
4. Think about the question.
5. Understand the question. Don't answer unless and until you do.
6. If you don't fully understand the question, say so. Ask the questioner to repeat, explain, or rephrase the question.
7. Pause, and think as long as necessary before answering.
8. Don't pause *too* long before answering.
9. Answer clearly and directly.

10. If you don't know the answer, say "I don't know."
11. If you don't remember the answer, say "I don't remember."
12. Don't confuse "I don't know" with "I don't remember."
13. Where appropriate, qualify your "I don't remember" answer. Say something like "I don't remember at this moment" or "I don't remember without looking at" the document that is the subject of the question.
14. Answer "yes" or "no" if appropriate.
15. Don't answer "yes" or "no" if the question can't be answered accurately with "yes" or "no."
16. Don't speculate.
17. Don't guess.
18. Speculate or guess if asked to speculate or guess, but qualify your answer by identifying it as speculation or a guess.
19. If you are unable to speculate or guess, say so. Where appropriate, explain why, saying something like "I am unable to speculate on that because I don't have sufficient information."
20. Don't feel obligated to speculate or guess because the questioner suggests, and tries to make you believe, that you "should" know the answer.
21. Don't speculate or guess, or be embarrassed, because you can't answer a question and feel, or the questioner tries to make you feel, that you "should" know the answer. If you don't know, say so. If you can't remember, say so.
22. When appropriate, ask for information to aid your memory, saying something like, "I don't remember the numbers at this moment but if you show me the balance sheet, it may help me answer your question" or "If you'd like me to tell you when the project report was completed, you'll have to remind me of the date of the board meeting."
23. Don't assume.
24. Assume if directed to make assumptions. Make sure the assumptions are clearly stated. Qualify as appropriate, e.g., "At your direction I am assuming that the car was traveling at 60 m.p.h. even though I have no knowledge of the actual speed. Based on the assumption you want me to make my answer is…" or "What you're asking me to assume is an impossibility."
25. Be positive, assertive, confident, certain, strong, and precise.
26. Don't give wishy-washy, equivocal answers—"possibly," "probably," "maybe"—where you can and should be positive, assertive, confident, certain, strong, and precise.
27. Beware of imprecise questions that contain wishy-washy, equivocal words like "possibly," "probably," "maybe."
28. If you can't be precise, and must approximate, say so. Say something like "it was *around* three p.m." or "it was *about* 50 feet."
29. Answer narrowly.
30. Answer only the question asked.
31. Don't help the questioner by answering the question that should have been asked.
32. Don't help the questioner by supplying information to fix the question.
33. Don't volunteer.
34. When appropriate, volunteer.
35. When appropriate, supply information to fix the question as part of your answer. For example:

    Q. Isn't it true the car was blue?

    A. It was blue, but it wasn't a car. It was a pick-up truck.
36. Don't agree with the cross-examiner unless you are satisfied that the leading question is 100 percent accurate. Your "yes" or "no" answer to a leading question makes the premise, content, and phrasing of that question *your* sworn testimony.

37. Don't let the questioner put words in your mouth. For example:

    Q. Isn't it true the car was blue?

    A. No.

    Q. What color was it?

    A. I would call it aquamarine.

38. Don't ask the questioner questions about the questioner's questions. If you don't understand the question, say you don't understand.

39. Don't think out loud. If you need time to consider your answer, pause and think *silently*. When you're done thinking and ready, answer.

40. Don't be apologetic or self-deprecating. ("Oh, I should know the answer. My memory is going.")

41. Answer questions; don't offer editorial comment. ("That's a good question." "That's an interesting question." "I'm glad you asked me that question.")

42. Don't exaggerate or overstate.

43. Answer from personal knowledge, based on what you experienced with your senses, what you saw, heard, touched, tasted, and smelled.

44. Don't engage in "mind-reading" by testifying to others' unstated motivations, thoughts, or feelings. Instead, testify to what *you* saw, heard, touched, tasted, smelled, and if asked, what *you* thought and why.

45. Give short, concise answers. Don't be long-winded, prolix, otiose, or pleonastic. Eschew the superfluous, extraneous, duplicative, redundant, superrogatory, and unnecessary. Be succinct. Be brief.

46. Stick to the point. Don't go off on tangents. Don't ramble. Don't respond with extraneous details and irrelevancies.

47. Don't offer information that wasn't requested. You are not obligated to provide all details and relevant information if not asked.

48. Don't omit important details and relevant information.

49. Give complete answers.

50. Remember the transcript. Enunciate. "Uh-huh" can be erroneously recorded as "un-unh" and *vice versa*. Non-verbal communication—body language, gestures, voice tone, etc.—does *not* make it into the transcript.

51. Don't use formulations that dilute your credibility. If you preface your answer with a term like "frankly" you suggest that you may be other than frank when giving answers not labeled as being frank. The same is true of formulations like "the truth is…," "to be totally honest…," etc.

52. Pay attention. Focus. Concentrate.

53. Listen to every objection. Stop talking when an objection is made. When I object, it usually means the question and answer are important. Think about the objection. It may call your attention to a flaw in the question. Don't answer until I direct you to answer, after the objection is completed.

54. After an objection, wait for *my* instruction. Don't follow the questioner's instruction. Wait to hear from *me*.

55. If I instruct you to answer, answer, but follow the rules, i.e, listen to the question, pause, think before you answer, etc.

56. If I instruct you not to answer, follow my instruction. Don't answer.

57. I'll only instruct you not to answer if we have a sound legal basis for refusing to answer *and* we have a reason to keep the testimony out. Generally, this will occur when the question asks for privileged information or the inquiry is abusive or otherwise grossly improper. At trial, the judge generally will rule immediately, and either sustain (grant) the objection or overrule (reject) it and direct you to answer. At deposition, however, generally you have to answer all questions, even if they ask for irrelevant information.

58. Don't object. That's my job. Be the witness, and let me be the lawyer.

59. Be controlled. Don't get angry.
60. If you get angry, don't express your anger.
61. Be calm. Don't ventilate.
62. Don't complain about questions, the cross-examiner, the deposition process, the justice system, legal fees, the weather, or anything else. Just answer the questions.
63. Don't argue with the questioner. Leave arguing to the lawyers. Your job is to answer questions.
64. Be polite and courteous.
65. Be serious. Your testimony is no place for humor, sarcasm, or irony.
66. Beware of unfamiliar words and terminology in questions.
67. Use words and terminology that are comfortable for you. Answer "in your own words."
68. Don't use inappropriate slang, "street language," or unnecessary profanity.
69. Don't use technical terms or jargon *if* you want to be understood by those unfamiliar with the subject matter.
70. Don't unnecessarily display your controversial views about politics, religion, the death penalty, or anything else that will distract from the matter at hand.
71. Don't let the questioner interrupt. Say something like "I haven't completed my answer. May I complete my answer?"
72. Don't interrupt the questioner. Listen to the entire question.
73. Don't answer a question until you have heard the *entire* question.
74. Look the questioner in the eye while being questioned.
75. Look the questioner in the eye while answering.
76. Remember that you are dictating the transcript. Keep an eye on the court reporter while answering. Make sure the court reporter hears your answer. If important to our case, help the court reporter with spellings, unusual words, etc.
77. Be "transcript aware." Consider how what you are saying will appear in writing.
78. Don't look at me or anyone else as if you need help answering.
79. You *will* make mistakes. *Everybody* does. You may even forget some of these rules. Don't worry about it. Don't ruminate. Move on. Just don't make any more mistakes.
80. Correct mistakes. If you realize you've been inaccurate or incomplete, say so. ("Excuse me. A few minutes ago you asked me how many times I requested my personnel file and I said three. I just remembered that I asked a fourth time, too.")
81. Be comfortable with the questioner's pauses. Don't feel obligated to fill silences. Answer the question, stop, and wait for the next question.
82. Don't answer a question with a question, rhetorical or otherwise. If you can answer, answer. If you don't understand the question, say so.
83. Keep in mind that no matter how pleasant the cross-examiner is, the cross-examiner has interests different than, and likely hostile to, your interests.
84. The cross-examiner is not your friend. Be civil but don't chat, socialize, or explore common acquaintances. Business is business.
85. If appropriate and useful, write notes outlining your answer before you give it, to make sure it is complete and organized. Don't write anything you don't want the cross-examiner to see.
86. Beware of questions that assume inaccurate facts, as in "Have you stopped beating your spouse?"
87. Beware of questions that require a choice between alternatives selected by the questioner, like "Was the light red or green?" If appropriate, answer "neither" and wait for the next question.

88. Beware of questions that purport to summarize your earlier testimony.
89. Beware of questions that rephrase your earlier testimony.
90. Beware of compound and multiple questions.
91. Beware of vague questions.
92. Beware of ambiguity in questions.
93. Beware of questions about what “might have,” “could have,” “must have,” or “possibly” happened.
94. Beware of questions about what was done or not done “regularly,” “normally,” “usually,” “typically,” “occasionally,” or “rarely.”
95. Beware of questions that use absolutes, like “never” and “always.”
96. Be careful of answering with absolutes, like “never” or “always,” unless you are *absolutely* sure.
97. Beware of questions that foreclose later recollection, like “Have you told me everything about the events of March 15?” Answer something like: “I have told you everything that I can recall right now.”
98. Beware of the “recall” formulation. Using it may inappropriately dilute the strength of your answer. (“I recall that I stopped behind the crosswalk” versus “I stopped behind the crosswalk”).
99. Beware of the “would have” formulation. Using it may inappropriately dilute the strength of your answer. (“I would have stopped behind the crosswalk” versus “I stopped behind the crosswalk”).
100. Do not, in your answers, inappropriately mirror questions using the “recall” and “would have” formulations where your answer should be positive, assertive, certain, strong, and precise. (“Q. As you recall, where would you have stopped? A. I stopped behind the crosswalk.”).
101. Answer the question first, then add explanations: “Yes, except that…” or “No, but…”
102. Offer necessary explanations first, before giving your qualified “yes” or “no.”
103. Don’t let your guard down. Nothing said in the presence of the opposition is really “off the record,” even if the court reporter isn’t recording.
104. Request recesses: bathroom breaks, time for stretching, fresh air, moments of peace, a cigarette, a cup of coffee.
105. Don’t get wired on coffee.
106. Don’t smoke, chew tobacco, or use snuff while testifying.
107. Don’t drink alcohol before (or during) your testimony.
108. Don’t smell like alcohol.
109. Don’t use drugs, prescription or otherwise, that will adversely affect your performance.
110. Take your prescription medication, aspirin, cold pills, and other appropriate substances necessary to effective performance.
111. Don’t chew gum while testifying.
112. Don’t eat candy, or anything else, while testifying.
113. Turn off your cell phone. Turn off your pager (if you still use one).
114. Be on your best behavior.
115. Speak up.
116. Sit up straight.
117. Don’t cop an attitude. Don’t be arrogant, flippant, hostile, evasive, uncooperative, nasty, or superior.
118. Be yourself.
119. Dress appropriately.
120. Don’t wear inappropriate jewelry or other paraphernalia.
121. Dress comfortably.
122. Bring your reading glasses. Use your hearing aid.

123. Be assured that it is proper that you prepared for your testimony.

124. Be assured that it is proper that you discussed your testimony with me.

125. If asked, acknowledge what you did to prepare for your testimony, including review of documents, interrogatories, others' deposition testimony, notes, etc., unless I instruct you not to answer because the question calls for privileged information.

126. Review everything in advance.

127. Don't review anything in advance that you don't want to have to acknowledge having reviewed.

128. Review only what I tell you to review.

129. Don't bring anything that you don't want to be questioned about.

130. Don't bring anything.

131. Bring what you need: checklists, documents key to your testimony, notes, etc.

132. Bring only what I tell you to bring.

133. Show me everything you've brought *before* the deposition starts.

134. No weapons. Leave your Swiss Army knife, pepper spray, licensed firearm, and anything else that might reasonably be viewed as a weapon in the car or at home.

135. Don't answer questions about a document until you have read the document. ("If you'd like me to answer that question, I'd need to review the document.")

136. Take your time and read any document that you're questioned about. Take as much time as necessary. Let the cross-examiner wait for you.

137. When asked to identify a document, be wary. Identify it only if you know it is authentic (i.e., genuine, "what its proponent claims").

138. If asked to identify a document, check it. Look at the dates and the signature. Make sure all the pages are there. Don't identify it unless you are positive it is complete and authentic.

139. Don't "identify" a document based on assumptions derived from the document's title, appearance, or content or based solely on information supplied by the questioner.

140. If the only basis for your knowledge is in a document supplied by the cross-examiner, say so. Don't testify as if you had personal knowledge if you do not. ("I see from this letter that the first meeting was scheduled for January 17, but I have no knowledge of the date of the first meeting other than what I read here today.")

141. State appropriate qualifications to your identification of a document. ("This appears to be a photocopy of the contract, but I'd have to compare it to the original to be sure.")

142. State appropriate qualifications regarding your review of a document, like "This is a 57-page document. I've only had time to skim a few pages. If you want me to review it thoroughly so I can answer your questions definitively, we should go off the record for a couple hours."

143. Ask for anything you need to accurately answer a question—an exhibit, a document, a photograph, a map, a calculator, a tape measure, a magnifying glass, a slide rule, an abacus, etc.

144. Tell me about the skeletons in your closet now. Any heat-of-anger admissions to the other side, perjury convictions, substance abuse problems, personal protection orders, ex-spouse issues? No surprises at the deposition.

145. Admit what you have to admit.

146. Don't admit what isn't true.

147. Don't be evasive. Don't undermine your credibility with quibbling. If you're worried about being cross-examined on some subject, tell me what and why now. I'll help.

148. Don't worry about hearsay. Some hearsay is admissible, some is not. Some hearsay is favorable to us, some is not. If a question calls for inadmissible hearsay that is unfavorable and I think it appropriate to object, I'll object.

149. Keep in mind the difference between what you know, what you've inferred, what you've assumed, and what you've been told. Keep in mind, too, when you learned what you now know.

150. Don't offer to do anything later. Don't promise to do anything later. If the cross-examiner wants you to search for documents or provide a name, the request should be directed to me. Respond: "Why don't you make that request to my lawyer. That's why my lawyer gets the big bucks."

151. Don't discuss confidential business in the hall, the elevator, on the stairway, in the cafeteria, the restroom, or anywhere else that you may be overheard.

152. Relax, but keep that edge.

153. Don't relax. Keep wary and vigilant. Keep those critical faculties in high gear.

154. You are on display. Act like it.

155. Beware the mid-afternoon doldrums. Don't lose your concentration because of fatigue or boredom. Take a break to regain focus.

156. Beware of "garbage time," when the deposition is almost over, you're thinking about beating the rush hour traffic, and there is a tendency to relax. Stay focused until the bitter end.

157. Don't be overwhelmed by the fact that I'm giving you 162 rules, some of which contradict others.

158. Break the rules if you have good reason.

159. It's not just you. Testifying at a deposition is an unusual, artificial, disconcerting experience for everyone and preparing for a deposition is hard work.

160. If you have any questions—about these rules, your deposition, the case, or anything else—ask me now.

161. You can do this. You will be prepared. You will be ready.

162. Don't screw up.

AFTERWORD

In compiling the 162 essential rules, I had to make many judgments about what to include and what to exclude. I excluded 231 important rules because they just did not make the "essential" threshold. For example, I omitted: "Do not spit tobacco juice into a Styrofoam cup while testifying." This is a useful rule—I once called a trial witness who violated this rule because, foolishly, I had not included it in preparation; luckily, the judge interceded at an early point. Still I did not include the tobacco juice rule in the essential 162. It lacks the requisite universality (and is encompassed in the more global rule 106).

And I omitted another useful rule, the first of the 19 standing orders for Rangers attributed to Colonel Robert Rogers during the French and Indian War (1754-1763): "Don't forget nothing." This rule is encompassed in rule 162 and also lacks grammatical refinement.

Despite my discerning judgments and care to be comprehensive, I recognize that there may be other essential rules that ought to be added. I plan to continue my rule compilation and would appreciate your help. If you have additional rules that should be included in the definitive collection, please send them to me via The Practical Lawyer's Editor, Joe DiPietro. He can be reached at jdipietro@ali-cle.org.