A COMPARISON OF DYNASTY TRUSTS IN ALASKA, DELAWARE AND OHIO FROM THE PERSPECTIVE OF THE OHIO PRACTITIONER

by Merwin (Trey) Grayson III

I. INTRODUCTION

This article contains an overview of some of the changes in state law around the country that have facilitated the creation of Dynasty Trusts. It focuses on Ohio, Alaska and Delaware because Ohio offers the advantages of geographic proximity while Alaska and Delaware both purport to allow settlors to create Dynasty Trusts that are also self-settled spendthrift trusts. The article concludes that Ohio Dynasty Trusts are an effective and convenient way for Ohio residents to establish a Dynasty Trust, while Alaska and Delaware Asset Protection Trusts are too uncertain for practitioners to recommend to clients.

1. Merwin (Trey) Grayson III is an associate with the Cincinnati, Ohio and Covington, Kentucky offices of Greenebaum Doll & McDonald PLLC, where his practice is concentrated in estate, business and financial planning, charitable giving and estate administration. He received his A.B. degree, cum laude, from Harvard College in 1994, and his J.D./M.B.A. degree, magna cum laude, from the University of Kentucky in 1998.
II. CHANGES IN STATE LAW FACILITATING THE CREATION OF DYNASTY TRUSTS

State law has changed over the past few years to facilitate the creation of Dynasty Trusts. The biggest change in state law has been the repeal of the Rule Against Perpetuities in a growing number of states, including Ohio, Alaska and Delaware. This repeal is being made to the cheers of lawyers and law students around the country. Often considered the least popular, if not the hardest, concept a law student ever learns, the Rule is seen as an anachronism in an age when record-keeping is so advanced. Therefore, the repeal is seen by many as modernization of the legal code.

The repeal can also be seen as an economic development tool. Many states want to keep assets housed within their borders, or even attract new assets. By doing so, the fee income paid to banks, trust companies and financial institutions also remains in the state. The repeal also permits a settlor of a trust to create a so-called “Dynasty Trust” for the benefit of his descendants for as many generations as the settlor desires. Such Dynasty Trusts have tremendous estate tax advantages, as discussed below.

A self-settled spendthrift trust is one in which the settlor retains some kind of income interest, yet offers the same spendthrift protections as traditional spendthrift trusts. Traditionally, the laws of all fifty states prohibited these trusts. Thus, settlors had to go offshore -- to a Caribbean island, such as Bermuda or the Cayman Islands, for instance -- to create such a trust. Many, however, felt that the creditor protections (and for some, the ability to better shelter income and assets from taxes, spouses and business partners) far outweighed the costs and risks of such trusts.

Alaska and Delaware have attempted to provide U.S. citizens with an “on
shore” alternative to offshore trusts. By coupling these trusts with a repeal of the Rule Against Perpetuities, Alaska and Delaware purport to offer Asset Protection Trusts that can save taxes, protect from creditors and give the settlor the opportunity to tap into the funds, if necessary. Ohio has made changes as well, allowing for the existence of Dynasty Trusts, provided certain requirements are fulfilled.

These trusts sound almost too good to be true. In fact, they probably are. Before examining the pitfalls that surround these trusts, an examination of the estate planning advantages of Dynasty Trusts is needed.

The second change has occurred in only two states—Alaska and Delaware. In response to the growing popularity of offshore trusts, Alaska and Delaware now purport to allow the creation of self-settled spendthrift trusts. A spendthrift trust is one that restricts a beneficiary’s ability to voluntarily or involuntarily transfer an interest in trust. A beneficiary of such a trust may not assign his income interest to a third party. Similarly, a creditor cannot attach to the beneficiary’s income interest. The public policy rationale supporting such trusts has traditionally been that the settlor of the property may do what he desires with the property.

III. ESTATE PLANNING ADVANTAGES OF A DYNASTY TRUST

For most people, the most attractive aspect of a Dynasty Trust is the protection of assets from claims of creditors and divorcing spouses. The trust assets are protected from such claims because the trusts are spendthrift trusts. Such protections offer peace of mind to parents and grandparents that their heirs will not become easy targets for frivolous lawsuits or former spouses.

6. Commentators have estimated that over one trillion dollars are held in these offshore trusts. See Jeremy M. Veit, Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?, 16 ALASKA L. REV. 269, 276 (1999).

7. See generally William T. McGovern et al., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 341-44 (West 1988) (expanding upon the origin and arguments for spendthrift trusts); see also George T. Bogert, TRUSTS § 40 (6th ed. 1987) stating that:

A spendthrift trust is one which, either because of a direction of the settlor or because of a statute, the beneficiary is unable to transfer his right to future payments of income or principal and his creditors are unable to subject the beneficiary’s interest to the payment of their claims.

Id.

In addition to these protections, Dynasty Trusts also represent an effective estate planning technique. The goal behind most estate planning techniques is to leverage the exemptions and deductions given under the tax code to maximize their effectiveness. Dynasty Trusts are one of the best leveraging techniques available.

Consider the following example in which a settlor who is in the highest estate tax bracket -- 55% -- contributes $1,000,000 to a trust whose assets will grow 5% per year. The trust will be a true Dynasty Trust, benefiting the settlor's heirs for as many generations as the settlor wishes. The $1,000,000 has significance because it equals the exemption given to each individual from the federal generation skipping tax ("GST"). This example assumes that estate taxes would be paid every 25 years because of a death at that generation.

<table>
<thead>
<tr>
<th>Years</th>
<th>Generation</th>
<th>Dynasty Trust Value</th>
<th>No Trust Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>Children</td>
<td>$3,386,355</td>
<td>$1,523,860</td>
</tr>
<tr>
<td>50</td>
<td>Grandchildren</td>
<td>$11,467,400</td>
<td>$2,322,148</td>
</tr>
<tr>
<td>75</td>
<td>Great-Grandchildren</td>
<td>$38,832,686</td>
<td>$3,538,629</td>
</tr>
<tr>
<td>100</td>
<td>Great-Great-Grandchildren</td>
<td>$131,501,258</td>
<td>$5,392,373</td>
</tr>
</tbody>
</table>

As you can see, the numbers are astronomical, even at this low growth rate. This begs the question — why haven't more people established Dynasty Trusts? Many factors have prevented the creation of Dynasty Trusts. One factor is a desire to prevent assets from being tied up for so many years. Many individuals have little desire to structure their own estates, let alone the estates of their great-grandchildren.

Another factor is that under federal estate tax law, a settlor generally cannot retain an interest in the trust without the trust assets being included in a settlor's estate for federal estate tax purposes. Many people are reluctant to give up their

9. I.R.C. § 2631(a) (1999). This exemption is adjusted for inflation annually and actually equals $1,000,000 per person for 2000. Id. at § 2631(c) (1999).
10. For instance, I.R.C. § 2036(a) includes in a settlor's gross estate any assets over which the settlor retains "possession or enjoyment of, or the right to the income from, the trust." Id.
assets completely, with no possibility of tapping the assets in an emergency, even if they will end up paying more in estate taxes at their deaths.

An additional factor is the inability of a settlor to shelter the trust assets from creditors while retaining at least a discretionary income interest in the trust property. As discussed above, self-settled spendthrift trusts have been prohibited in all states until recently.11

A final factor has been the Rule Against Perpetuities. The Rule traditionally keeps trusts from extending beyond two generations. As the above example demonstrates, the benefits from Dynasty Trusts increase dramatically after two generations. Now that states like Ohio, Alaska and Delaware have started to repeal the Rule Against Perpetuities, estate planning practitioners are likely to see more clients seeking to establish Dynasty Trusts.

IV. OHIO DYNASTY TRUSTS

Prior to 1999, Ohio followed the traditional Rule Against Perpetuities,12 modified by the wait-and-see doctrine.13 But under the new law, a settlor may choose to opt out of the Rule for both personal property and real property. This allows the settlor to establish a true Dynasty Trust that will continue for generations.

Ohio’s repeal applies to any interests created by wills, trusts or general powers of appointment14 after March 21, 1999.15 This effective date continues to be relevant because an amendment to a trust created prior to March 21, 1999 cannot

11. Alaska and Delaware are the first two states to allow such trusts to be created. See discussion infra Part V.
13. The “wait and see” doctrine is the result of legislation enacted to modify the common law Rule Against Perpetuities to provide that the validity of future interests under the Rule shall be determined by a consideration of actual future events, rather than possible future events. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 143 (2d ed. 1993). A substantial number of states, including Kentucky and Ohio, have legislation embodying the “wait and see” doctrine coupled with the equitable doctrine of cy pres which authorizes courts to reform instruments containing provisions that violate the common law Rule while avoiding total invalidity of the instrument. Id. at 144.
14. The statute defines a general power of appointment as a power exercisable in favor of the power holder, his estate, his creditors or the creditors of his estate. OHIO REV. CODE ANN. § 2131.09(C) (West 2000).
15. OHIO REV. CODE ANN. § 2131.09(B)(3) (West 2000).
qualify, the amended trust would be deemed to have been created as of the date of
the initial trust instrument.

To establish an Ohio Dynasty Trust, the settlor must affirmatively state that the
Rule Against Perpetuities does not apply.\footnote{Id. § 2131.09(B)(1) (requiring that "the trust specifically states that the rule against perpetuities
or the provisions" of § 2131.08 shall not apply to the trust).} The trust instrument must also grant
one of the following powers: (1) the unlimited power to terminate the entire trust;\footnote{Id.
(stating that the power to terminate may be held by anyone, including the trustee).}
and (2) the unlimited power to sell all assets.\footnote{Id. (permitting the unlimited power to sell all trust assets to be held only by the trustee).}

This second requirement can sometimes make the Dynasty Trust less attractive
to the settlor. It can also pose problems for practitioners who blindly use the same
method to qualify the trust as an Ohio Dynasty Trust. For example, if the trust
limits the sale of closely-held business interests, the trustee must be given the power
to terminate the trust or the trust will not qualify as a Dynasty Trust in Ohio.

To be governed by Ohio law, one of the following jurisdictional requirements
must be met:

(1) The trust is executed in Ohio;

(2) At least one trustee is domiciled in Ohio;

(3) The trust is administered in Ohio (or is the situs of a substantial portion of the
trust assets);

(4) The trust provides that Ohio law governs.\footnote{Id. § 2131.09(B)(2).}

Can a settlor from another state that follows the Rule Against Perpetuities, such
as Kentucky, create a trust that is by governed by Ohio law to avoid the Rule
Against Perpetuities? The answer to this is likely yes, but no case law exists
confirming the conclusion.

Ohio law generally follows the Restatement (Second) of Trusts in this
respect.\footnote{Karen M. Moore, Applicability of Common Law Conflicts of Interest Principles to the Non-Ohio
Settlor Who Seeks to Create an Ohio Dynasty Trust, 10 PROB. L.J. OF OHIO 33 (1999).} Under the Restatement, the answer depends upon the type of property
interest. A settlor can generally choose the governing law of personal property,
such as marketable securities, so long as there is a "substantial connection" with the
chosen state.\footnote{See RESTATEMENT (SECOND) OF TRUSTS §§ 268-270 (1959).} One commentator suggests that non-Ohio residents must meet at
least two of the four jurisdiction tests for Ohio Dynasty Trusts that hold personal
property because this would result in a “substantial connection” with Ohio. For
non-Ohio residents, the best way to meet two requirements would be to state in the
trust instrument that Ohio law governs the trust and also to ensure that
administration of the trust actually occurs in Ohio. The latter requirement can be
easily met by hiring an Ohio corporate trustee.

Real property, however, is generally governed by the law of its situs. Thus,
real property located in Kentucky that is held in an otherwise valid Ohio Dynasty
Trust would likely be governed by Kentucky’s Rule Against Perpetuities law. This
does not mean that the real property will necessarily poison the trust for any
personal property also held in the trust because the trust instrument can include a
savings clause that applies the Rule when necessary. One potential way around
this is to convey the Kentucky real property to a limited partnership and then
transfer the limited partnership interests into the Ohio Dynasty Trust.

V. ALASKA ASSET PROTECTION TRUSTS

Alaska has been one of the leaders in the area of Dynasty Trusts. Alaska was
one of the first states to repeal the Rule Against Perpetuities and was the first to

22. Karen M. Moore, Applicability of Common Law Conflicts of Interest Principles to the Non-Ohio
Settlor Who Seeks to Create an Ohio Dynasty Trust, 10 PROB. L.J. OF OHIO 37 (1999).
24. Such a savings clause may state: “It is Settlor’s intention that no rule of law against perpetuities
or any law restricting or limiting the duration of trusts apply with respect to any interest in real or
personal property held in trust under this Trust Agreement, and that this trust be administered in
accordance with the provisions of Section 2131.09 of the Ohio Revised Code, as amended. In the
event Section 2131.08 of the Ohio Revised Code shall apply to any trust established under this Trust
Agreement despite this intention, no trust created under this Trust Agreement shall continue beyond
21 years after the death of the last to die of those beneficiaries who were living as of the date of this
Trust Agreement. If that trust is subject to the rule against perpetuities, upon the expiration of such
period all trusts shall terminate and the assets thereof shall be distributed outright to those beneficiaries
(and in the same proportions) as are then receiving, or are then eligible to receive, the income
therefrom.”
25. An additional advantage of creating a family limited partnership is that the limited partnership
interests can be transferred to family members or Dynasty Trusts for the benefit of family members
at a discounted value.
purport to offer self-settled spendthrift trusts.  

Unlike Ohio, Alaska has completely repealed the Rule Against Perpetuities for all trusts. No opt-out language or any other affirmative steps are necessary. The

---


27. ALASKA STAT. § 34.27.050 (Michie 2000). On April 22, 2000, Alaska repealed § 34.27.050 with the enactment of 2000 Alaska Sess. Laws Ch. 17 (S.B. 162). However, the abolishment of the common law Rule Against Perpetuities remains intact. ALASKA STAT. § 34.27.075 (Michie 2000). This legislation was an act “relating to the rule against perpetuities, nonvested property interests, and powers of appointment.” 2000 Alaska Sess. Laws Ch. 17. The statutory Rule Against Perpetuities found in the former § 34.27.050 was replaced with § 34.27.051 which provides:

(a) A general or nongeneral power of appointment not presently exercisable because of a condition precedent is invalid unless, within a period of 1,000 years after its creation, either the power is irrevocably exercised or the power terminates. For purposes of this subsection, the period in which the power must be exercised or the power terminated is computed from the time of creation of the original power of appointment under which a subsequent general power of appointment not presently exercisable or a subsequent nongeneral power of appointment not presently exercisable was created.

(b) If a nongeneral power of appointment is exercised to create a new general power of appointment, all property interests subject to the exercise of that new general power of appointment are invalid unless, within 1,000 years after the creation of the new general power of appointment, the property interests that are subject to the general power of appointment either vest or terminate.

(c) If a nongeneral power of appointment is exercised to create a new or successive nongeneral power of appointment, all property interests subject to the exercise of that new or successive nongeneral power of appointment are invalid unless, within 1,000 years from the time of creation of the original instrument or conveyance creating the original nongeneral power of appointment that is exercised to create a new or successive nongeneral power of appointment, the property interests that are subject to the nongeneral power of appointment either vest or terminate.

ALASKA STAT. § 34.27.051 (Michie 2000).

The provisions of § 34.27.051 apply to a trust instrument or conveyance executed on or after April 2, 1997, if the trust instrument or conveyance creates a contingent power of appointment or nonvested
repeal is effective for all personal or real property held in trust. Alaska, however, has gone one step further than Ohio by allowing the creation of self-settled

property interest subject to the exercise of a power of appointment that creates a new or successive power of appointment. *Id.* § 34.27.070(c). The former provisions of §§ 34.27.050 - 34.27.090 apply to a nonvested property interest or a power of appointment that is created after January 1, 1996 but before April 2, 1997. *Id.* § 34.27.070(a). If a nonvested property interest or a power of appointment was created before January 1, 1996, and is determined in a judicial proceeding, commenced on or after that date, to violate Alaska’s Rule Against Perpetuities as the Rule existed prior to January 1, 1996 (or if a nonvested property interest or a power of appointment was created on or after January 1, 1996 but before April 2, 1997, and is determined in a judicial proceeding commenced on or after that date, to violate Alaska’s Rule Against Perpetuities as the Rule existed on or after January 1, 1996, but before April 2, 1997) a court may reform the disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the limits of the Rule Against Perpetuities applicable when the nonvested property interest or power of appointment was created. *Id.* § 34.27.070(b).

Additionally, the new legislation enacted a new provision relating to perpetuities and the power of alienation which provides in part:

(a) A future interest or trust is void if, as to property subject to the future interest or trust,

   (1) the future interest or trust suspends the power of alienation of the property, the suspension of the power is for a period of at least 30 years after the death of an individual alive at the time of creation of the future interest or trust, and the suspension of the power of alienation occurs in the document creating the future interest or trust;

   (2) the future interest or trust suspends the power of alienation of the property and the suspension of the power is for a period of at least 30 years after termination of a power to revoke the trust;

   (3) the future interest or trust suspends the power of alienation of the property, the future interest or trust is created by the exercise of a general power of appointment, whether by will or otherwise, and the suspension of the power is for a period of at least 30 years from the time the power of appointment is exercised; or

   (4) the future interest or trust suspends the power of alienation of the property, the future interest or trust is created by the exercise of a power of appointment that is not a general power of appointment, and the suspension of the power is for a period of at least 30 years from the time of creation of the original instrument or conveyance creating the original power of appointment that was exercised to create a new or successive nongeneral power of appointment.

*Id.* § 34.27.100.

28. Alaska Stat. § 34.27.050 (repealed by 2000 Alaska Sess. Laws Ch. 17 (S.B. 162)).
spendthrift trusts. For this reason, I will refer to Dynasty Trusts created in Alaska as "Alaska Asset Protection Trusts."

To qualify as an Alaska Asset Protection Trust, at least some of the trust’s assets must be deposited in Alaska.\textsuperscript{29} A qualified trustee must maintain at least some records for the trust and must prepare or arrange for preparation of trust tax returns.\textsuperscript{30} Finally, at least some trust administration must occur in Alaska, including physically maintaining the trust records.\textsuperscript{31}

To be a qualified trustee, the trustee must be one of the following: (1) a resident of Alaska, (2) a trust company organized under Alaska law with a principal place of business in Alaska, or (3) a bank organized under Alaska law with a principal place of business in Alaska.\textsuperscript{32} Non-residents can serve as co-trustees, so long as at least one of the trustees is qualified.\textsuperscript{33}

Alaska grants its courts exclusive jurisdiction over any claims made concerning Alaska Asset Protection Trusts. Alaska courts will entertain claims only in the following situations: (1) fraudulent conveyance, (2) delinquent child support obligations to the extent of any settlor’s right to distributions, (3) to the extent the

\begin{itemize}
  \item \textsuperscript{29} \textit{Alaska Stat.} § 13.36.035(c)(1) (Michie 2000). The jurisdictional provision of this statute states:
    \begin{itemize}
    \item A provision that the laws of this state govern the validity, construction, and administration of the trust and the trust is subject to the jurisdiction of this state is valid, effective and conclusive for the trust if
    \item (1) some or all of the trust assets are deposited in this state and are being administered by a qualified person; in this paragraph, “deposited in this state” includes being held in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state;
    \item (2) a trustee is a qualified person who is designated trustee under the governing instrument or by a court having jurisdiction over the trust;
    \item (3) the powers of the trustee identified under (2) of this subsection include or are limited to (A) maintaining records for the trust on an exclusive basis or nonexclusive basis; and (B) preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust; and
    \item (4) part or all of the administration occurs in this state, including physically maintaining trust records in this state.
    \end{itemize}
  \item \textsuperscript{30} \textit{Id.} at § 13.36.035(c) (Michie 2000).
  \item \textsuperscript{31} \textit{Id.} § 13.36.035(c)(3).
  \item \textsuperscript{32} \textit{Id.} § 13.36.035(c)(4).
  \item \textsuperscript{33} \textit{Id.} § 13.36.390(1).
  \item \textsuperscript{34} \textit{Id.} § 13.36.320(a).
\end{itemize}
settlor retains power to revoke, and (4) to the extent of mandatory distributions of principal and/or income to the settlor.\textsuperscript{34} In addition, Alaska places a statute of limitation on claims. An existing claim must be brought within four years after the transfer or within one year after the transfer was or should have been discovered.\textsuperscript{35} A claim arising after the transfer must be brought within four years.\textsuperscript{36}

For practitioners in other states, Alaska’s repeal of the Rule Against Perpetuities offers little more than can be obtained under Ohio law. Therefore, no practitioner in Indiana, Kentucky or Ohio should ever advise a client to establish a Dynasty Trust in Alaska. Alaska’s appeal to practitioners lies in the promise of self-settled spendthrift trusts. Before analyzing the effectiveness of Alaska Asset Protection Trusts, a brief overview of Delaware Asset Protection Trusts is necessary.

VI. DELAWARE ASSET PROTECTION TRUSTS

Like Alaska and Ohio, Delaware has repealed the Rule Against Perpetuities in certain situations.\textsuperscript{37} Delaware places no limit for personal property held in trust,

\begin{itemize}
\item[(1)] A trust for the benefit of 1 or more charitable organizations as described in §§ 170 (c), 2055(a), and 2522(a) of the United States Internal Revenue Code of 1986 (Title 26 of the United States Code) [26 U.S.C. §§ 170 (c), 2055 (a) and 2522 (a)], or under similar statute;
\item[(2)] A trust created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan or profit sharing plan for the exclusive benefit of some or all of its employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees the earnings or the principal, or both earnings and principal, of the fund held in trust;
\item[(3)] A business trust formed under Chapter 38 of Title 12 for which a certificate of business trust is on file in the office of the Secretary of State; or
\item[(4)] A trust of real or personal property created for the perpetual care of cemeteries pursuant to the provisions of subchapter IV of Chapter 35 of Title 12.
\end{itemize}

\textit{Id.} at § 503(b).
but it retains a 110-year limit on real property held in trust.  

After Alaska passed its 1997 changes, Delaware quickly reacted by passing a law similar to Alaska that permits the creation of self-settled spendthrift trusts in Delaware. In fact, the preamble to the law states that the law is designed to maintain Delaware as "the most favored domestic jurisdiction for the establishment of trusts." Delaware sees this as an economic development tool by which Delaware encourages U.S. citizens to establish their trusts in Delaware rather than taking them offshore or to Alaska. Delaware trustees would manage the trust assets, thereby keeping trustee fees in Delaware.

To create a "Delaware Asset Protection Trust," a settlor must make a "qualified disposition" to a trust. A qualified disposition is defined as a disposition by a settlor to a "trustee" by means of a "trust instrument." A qualified trustee is (1) an individual residing in Delaware, or (2) an entity authorized by the law of Delaware to act as trustee. All trustees must be qualified. The qualified trustee must perform at least one of the following tasks: (1) maintain or arrange for custody in Delaware of some trust property, (2) maintain records, (3) prepare or arranged for the trust income tax return, or (4) otherwise materially participate in the administration of the trust.


41. Del. Code Ann. tit. 12, § 3570(6) (1999) ("'Qualified disposition' means a disposition by or from a transferor to a qualified trustee or qualified trustees, with or without consideration, by means of a trust instrument.")

42. Id.

43. Id. § 3570(8) ("'Transferor' means a person who, as an owner of property, as a holder of a general power of appointment, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made.")

44. Qualification means the performance by the trustee of certain acts required by statute, the court, or the settlor as a preliminary to the beginning of his work as trustee. George T. Bogert, Trusts § 33 (6th ed. 1987).

The “trust instrument” itself must be irrevocable, state that Delaware law governs, and contain a spendthrift clause.\textsuperscript{46} A trust is still deemed to be irrevocable even if the settlor can do one of the following: (i) veto distributions, (ii) maintain special power of appointment, (iii) receive discretionary income or principal distributions, (iv) receive current income distributions, (v) or receive income or principal under an ascertainable standard.\textsuperscript{47}

Delaware attempts to offer settlors protection by requiring that any action which sets aside a qualified disposition to a Delaware Trust must be based upon the Delaware Uniform Fraudulent Transfer Act (“DUFTA”).\textsuperscript{48} DUFTA provides that actions, even actions to enforce a judgment, may be brought only in the following situations: (1) a fraudulent conveyance, (2) a court order or agreement for alimony or property division, (3) a court order or agreement for child support, or (4) tort liability resulting from death, personal injury or property damage before the date of the qualified disposition.\textsuperscript{49} Delaware differs from Alaska, which does not include spouses and tort victims in the preferred class of creditors.

Like Alaska, Delaware places a statute of limitation on claims.\textsuperscript{50} Existing claims must be brought within four years after the transfer or within one year after the transfer was or should have been discovered.\textsuperscript{51} New claims must be brought within four years.\textsuperscript{52}

This article has discussed how asset protection trusts may be established in Alaska or Delaware. In the following passages, this article will discuss the effectiveness of these trusts in achieving their stated purpose — allowing a settlor to establish an on-shore self-settled spendthrift trust.

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. § 3572(a) (providing that no action to enforce a judgment shall be brought unless pursuant to §§ 1304 and 1305 of Title 6). Compare this provision with the Alaska provision which requires that all actions be brought in Alaska courts.
\textsuperscript{49} DEL. CODE ANN. tit. 6, § 1304 (1999).
\textsuperscript{50} DEL. CODE ANN. tit. 12, § 3572(b) (1999).
\textsuperscript{51} DEL. CODE ANN. tit. 12, § 3572(b)(1) (1999).
\textsuperscript{52} DEL. CODE ANN. tit. 12, § 3572(b)(2) (1999).
VII. FEDERAL TAX ISSUES: ALASKA AND DELAWARE ASSET PROTECTION TRUSTS

A. Federal Income Tax

The federal income tax consequences are clear. If a settlor retains the right to receive income and principal distributions in the discretion of the trustee or advisors, the trust will be a Grantor Trust for federal income tax purposes.53 A Grantor Trust is one that is treated as if the settlor owned it from an income tax standpoint, so that all income generated by the trust is taxed on the settlor's individual return.

This would create a situation where income that remains in the trust or is held for the benefit of the settlor's children would be taxable to the settlor for the federal income tax liability on the trust. Although this sounds like a bad situation, it is actually a benefit from an estate tax standpoint. This is because the settlor would be, in effect, paying the trust's income tax liability, and this is not treated as a gift by the settlor for gift tax purposes. Therefore, the payment of the income tax liability by the settlor would be a transfer of assets free of transfer taxes.

B. Federal Gift Tax Consequences

A completed gift is made when the assets are beyond the dominion and control of the settlor. The IRS has ruled that a completed gift occurs if the settlor's creditors cannot reach the assets of a trust.54 Conversely, a completed gift has not

53. See I.R.C. § 677(a) (1999) (stating that the grantor shall be treated as the owner of any portion of a trust whose income may be distributed to the grantor or grantor's spouse, held or accumulated for future distribution to the grantor or grantor's spouse; or applied to the payment of premiums on policies of insurance on the life of the grantor or grantor's spouse, except policies irrevocably payable for a charitable purpose specified in § 170(c)); and I.R.C. § 673(c) (1999) (stating that the grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income if, as of the inception of that portion of the trust, the value of such interest exceeds five percent of the value).

54. Rev. Rul. 77-378 (holding that where the grantor of a trust conveyed one-half of the grantor's income producing property to an irrevocable trust pursuant to which the trustee had the power to pay to the grantor amounts of income or principal as determined in the trustee's absolute discretion, and that upon the death of grantor, the remaining principle was to be paid to grantor's spouse and children, the gift was complete for gift tax purposes at the time the trust was created because the applicable state law prohibited the grantor from requiring distributions be made to himself or permitting the grantor's creditors to reach his interest).
occurred if a settlor’s creditors can reach the assets of a trust. The rationale behind these rulings is that a settlor could constructively reach the trust assets because his creditors could attach their claims to the trust assets. This would give him constructive “dominion and control” over the trust assets.

This concept could potentially create some gift tax issues for Alaska and Delaware Asset Protection Trusts. The exceptions in Delaware (fraudulent conveyances, torts, child support, spousal support) and Alaska (fraudulent conveyances and child support) mean that both Alaska and Delaware Asset Protection Trusts allow some creditors to reach the assets of a trust. Arguably, these exceptions could be enough to make the gift incomplete.

For Alaska Asset Protection Trusts, the IRS answered this question in a recent Private Letter Ruling. The IRS has ruled that a transfer to an Alaska Trust was a completed gift. The Alaska trust provided that the settlor was to receive, in the trustee’s sole discretion, any part or all of the income and/or principal of the trust. The donor had no power to remove or replace the trustee or appoint a successor trustee. This ruling was conditioned on the taxpayer’s representation that no express or implied agreement existed between the donor and the trustee. Whether this conclusion would be true for a Delaware trust, which has a few more exceptions, is uncertain.

C. Federal Estate Tax

Assets transferred to Alaska or Delaware Asset Protection Trusts might be included in the settlor’s estate under two different sections in the federal estate tax code. The first of these sections is § 2038(a)(1), which includes trust assets in a settlor’s gross estate if the settlor retains the power to alter, amend, revoke or terminate the trust. The IRS, in Revenue Ruling 76-103, ruled that the power to “relegate” assets to creditors is equivalent to the power to revoke or terminate a trust. To relegate trust assets to creditors, the settlor could spend all of his non-trust assets knowing that creditors could reach the assets of his trust to settle their claims. This power, in effect, is the same as the settlor having the power to

---

55. Rev. Rul. 76-103 (holding that a transfer in trust, whose assets are subject to the claims of the grantor’s creditors, does not constitute a completed gift because grantor retains dominion and control of the trust assets).
terminate or revoke his trust.

The IRS might argue that the exceptions granted to spouses (in both states) and children and tort victims (in Delaware) would be enough to argue that a power to relegate assets to creditors exists. The IRS, in a private letter ruling, has already specifically refused to rule as to whether an Alaska Asset Protection Trust was includable in the settlor’s estate under § 2038(a)(1).59 This uncertainty is not comforting for practitioners trying to decide whether an asset protection trust is a viable option for their clients.

Another potential estate tax issue for Alaska and Delaware Asset Protection Trusts is I.R.C. § 2036(a) which concerns trust assets that are included in a settlor’s gross estate if the settlor has retained (a) the possession or enjoyment of, or the right to the income from, the trust, or (b) the right to designate the persons who can possess or enjoy the trust’s principal or income.60 Again, the issue boils down to the effect of the existence of certain exceptions for certain types of creditors. Are these exceptions enough to cause the IRS to rule that the settlor has retained the enjoyment of the trust assets? Another possibility is that the IRS would argue that if a settlor retains the right to receive current income distributions or to receive income or principal distributions pursuant to an ascertainable standard, the trust assets should be included in the settlor’s gross estate. This would be particularly true if an arrangement between the trustee and the settlor could be proven or inferred from a pattern of distributions.61 On the other hand, numerous cases stand for the proposition that income payments made at the discretion of the trustee are not enough to cause the trust assets to be included in the settlor’s estate.62

Because of the potential estate tax inclusion, an Alaska attorney has proposed three possible solutions. First, prior to three years before his death, the settlor could renounce his income interest. If such a renunciation occurred within three years of death, § 2035 would include the trust assets in the settlor’s estate.63 Second, the

---

60. 1.R.C. § 2036(a) (1999).
62. Estate of Wells v. Commissioner, 42 T.C.M. (CCH) 1305 (1981); Estate of Uhl v. Commissioner, 241 F.2d 867 (7th Cir. 1957); Estate of German v. United States, 7 Cl. Ct. 641 (1985); Priv. Ltr. Rul. 9332006 (Aug. 20, 1992). Indeed, these cases were cited by the taxpayer in Private Letter Ruling 9837007 in her request for a ruling as to whether the trust assets would be included in her estate. David G. Shaftel, Newest Developments in Alaska Law Encourage Use of Alaska Trusts, 26 EST. PLAN. 51, 57 (1999).
63. I.R.C. § 2035 includes in a settlor’s gross estate any assets that were transferred within three
settlor could give a third party the power to renounce the interest and avoid § 2035 entirely. 64 Third, the settlor could condition the income renunciation power upon an external event such as reaching a certain age or health deterioration. 65

D. Generation Skipping Tax ("GST")

How the IRS and the courts answer the estate tax inclusion issue directly affects the GST consequences. As long as the trust is includable in a settlor’s gross estate, the trust assets are subject to an estate tax inclusion period ("ETIP"), and the settlor may not allocate any GST exemption to the transfer. 66 The above discussion demonstrates that the existence of an ETIP may not be resolved conclusively until after the settlor’s death.

The inability to allocate the GST exemption to the transfer undermines the effectiveness of a Dynasty Trust. For example, if an eight-year delay were to occur before the GST exemption could be allocated to a $1,000,000 transfer to an Alaska or Delaware Asset Protection Trust and the trust assets grew approximately 9%, the trust would double in value to $2,000,000 before any GST exemption could be allocated. This would likely require the payment of GST tax at 55% in addition to the payment of any gift or estate taxes on the growth.

VIII. LIKELIHOOD OF SUCCESS OF ALASKA AND DELAWARE TRUSTS OFFERING CREDITOR PROTECTION

Alaska and Delaware both claim that their trusts can be protected from creditor claims. To analyze the effectiveness of this claim, a practitioner must ask three questions. First, what is the correct court for a claim? Second, whose law will the forum state apply? Third, will a judgment from another state be enforced by Delaware or Alaska courts?

years of death that would have been otherwise included in the settlor’s gross estate under I.R.C. §§ 2036, 2037, 2038 or 2042, if the transfer had not taken place. This proposal was included in David G. Shaftel, Newest Developments in Alaska Law Encourage Use of Alaska Trusts, 26 EST. PLAN. 51, 58 (citing Jonathan Blattmachr and Gideon Rothschild as the original conceivers of the strategy).

64. David G. Shaftel, Newest Developments in Alaska Law Encourage Use of Alaska Trusts, 26 EST. PLAN. 51, 58 (citing Jonathan Blattmachr and Gideon Rothschild as the original conceivers of the strategy).

65. Id. (citing Jonathan Blattmachr and Gideon Rothschild as the original conceivers of the strategy).

First, what is the correct court? Alaska, as discussed earlier, requires that all claims against the assets in an Alaska Asset Protection Trust be brought in Alaska courts.67 This is how Alaska attempts to prevent a creditor from securing a valid claim in another state and bringing the judgment to Alaska for enforcement under the Full Faith and Credit Clause of the United States Constitution. But the problem with this is obvious. Alaska law cannot prevent another state from hearing a claim provided the other state has proper jurisdiction. If Alaska cannot prevent another state from hearing this claim, it cannot prevent that state from entering a judgment in favor of that creditor.

Assuming a creditor can secure jurisdiction in a state other than Delaware or Alaska, whose law will the forum state apply? This is the classic conflicts of law question discussed earlier in section IV on Ohio Dynasty Trusts. Under the Restatement, the settlor is generally allowed to choose the governing law so long as there is a substantial connection with the chosen state.68 An Alaska or Delaware Asset Protection Trust must state that either Alaska or Delaware law governs. Furthermore, Delaware mandates that only claims brought under DUFTA are valid.

The Restatement also addresses what state has the greatest interest.69 The creditor presumably has a nexus of some type with the forum state so that the creditor can secure jurisdiction in the forum state. The creditor is not really challenging the validity of the trust itself, but rather the transfer to the trust. A state could have a strong interest in protecting the rights of its creditors, because the creditor felt the effect of the fraudulent act in the forum state and the state wants to assist its citizens to recover if they have been defrauded. Another provision in the Restatement instructs a court to look to the location of the assets in order to determine whether a creditor can reach trust assets.70

One commentator proposed the following hypothetical situation in which a court clearly would not apply Alaska law: An Illinois debtor makes an outright gift to a friend in Alaska and both agree that Alaska law will govern the gift. An Illinois creditor sues the Illinois debtor in Illinois court and the Illinois court applies Illinois law.71 Alaska has a connection to the transaction, but Illinois has a more significant connection. Furthermore, the Illinois creditor is asking his own court

67. Delaware does not have this requirement.
69. Id. § 188.
70. Id. § 132.
to protect its own citizens. If one were to change the facts so that the Illinois debtor transfers assets to an Alaska or Delaware trustee and is sued by an Illinois creditor in an Illinois courts, the same reasoning would dictate that the Illinois court would allow the defrauded Illinois creditor to sue the Illinois settlor of the Asset Protection Trust.

For these reasons, it is likely that a state would not enforce the governance clause in the trust instrument to apply Alaska or Delaware law and would instead apply its own laws which do not allow self-settled spendthrift trusts. The court would then enter a judgment in favor of the creditor.

Now that a valid and final judgment has been entered, the last question is whether this judgment will be enforced in Delaware or Alaska under the Full Faith and Credit Clause of the United States Constitution. Under the Full Faith and Credit Clause, a state must give full faith and credit to judgments of other states when the other state had proper jurisdiction. Alaska or Delaware would therefore be required to enforce the judgment. The Restatement allows an exception to the Full Faith and Credit Clause if enforcement of the judgment would improperly interfere with the enforcing state’s interests. Most commentators agree that Alaska and Delaware’s interests in Asset Protection Trusts do not reach this level. The judgment therefore would be enforced.

IX. CONCLUSION

Ohio practitioners should not hesitate to use Ohio Dynasty Trusts. Such trusts are effective estate planning tools that will protect trust assets from the claims of creditors and divorcing spouses of its non-settlor beneficiaries. In addition, the ability of these trusts to continue for as long as the settlor desires allows a settlor to leverage his estate tax savings for generations.

On the other hand, Ohio practitioners should steer clear of Alaska and Delaware Asset Protection Trusts. If structured as self-settled spendthrift trusts, these trusts


73. RESTATEMENT (SECOND) OF TRUSTS § 117 (1959).

have uncertain tax consequences and are unlikely to protect trust assets from the claims of creditors. Stripped of the self-settled spendthrift feature, the trusts offer nothing more than Ohio Dynasty Trusts. Ohio practitioners, and perhaps practitioners in other states as well, would be wise to let others be the test cases for the viability of Alaska or Delaware Asset Protection Trusts.
THE PSYCHOLOGICAL AND EMOTIONAL ABUSE OF CHILDREN:
SUING PARENTS IN TORT FOR THE INFLICTION OF EMOTIONAL
DISTRESS

Dr. G. Steven Neeley

You see, I must repeat again, it is a peculiar characteristic of many people, this
love of torturing children, and children only. To all other types of humanity
these torturers behave mildly and benevolently, like cultivated and humane
Europeans; but they are very fond of tormenting children, even fond of
children themselves in that sense. It's just their defenselessness that tempts the
tormentor, just the angelic confidence of the child who has no refuge and no
appeal, that sets his vile blood on fire.2

Someday, maybe, there will exist a well informed, well considered, and yet
fervent public conviction that the most deadly of all possible sins is the
mutilation of a child's spirit.3

There is considerable recent literature regarding the infliction of emotional
distress.4 There is similarly no dearth of commentary concerning child abuse.5

---
1. Dr. Steven G. Neeley is an Associate Professor of Philosophy at Saint Francis College. He
maintains private practices as both a psychotherapist and an attorney. He received his B.S.B.A. from
Xavier University and holds a J.D., M.A. and Ph.D. from the University of Cincinnati.
2. Fyodor Dostoevsky, The Brothers Karmazov, in A MODERN INTRODUCTION TO PHILOSOPHY 458
Erikson).
the Fear of Contracting AIDS, 33 TORT & INS. L.J. 169 (1997); Mark McLaughlin Hager, Harassment
as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed, 30 CONN. L. REV. 375
(1998); Janet H. Smith, Increasing Fear of Future Injury Claims: Where Speculation Carries the Day,
64 DEF. COUNS. J. 547 (1997); Hon. Leon D. Lazer, Tort Law, 14 Touro L. REV. 459 (1998); F.
Patrick Hubbard, Making People Whole Again: The Constitutionality of Taxing Compensatory Tort
Damages for Mental Distress, 49 FLA. L. REV. 725 (1997).
5. See generally Jolene M. Lowry, Family Group Conferences as a Form of Court-Approved
(proposing that outcomes reached by agreement of the parties is more beneficial than litigation in child
abuse and neglect cases); Steven W. Huang, For the Love of a Child: Christian Science v. Medicine,
44 MED. TRIAL. TECH. Q. 135 (1997) (suggesting that courts are becoming less tolerant of Christian
Scientist parents who deny conventional medical treatment to their children); Karen L. Ross, Revealing
Arguments have addressed the infliction of emotional distress in domestic violence cases and divorce actions, and at least one commentator has argued that suing parents in tort for child abuse is an appropriate role for the court appointed guardian ad litem. Oddly, there appears to be no sustained argument regarding the question of psychologically and emotionally abused children who might wish to sue their parents in tort for the infliction of emotional distress.

This paper will seek to remedy that particular paucity in legal scholarship. Specifically, in section I, the paper will contend that the infliction of psychological and emotional distress upon a child is every bit as damaging and, indeed, is likely even more devastating to the psyche than physical or even sexual abuse. Moreover, this type of behavior is likely to be passed down from generation to generation, further exacerbating the many social ills which we already face. In section II, the paper will briefly detail the law's present response to this form of abuse and indicate why that response is inadequate. Section III will examine tort law regarding the intentional or negligent infliction of emotional distress. This section will examine intra-family tort immunity and will attempt to properly situate emotional distress claims within the arsenal of protection and relief afforded to survivors of child abuse. In section IV, the paper will sadly declare that while suits for the infliction of emotional distress may compensate survivors for their psychological injuries, and may prove to be a socially beneficent deterrent against psychological and

Confidential Secrets: Will it Save Our Children?, 28 SETON HALL L. REV. 963 (1998) (discussing whether professional privileged communications should be revealed in order to expose child abuse); Rita Smith & Pamela Coukos, Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations, 36 no. 4 JUDGES J. 38 (1997) (discussing the duty of a judge in determining custodial or visitation arrangements in cases of domestic violence and/or child abuse); Karla G. Sanchez, Barring the Media from the Courtroom in Child Abuse Cases: Who Should Prevail?, 46 BUFF. L. REV. 217 (1998) (proposing that in cases involving child victims or witnesses, child custody disputes should be excluded from the media to protect the child's interests).


9. This apparent lack of concern is surprising in light of the fact that "[t]he law concerning emotional distress cases is clearly in a process of expansion." Karp & Karp, supra note 6, at 399.
emotional child abuse, the vast majority of psychological abuse scenarios will fall easily and unimpeded through the wide netting of the tort.

I. PSYCHOLOGICAL AND EMOTIONAL CHILD ABUSE

There are numerous forms of adult behavior which may adversely affect a child's development or even prevent the child from reaching his/her full potential. In its most conspicuous mold, child abuse may take the form of beatings, sexual abuse, or the failure to provide basic necessities such as food, shelter, clothing and medicine. While "state legislatures, courts, and societies have historically tended to view psychological, intellectual, social, moral, and emotional abuse as nebulous and insignificant," child development experts and other professionals have identified these more covert forms of abuse as causing "at least as much long-term damage to the child as does a brutal physical battering." Indeed, "[e]xcept for a relatively small percentage of cases in which children are in danger of death or permanent physical injury, the most debilitating injuries are emotional." Thus, whereas children can generally absorb and overcome the experience of physical assault and sexual abuse if they are psychologically strengthened, they can rarely do so if they are psychologically mistreated as part of the experience.

While acts of physical and sexual abuse are generally readily identifiable and thus more susceptible to precise definition, researchers have grappled with various attempts to define psychological maltreatment. Whiting, for example, maintains a distinction between emotional neglect and emotional abuse: (1) "Emotional neglect is a result of subtle or blatant acts of omission or commission experienced by the child, which causes handicapping stress on the child and is manifested in patterns of inappropriate behavior. . . ." (2) "[E]motional neglect occurs when] meaningful adults [are unable] to provide necessary nurturance, stimulation,

11. See id.
13. McMullen, supra note 9, at 483.
14. Id. at 494 (citing JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 13 (1980)).
encouragement, and protection to the child at various stages of development, which
inhibits his optimal functioning.16 When, however, deliberate parental action has
engendered the child’s emotional disturbance, the term "emotional abuse" is
appropriate.17 Lourie and Stefano have evinced the view that mental health
professionals would require a broad definition of psychological maltreatment,
whereas those engaged in legal redress against their perpetrators would need a more
explicit and limited definition in order to avoid having actions dismissed on
grounds of vagueness.18 Their clinical definition of psychological maltreatment
therefore focuses upon the element of "mental injury," "[a]n injury to the
intellectual or psychological capacity of a child, as evidenced by an observable and
substantial impairment in his or her ability to function within his or her normal
range of performance and behavior with due regard to his or her culture."19
Besharov has similarly defined "emotional neglect" as a gross failure to provide the
emotional nurturing and the physical and cognitive stimulation needed to prevent
serious developmental deficits in children,20 whereas "emotional abuse" is
regarded as "an assault on the child’s psyche."21 Besharov has also concluded that
the term "psychological maltreatment" is preferable in terms of describing "the
parental behaviors that can cause serious conduct, cognitive, affective, or other
mental disorders in children."22 A more forward-thinking definition of
psychological maltreatment which focuses upon an overall cluster of maladapted
parenting behaviors can be found in Garbarino, Guttman, and Seeley:

[P]sychological maltreatment is a concerted attack by an adult on a child’s
development of self and social competence, a pattern of psychically destructive
behavior, and it takes five forms:

Rejecting (the adult refuses to acknowledge the child’s worth and the legitimacy of
the child’s needs).

Isolating (the adult cuts the child off from normal social experiences, prevents the

16. Id. (quoting L. Whiting, Defining Emotional Neglect, 5 CHILDREN TODAY 2, 4 (1976)).
17. Id. at 2.
18. I. Lourie & L. Stefano, On Defining Emotional Neglect, 2 NAT’L CONFERENCE ON CHILD ABUSE
   AND NEGLECT 201 (1978).
19. Id. at 203.
21. Id. at 114.
22. Id.; see generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL
   OF MENTAL DISORDERS (3d ed. 1980).
child from forming friendships, and makes the child believe that he or she is alone in the world).

_Terrorizing_ (the adult verbally assaults the child, creates a climate of fear, bullies and frightens the child, and makes the child believe that the world is capricious and hostile).

_Ignoring_ (the adult deprives the child of essential stimulation and responsiveness, stifling emotional growth and intellectual development).

_Corrupting_ (the adult 'mis-socializes' the child, stimulates the child to engage in destructive antisocial behavior, reinforces that deviance, and makes the child unfit for normal social experience).^{23}

The psychological impact of maltreatment is staggering. To begin, maltreatment is not an isolated event.^{24} It is, instead, a continuing pattern of inappropriate and injurious interaction between parent and child.^{25} It is accordingly rare to locate only one type or instance of maltreatment within a family.^{26} Moreover, it is the serious _psychological damage_ which results from any form of abuse which poses the "most disruptive effect on the child's short- and long-term functioning."^{27}

Children subject to neglect manifest a variety of physical ailments.^{28} Inadequate nutrition may lead to deficiency diseases such as beriberi and scurvy, and a lack of proper hygiene may promote severe diaper rash, persistent skin rashes, tooth decay and gum disease.^{29} Infants left unattended may develop a bald spot on the scalp or even a slight flattening of the head due to laying in one position for an

---

23. _Garbarino_, _supra_ note 15, at 8. In addition to these five aspects of emotional maltreatment, Brassard and Gelardo would also include: degrading (name calling and public humiliation) and exploiting (using for self-gain at the child's expense). _See_ Seth C. Kalichman, _Mandated Reporting of Suspected Child Abuse: Ethics, Law, and Policy_ 87 (1993).

24. _See_ McMullen, _supra_ note 10, at 495.

25. _Id._

26. _Id._

27. _Id._ (citing James Garbarino & Gwen Gilliam, _Understanding Abusive Families_ 8-10 (1980)).


29. _Id._
extended period of time.\textsuperscript{30} The physical manifestations of bodily assault are even more apparent and may include bruising, bite marks, bone fractures, burn marks, subdural hematoma, other severe injury, or even death.\textsuperscript{31} Indications of sexual abuse include bruises, cuts, swelling, or pain around the genital area or mouth, or difficult and painful urination, venereal disease, or even pregnancy.\textsuperscript{32} While emotional abuse is not typically discussed in association with overt physical symptoms, verbal abuse or physical neglect may lead to anxiety and concomitant somatic manifestations such as psychogenic skin disorders, persistent pain or illness lacking an organic basis, and ulcers.\textsuperscript{33}

Emotional maltreatment can also lead to cognitive, emotive, behavioral, and sociological deficits.\textsuperscript{34} Parents who are typically unresponsive to their children or whose interactions with their children are based solely upon parental needs may rear children who are easily distracted or who have difficulty functioning in a structured learning environment.\textsuperscript{35} Children from a chaotic or isolated family of origin may be unable to effectively interact with others, and may have decreased levels of motivation.\textsuperscript{36} Sexual and emotional abuse can hamper effective school performance by occasioning poor attendance and decreased classroom participation.\textsuperscript{37}

Both physical abuse and neglect have been associated with language delays and regressive tendencies.\textsuperscript{38} Indeed, neglect alone has been found to be more detrimental to the acquisition of appropriate language skills than the combined effects of physical abuse with neglect.\textsuperscript{39} Similarly, maltreated children frequently appear intellectually impaired, and there is research support for the proposition that maltreated children, as a group, score lower on IQ tests that non-maltreated children.\textsuperscript{40} Language deficits and intellectual impairment carry immediate implications for an individual's academic, social, and behavioral functioning.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. at 78-84.
\item \textsuperscript{32} Id. at 83.
\item \textsuperscript{33} Id. at 84.
\item \textsuperscript{34} Id. at 86.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 87.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 89.
\item \textsuperscript{40} Id. at 90.
\item \textsuperscript{41} Id.
\end{itemize}
Offspring suffering such deficits will learn more slowly, and the learning will require greater effort.\textsuperscript{42} Attendant communication and social deficiencies may promote negative attitudes toward learning situations.\textsuperscript{43} Clinical experience suggests that any type of maltreatment may interfere with motivation and concentration.\textsuperscript{44} Maltreated children appear slower to initiate tasks, seem to lack persistence, and are commonly described as "distractible and unmotivated."\textsuperscript{45} More horrendous still is the myriad of adverse effects which continually haunt the maltreated child's perception of self, overall social and emotional development, interpersonal behavior, social perceptions, and emotional responsiveness. In fact, "[c]hild abuse and neglect is thought to affect all facets of socio-emotional development. Maltreated children have been described as aggressive, withdrawn, fearful of others, anxious and compulsive, generally unable to get along with peers, and suffering from low self-esteem."\textsuperscript{46} A disturbance of interpersonal behavior is one of the most commonly recognized characteristics.\textsuperscript{47} Characterizations of maltreated children which appear in the literature include, in addition to items listed above, terms such as "socially inappropriate, immature, angry, hostile, and unresponsive."\textsuperscript{48} Maltreated children have also been portrayed as "passive or withdrawn, demanding, compliant, suspicious of others, and antisocial."\textsuperscript{49} Maltreated children, furthermore, often appear to be distrustful, negativistic, pessimistic or depressed.\textsuperscript{50} As such, it has been theorized that maltreated children

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 92.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{47} IVERSON & SEGAL, supra note 28, at 95.
\textsuperscript{48} Id. (citing R. Galdston, Preventing the Abuse of Little Children: The Parent's Center Project for the Study and Prevention of Child Abuse, 45 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 372 (1975)); see also R.S. KEMP & C.H. KEMP, CHILD ABUSE (1978); J. Sebold, Indicators of Child Sexual Abuse in Males, 68 SOCIAL CASEWORK: THE JOURNAL OF CONTEMPORARY SOCIAL WORK 75 (1987); Terr, supra note 46.
\textsuperscript{49} IVERSON & SEGAL, supra note 28, at 100.
\textsuperscript{50} Id. at 101.
perceive and respond to their world with a negative bias.\textsuperscript{51} Moreover, because behavioral responses are contingent upon how stimuli are perceived, maltreated children who are apt to misinterpret social situations or the cues of others are also disposed to behave in inappropriate or maladaptive ways.\textsuperscript{52} Precisely because perceptions of one's self develop primarily from accumulated experience, "any type of maltreatment is thought to negatively affect a child's self-esteem."\textsuperscript{53} Even worse is the lasting impact of maltreatment upon a child's mood or emotional display. Mood colors and influences the entire psychic life of the individual, and the general affective display of maltreated children differs significantly from that of non-maltreated children, and includes characterizations such as angry, fearful, sad, depressed, and effectively inappropriate.\textsuperscript{54}

Other research indicates that adult survivors of childhood maltreatment are apt to suffer from psychosocial problems, somatic problems and eating disorders, and relationship and sexual dysfunctions.\textsuperscript{55} The psychosocial difficulties linked to childhood mistreatment include depression, low self-esteem, dissociative reaction, addictions, self mutilation, suicide attempts, and parenting problems.\textsuperscript{56} Somatic complaints and eating disorders include anorexia nervosa, bulimia, obesity, headaches, stomach aches, skin problems, and a variety of additional diseases and infections.\textsuperscript{57} The relationship and sexual problems associated with maltreatment include unstable relationships, poor choice of partners, orgasmic disorders, desire disorders, and promiscuity.\textsuperscript{58} There is also a high correlation between childhood maltreatment and post traumatic stress disorder and multiple personality disorder.\textsuperscript{59} What is more, "[c]hild maltreatment has a tendency to pass from one generation to another."\textsuperscript{60} Because individuals typically learn parenting skills from their own parents, the overall problem of childhood maltreatment produces societal ripple

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 103.
\textsuperscript{54} Id. at 104.
\textsuperscript{55} See McMullen, supra note 10, at 497.
\textsuperscript{56} Id. (citing ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 49-51 (1988)).
\textsuperscript{57} Id. (citing ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 51-52 (1988)).
\textsuperscript{58} Id. (citing ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 52-54 (1988)).
\textsuperscript{59} Id. (citing ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 54 (1988)).
\textsuperscript{60} Id. at 499 (citing Michael Rutter, Intergenerational Continuities and Discontinuities in Serious Parenting Difficulties, in CHILD MALTREATMENT 317, 317-48 (Dante Cicchetti & Vicki Carlson eds., 1989)).
effects in momentous proportions.61

II. THE LAW'S RESPONSE TO PSYCHOLOGICAL AND EMOTIONAL CHILD ABUSE

Since the dawn of humankind, "all manner of tortures have been inflicted on children for the stated purpose of education, moral edification, increasing their physical or sexual prowess, or correcting their errant behavior."62 Indeed, child abuse cases have been dated as far back as Greek and Roman times.63 Early civilizations vested no semblance of legal rights to children:64 infanticide, abandonment, and child mutilation were not only commonplace, but were sanctioned by law.65

The American colonies imported much of the common law of England. The common law gave parents, especially the father, a leniency of stewardship which practically amounted to property rights in the child.66 While parents had a duty to maintain, educate, and protect their children, it was largely a duty devoid of legal compulsion, and parents were essentially free to raise their children independently of government restraint.67 The industrial revolution in America bore witness to an escalating number of children consigned to urban poverty.68 Society's attempt to alleviate the sins of poverty resulted in laws affecting children in poverty's grasp.69 One early endeavor was to apprentice children of the poor to farmers, tradesmen, sea captains, and housewives,70 while another approach removed poor children from parental custody to place them in poorhouses or reform schools.71 The central focus

63. See Kincanon, supra note 12, at 1045.
64. See Lanham, supra note 8, at 102.
65. See Mason P. Thomas, Jr., Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. REV. 293, 294-95 (1972).
67. Id. at 3.
68. Id.
69. Id.
70. See Thomas, supra note 65, at 302-03.
71. Id. at 302.
of such laws was "to eradicate delinquency and alleviate the strain on the public
fisc" rather than to vest children with independent rights. The statutes prohibiting
parental abuse and neglect took root in the early 19th Century. But it was not,
perhaps, until the celebrated Mary Ellen Wilson case of 1873 that child abuse
became a serious political issue. In 1874, the New York Society for the
Prevention of Cruelty to Children was created. This organization established the
law enforcement approach to child rescue, emphasizing the removal of endangered
children from parental custody and the prosecution of their neglectful and abusive
parents. Other cities followed soon after with similar protective societies, and
the first statewide juvenile court system was established by Illinois in 1899. The
juvenile court system was designed specifically to address the problems of youth:
abuse, neglect, dependency, delinquency, and status offenses. The law
enforcement approach to child rescue remained the dominant model until the
1960s.

The psychological abuse of children, however, remained unrecognized by the
medical and legal communities for many decades after the "discovery" of physical
abuse and neglect. It was not until the mid 20th Century that an emotional form
of child abuse was even recognized by the mental health profession. Because of
the medical fraternity's long delay in recognizing the problem, coupled with the

72. Lanham, supra note 8, at 103 (citing Thomas, supra note 65, at 306).
73. Lanham, supra note 8, at 103.
Work 500 (1990). In 1873, Etta Wheeler learned that Mary Ellen Wilson was being severely
mistreated by her foster mother. Id. After various attempts to involve police and other officials proved
unsuccessful, Mrs. Wheeler approached the president of the New York Society for the Prevention of
Cruelty of Animals, Henry Bergh, for assistance. Id. Bergh and his attorney persuaded a judge to
preside over the case and brought the proceedings to the attention of the New York Times. Id. The
case was given considerable coverage, beckoning public opinion toward an increased awareness of the
problem of child abuse and neglect. Id.
75. Id.
76. Id.
77. Thomas, supra note 65, at 311.
78. See Horowitz & Davidson, supra note 66, at 4.
79. Id.
80. See Thomas, supra note 65, at 311-31.
81. Sonia Renee Martin, A Child's Right to be Gay: Addressing the Emotional Maltreatment of
legal profession's reluctance to interfere with family autonomy,\textsuperscript{83} initial attempts to address the problem of child maltreatment were limited to severe physical abuse causing the endangerment of life or permanent and serious physical injury.\textsuperscript{84} Gradually, researchers became aware of the severe psychological repercussions posed by physical abuse and neglect, and additional research disclosed a wide range of parental behaviors that could be equally anemic to child development.\textsuperscript{85} The long-delayed legislative response to this increasing wealth of psychological discernment regarding child maltreatment was "a plethora of laws" specifically targeting emotional maltreatment as well as physical and sexual abuse.\textsuperscript{86}

It has been argued, nevertheless, that the legislative response to psychological child abuse remains painfully inadequate.\textsuperscript{87} The statutes which address emotional maltreatment fall into three basic categories.\textsuperscript{88} The first species of statute employs language that chiefly describes physical abuse but does not specifically address the issue of psychological maltreatment.\textsuperscript{89} This type of statute obviously neglects the many forms of parental behavior which may severely damage a child psychologically, but which do not immediately imperil the child's physical health.\textsuperscript{90} Thus, "[t]he inherent problem with such a statute is that judges are free to disregard the emotional abuse of children if they choose."\textsuperscript{91} The second form of statute specifically prohibits emotional maltreatment as well as physical abuse, and yet offers no statutory standard by which to ascertain when emotional maltreatment is present.\textsuperscript{92} These statutes typically rely upon such vague and subjective terms as...
"mental injury" or "harm to mental health." In practice, therefore, the difference between a statute which does not address emotional maltreatment per se, and a statute which prohibits emotional maltreatment without any attempt to clearly define it, "may be a matter of judicial interpretation." Again, under such enactments, children subject to emotional and psychological maltreatment may be left without legal redress. The third variant of statute not only refers to psychological maltreatment, but also offers a standard by which to gauge when such maltreatment is likely to have occurred. These more progressive enactments apparently accept the proposition that children can be severely injured in ways other than physical beating. One of the difficulties which plagues this type of statutory scheme, however, resides in the fact that many of these statutes require an element of demonstrable harm. Yet a specific showing of harm "is often not possible because the effects of emotional maltreatment are usually not perceptible until long after the actual verbal [or other] abuse occurs."

Given the significance and dimensions of the problem of psychological and emotional child maltreatment as presented in section I, and the deficiencies inherent to the majority of child abuse statutes regarding this particular form of maltreatment as examined in section II, it is clear that a new approach to the problem of psychological child abuse and neglect is warranted. Might a psychologically abused child sue a parent in tort for the infliction of emotional distress? To this question, we now turn.

III. THE INFLICTION OF EMOTIONAL DISTRESS

Although it was not always the case, "almost every American jurisdiction allows children to sue their parents for some acts of abuse," and all jurisdictions allow tort suits between parents and emancipated children. There is, moreover, a rapidly growing trend toward judicial recognition of "domestic torts," particularly

93.  Id.
94.  Id. at 490.
95.  Id. at 489-90.
96.  Id. at 491.
97.  Id.
98.  Id. at 491-93.
99.  Martin, supra note 81, at 184.
100. Lanham, supra note 8, at 101.
as involved in divorce actions. The causes of action which have been advanced for physical or psychological spousal abuse include: assault and battery, wrongful death, the intentional infliction of emotional distress, false imprisonment, and the use of excessive force. Other theories pled in domestic tort actions encompass the negligent infliction of emotional distress, defamation, negligence, negligence per se, and an implied cause of action for violation of a criminal statute. New and nameless remedies for severe domestic incivility are recognized every day. Courts have been asked to locate a cause of action for the intentional infliction of emotional distress in marital settings even where the plaintiff did not allege a physical beating. Would it not logically follow that psychologically and emotionally abused children would have standing to sue abusive and neglectful parents for the infliction of emotional distress?

During the 19th Century, while juvenile and criminal courts were beginning to protect children from parental abuse, tort law, through the doctrine of parental

102. Karp & Karp, supra note 6, at 389.
104. Id. (citing Herget Nat'l Bank v. Berardi, 356 N.E.2d 529 (Ill. 1976); Jones v. Pledger, 363 F.2d 986 (D.C. Cir. 1966)).
105. Id. at 390 (citing Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. 1985); Davis v. Bostick, 580 P.2d 544 (Or. 1978); Stuart v. Stuart, 410 N.W.2d 632 (Wis. 1987)).
106. Id. (citing Lorange v. Hays, 209 P.2d 733 (Idaho 1949)).
107. Id. (citing Rowell v. Wimberly, 312 So. 2d 369 (La. Ct. App. 1975)).
109. Id. (citing Papy v. Frischkorn, 234 So. 2d 718 (Fla. Ct. App. 1970)).
110. Id. (citing Maharam v. Maharam, 510 N.Y.S.2d 104 (N.Y. 1986)).
111. Id. (citing Mammo v. State, 675 P.2d 1347 (Ariz. Ct. App. 1983)).
112. Id. at 389.
113. Id. (citing Michael R. v. Jeffrey B., 205 Cal. Rptr. 312 (Cal. 1984)).
114. Ellman & Sugarman, supra note 7, at 1269.
115. Obviously, if a child has been physically beaten or sexually molested, an action would lie in tort for battery, inter alia, and damages might be recovered for emotional distress. This paper sought to ascertain whether an action for the infliction of emotional distress alone might be the basis of legal redress.
immunity, began shielding parents from civil liability for those same actions.\footnote{116} By virtue of parental immunity, children could not sue their parents in tort for harm sustained through parental misconduct.\footnote{117} The rule and rationale of the doctrine were established by a well-known triad of cases.\footnote{118}

In \textit{Hewellette v. George},\footnote{119} the court refused the right of a child to sue her mother for false imprisonment. The court opined:

\begin{quote}
[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.\footnote{120}
\end{quote}

\textit{McKelvey v. McKelvey}\footnote{121} denied the right of a child to sue her parents for "cruel and inhuman treatment"\footnote{122} as there was no remedy at common law for personal injuries inflicted by a father upon his child: "At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect and educate it.\footnote{123} These rights could only be forfeited by gross misconduct on his part."\footnote{124} Similarly, in \textit{Roller v. Roller},\footnote{125} the Washington State Supreme Court dismissed a civil suit by a fifteen-year-old girl against her father for damages resulting from rape. The court ruled that even if "harmonious relations existing have been disturbed in so rude a manner that they never can be again adjusted . . . if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarcation which can be drawn."\footnote{126} Accordingly, the principle arguments advanced in support of parental immunity during this period were: (1) "the need to maintain family harmony,"\footnote{127}

\begin{footnotes}
\item[116] Lanham, \textit{supra} note 8, at 106.
\item[117] Kearney, \textit{supra} note 8, at 436.
\item[118] \textit{See infra} notes 119-129 and accompanying text.
\item[119] \textit{See Hewellette v. George}, 9 So. 885 (Miss. 1891), \textit{overruled by} Glaskox v. Glaskox, 614 So. 2d 907 (Miss. 1992).
\item[120] \textit{Hewellette}, 9 So. at 887.
\item[121] \textit{See McKelvey v. McKelvey}, 77 S.W. 664 (Tenn. 1903), \textit{overruled by} Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994).
\item[122] \textit{McKelvey}, 77 S.W. at 664.
\item[123] \textit{Id}.
\item[124] \textit{Id}.
\item[125] \textit{See Roller v. Roller}, 79 P. 788 (Wash. 1905).
\item[126] \textit{Id} at 788-89.
\item[127] Kearney, \textit{supra} note 8, at 437 (citing \textit{Hewellette}, 9 So. at 887).
\end{footnotes}
"the need of parents to control their children," and (3) "concern about the financial effects of tort liability on a family." Changing social attitudes over the last century have largely eroded the doctrine of parental immunity and the policy arguments in support of that rule can be proven anemical to society's best interests. The initial concern that intra family lawsuits would disrupt family harmony is rendered moot by simple recognition of the event or series of events which occasioned the anticipated legal claim. Indeed, "courts have begun to recognize that a parent's tortuous conduct would have already disrupted family harmony, and would continue to disrupt it if the child were not permitted to formally address it by attempting to recover for the injuries caused by that behavior." It might also be argued that the existence of liability insurance, if present, could shift the adversarial strain away from family members and toward a particular family member and the insurance company.

The second policy argument that tort liability would undermine parental authority may be eviscerated by acknowledging that parents do not possess unbridled discretion in child rearing. The entire thrust of child welfare legislation demonstrates that children can no longer be regarded as the "property" of the parent. The final concern regarding the financial effects of tort liability upon a family should not, in itself, prove an effective bar to the suit. An essential tenet of tort law is that injured parties should be compensated for their loss, and the maltreated child's only means of compensation may well come from a judgment against the abusive parent. The economic, psychological, and sociological "cost" of child maltreatment is initially borne by the family unit anyway, until it is passed on to the larger society and ensuing generations.

Section 46 of the Restatement (Second) of Torts provides:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes

128. Id. (citing McKelvey, 77 S.W. at 664).
129. Id. (citing Roller, 79 P. at 789).
130. Kearney, supra note 8, at 437.
131. Id.
132. Id. (citing Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975)).
133. Id. (citing Streenz v. Streenz, 471 P.2d 282, 284 (Ariz. 1970)).
135. Kearney, supra note 8, at 438.
136. Id.
137. Id.
severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.\textsuperscript{138}

The majority of American jurisdictions recognize the intentional infliction of emotional distress as a distinct cause of action in tort.\textsuperscript{139} Even the United States Supreme Court has observed that the intentional and outrageous infliction of emotional distress rarely advances the social good and that it is understandable that the majority of states do not afford the underlying conduct "much solicitude."\textsuperscript{140} While emotional distress is often an element of damages where other interests have been invaded, it is clear that section 46 of the Restatement (Second) of Torts recognizes the intentional infliction of emotional distress as "a separate and distinct basis of tort liability."\textsuperscript{141} It is equally apparent, however, that the Restatement (Second) of Torts section seeks to confine its reach to govern only those actions that are "extreme and outrageous."\textsuperscript{142} Social enmity is a harsh fact of life, and individuals must accustom themselves to accept a good deal of course, rude, and objectionable behavior.\textsuperscript{143} Accordingly, culpability will lie "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."\textsuperscript{144} Generally, the case [must be] one in which the recitation of the facts to an average member of the community would arouse his

\textsuperscript{138} Restatement (Second) of Torts § 46 (1965).
\textsuperscript{139} See Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42, 43 n.9 (1982).
\textsuperscript{141} Restatement (Second) of Torts § 46 cmt. b (1965).
\textsuperscript{142} Restatement (Second) of Torts § 46 cmt. d (1965).
\textsuperscript{143} See id.
\textsuperscript{144} Id.
resentment against the actor, and lead him to exclaim, "Outrageous!" The tort "officially" embraces four critical elements: "(1) an intentional or reckless act that is (2) extreme and outrageous, and (3) causes (4) severe emotional distress." Yet in practice, the action seems to hinge entirely upon the component of extreme and outrageous misconduct, and "some scholars persuasively argue that outrageousness is the only real requirement for recovery under the intentional infliction tort." Thus, where intentional and outrageous conduct can be proven, the courts will assume that such conduct caused severe emotional distress. Conversely, where the element of outrageousness cannot be substantiated, an action cannot be maintained, even if the actor intended to create severe emotional distress and succeeded. In correspondence, no physical contact is required; the tort can arise through words or other non-physical acts alone. Furthermore, under the Restatement (Second) of Torts, the plaintiff need not prove any particular physical symptoms arising from the psychic distress. The law regarding emotional distress is clearly in a process of expansion. However, as previously mentioned, there is a surprising dearth of commentary regarding the next obvious and logical step in the evolution of the law of domestic torts: psychologically and emotionally abused children who might wish to sue abusive parents for the infliction of emotional distress. As such, speculation regarding this ensuing trend must be drawn from the most closely analogous field-specifically, inter-spousal tort actions in emotional distress. The majority of inter-spousal tort actions involve domestic violence. Over 75 percent of cases involving inter-spousal suits for the intentional infliction of

145. Id.
146. Ellman & Sugarman, supra note 7, at 1280.
147. Id.
149. See Givelbar, supra note 139, at 50.
150. See id. at 46.
151. Ellman & Sugarman, supra note 7, at 1280.
152. RESTATEMENT (SECOND) OF TORTS § 46 (1965).
153. Karp & Karp, supra note 6, at 399.
154. See supra notes 4-9 and accompanying text.
155. See generally Karp & Karp, supra note 6.
156. See id. at 398.
emotional distress include physical abuse which results in severe emotional harm.\(^{157}\) Following the requirements for this type of tort action, "[m]ost courts attempt to differentiate between those cases where the defendant's conduct is truly outrageous and the emotional distress is severe and those where the conduct is merely insulting, annoying, or even threatening."\(^{158}\) Thus, cases of severe physical violence which resulted in an emotional distress claim include scenarios in which a husband severed his wife's extremities with a machete;\(^{159}\) one spouse shot the other without provocation;\(^{160}\) a husband battered his wife so violently that she suffered a ruptured cervical disc;\(^{161}\) and a partner of ten years established a pattern of violent conduct consisting of sexual assault, anal rape, and various other acts which produced severe emotional distress.\(^{162}\) Other inter-spousal emotional distress claims involving physical violence or property damage include cases where a husband tore his wife's ear and threw hot coffee on her, broke her furniture, and verbally accosted her in front of her friends;\(^{163}\) a husband raped and assaulted his wife, accused her of sleeping with his brother, destroyed her house, threatened to destroy her inn, and engaged in a myriad of additional psychologically abusive actions;\(^{164}\) a husband killed his wife's pet, broke screens, and shattered her windows;\(^{165}\) a spouse dragged his wife down the steps by her feet in order to amuse himself;\(^{166}\) a husband broke his wife's nose, threatened to kill her, destroyed property, and told lies to her friends to harass her;\(^{167}\) and a husband broke the windows in his wife's house and threatened to kill her.\(^{168}\) Cases involving emotional distress claims between spouses which did not incorporate severe physical abuse include situations where one spouse intentionally or negligently transmitted a sexual disease to the other spouse;\(^{169}\) one spouse significantly interfered with the custodial rights of the

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) See Waite v. Waite, 618 So. 2d 1360 (Fla. 1993).


\(^{161}\) See Smith v. Smith, 530 So. 2d 1389 (Ala. 1988).

\(^{162}\) See Curtis v. Firth, 850 P.2d 749 (Idaho 1993).


\(^{164}\) See Henrikson v. Cameron, 622 A.2d 1135 (Me. 1993).

\(^{165}\) See Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. 1985).


\(^{167}\) See Davis v. Bostick, 580 P.2d 544 (Or. 1978).

other, a husband was prone to temper tantrums and was abusive, rageful, and explosive for many years; and a putative husband revealed to his spouse that they had never been married.

This litany of examples is important. To begin, it illustrates the type of basic factual scenario which the courts consider to be sufficiently "outrageous" as to qualify under the intentional infliction tort. Second, it emphasizes first-hand that severe domestic acrimony, unfortunately, is by no means unusual. Third, it demonstrates that a child who has been physically or sexually abused might similarly initiate a cause of action for, inter alia, emotional distress. Moreover, the Restatement (Second) of Torts provides that when extreme and outrageous conduct is directed at a third person, the actor is liable if he intentionally or recklessly causes severe emotional distress "to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." This means that any child who witnesses a parent's spousal rape or battery, or the physical or sexual abuse of a sibling, would be able to bring suit for the intentional infliction of emotional distress against the perpetrator, even where that child has not himself been physically or sexually assaulted. Since the majority of inter-spousal emotional distress cases involve domestic violence, it is not difficult to envision a plethora of situations in which a child may have been psychologically traumatized by witnessing the physical or sexual assault of another family member. Such an action brought on the child's part would help curb

173. See supra notes 136-145 and accompanying text; see also RESTATEMENT (SECOND) OF TORTS § 46 (1965).
174. See supra notes 136-145 and accompanying text.
175. See generally supra note 8.
177. See generally RESTATEMENT (SECOND) OF TORTS § 46 (1965).
178. See generally Karp & Karp, supra note 6.
domestic violence, enable the child to be compensated for her anguish, and would promulgate a warning to other potentially physically abusive spouses and parents. Finally, the list demonstrates that while the majority of domestic emotional distress cases involve physical abuse, not all do. It requires no great gift of imagination to conjure a wealth of situations where a child might be subject to extreme emotional distress without physical or sexual maltreatment. Since psychological maltreatment causes at least as much long-term damage as physical or sexual abuse, it would be absurd to allow a child a means of redress for one form of injury and not the other.

The Restatement (Second) of Torts also establishes and delineates a cause of action for the negligent infliction of emotional distress. The essential differences between the intentional and the negligent infliction of emotional distress torts center upon the elements of outrageous conduct and ensuing bodily harm. Whereas the intentional infliction claim requires "extreme and outrageous conduct," the negligence action bears no comparable standard. Furthermore, under the intentional infliction tort, liability may be found for the generation of emotional distress alone; recovery for the negligence claim - at least, under the Restatement (Second) of Torts formulation - is possible only if there is resulting illness or bodily harm. No less than eight states have decisions reflecting the adoption of the

179. See generally Karp & Karp, supra note 6; Lanham, supra note 8; Kearney, supra note 8; Ellman & Sugarman, supra note 7.
180. See supra notes 159-168 and accompanying text.
181. Id.
182. See supra notes 13-15, 27.
185. RESTATEMENT (SECOND) OF TORTS § 46 (1965).
186. See generally Crump, supra note 148, at 453-54 (arguing that the only practical limit on the tort of intentional infliction of emotional distress is the requirement of outrageousness).
188. See RESTATEMENT (SECOND) OF TORTS §§ 312, 313, 436, 436(A) (1965). Section 436(A) specifically provides that "[i]f the actor's conduct is negligent as creating a unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Id. Further, comment (a) to that section explains that the "difference is one between the negligent automobile driver who narrowly misses a woman and frightens her into a miscarriage, and the negligent driver who merely frightens her, without more." Id.
nigligent infliction of emotional distress as an independent tort. Yet it has been argued that the creation of an independent action for negligently-imposed distress "would create an all-purpose tort, which would render superfluous a variety of well-established theories of intentional tort liability," and the courts that have adopted the negligence claim as an independent action generally struggle to set appropriate limits to the claim. Accordingly, "[t]ort law on the negligent infliction of emotional distress thus remains highly unstable, varying from state to state, and lacking any satisfactory consensus among courts and commentators about its nature." Nevertheless, at least two types of negligent infliction claims are widely recognized:

First, if you are put in fear of physical injury to yourself by the negligence of another, you may sue for the emotional distress you suffer. Second, a large number of jurisdictions permit suits by those who are emotionally shocked by seeing their loved ones killed or injured through the negligence of others.

The majority of jurisdictions would likely reject an action for the negligent infliction of emotional distress brought by a child against a parent because of the overall disinclination of the courts toward recognizing this tort as an independent claim. However, it is clear that psychologically and emotionally abusive parents can engage in behaviors that present a legitimate claim under the tort of negligent infliction of emotional distress. Moreover, while many standard insurance

---

189. See Crump, supra note 148, at 499.
190. Id. at 454.
191. See id. at 499-506.
192. Ellman & Sugarman, supra note 7, at 1299.
193. Id. at 199.
194. Id. at 1299-1300.
195. See supra notes 11, 74-84 and accompanying text.
196. See RESTATEMENT (SECOND) OF TORTS § 312 (1965) which provides that:

If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause

(a) although the actor has no intention of inflicting such harm, and

(b) irrespective of whether the act is directed against the other or a third person.

Id. Moreover, comment (b) to that section provides in pertinent part that:

[The rule stated here extends ... somewhat further than the rule of § 46 (intentional infliction of emotional distress). It permits the negligence action in any case where it may be found
policies will exclude indemnity for the intentional infliction of harm,\textsuperscript{197} recovery may be permitted for the negligent imposition of harm.\textsuperscript{198} As such, a plaintiff may well have considerable interest in pursuing a claim under the negligent-infliction theory.\textsuperscript{199}

There are a myriad of social policy arguments which would support the general right of psychologically and emotionally maltreated children to sue abusive caretakers for the infliction of emotional distress.\textsuperscript{200} As we have seen, there is an overall mien of disregard in the legal system concerning psychological child abuse.\textsuperscript{201} Yet it is precisely this type of maltreatment which results in the most enduring harm.\textsuperscript{202} Thus, "[r]ather than casting psychological maltreatment as an ancillary issue, subordinate to other forms of abuse and neglect, we should place it as the centerpiece of efforts to understand family functioning and to protect children."\textsuperscript{203} To accomplish this end, new legal machinery is required.\textsuperscript{204}

Children are among the most vulnerable members of society and the state has an interest in ensuring their emotional well-being.\textsuperscript{205} Basic morality considerations dictate that individuals should take care of each other and practice, \textit{at least}, a

\begin{quote}
that the conduct, although intended to inflict emotional distress, amounts to something less than extreme outrage, but nevertheless involves an unreasonable risk, which the actor should recognize, that bodily harm will result.
\end{quote}

\textit{Id.}

\textsuperscript{197} See Crump, supra note 148, at 488.

\textsuperscript{198} See Kearney, supra note 8, at 438.

\textsuperscript{199} See generally id.; see also supra notes 183-194.

\textsuperscript{200} See generally Lanham, supra note 8; Kearney, supra note 8.

\textsuperscript{201} See supra notes 12, 87-99 and accompanying text.

\textsuperscript{202} Martin, supra note 81, at 171; see also supra notes 13-15, 25.

\textsuperscript{203} Martin, supra note 81, at 171 (quoting JAMES GARBARINO, THE PSYCHOLOGICALLY BATTERED CHILD 7 (1986)).

\textsuperscript{204} See generally McMullen, supra note 10, at 485-86 (discussing some of the problems with current statutes that deal with the emotional and sexual maltreatment of children). McMullen states that these problems are: "First, the nature of after-the-fact laws dictates there will be no meaningful intervention until significant harm has already been inflicted on the child." \textit{Id.} at 485. "The second problem with the after-the-fact laws is that in many cases of emotional and sexual abuse, proof of harm or other indicators of abuse may not be apparent until the victim has reached adolescence or adulthood." \textit{Id.} "The third problem with the after-the-fact statutes is that it is even more difficult to delineate and recognize behaviors constituting emotional or sexual abuse than those constituting physical abuse." \textit{Id.} at 486.

\textsuperscript{205} See Martin, supra note 81, at 192.
modicum of compassion. The moral obligation to assist maltreated children arises from the "natural responsibilities of social living and human relations." By recognizing the right of maltreated children to sue abusive parents for the infliction of emotional distress, civil courts would merely be following a moral precedent established by others. Mandatory reporting laws and other forms of child abuse legislation demonstrate society's commitment to halting abuse. The imposition of tort liability upon emotionally abusive caretakers would further strengthen this design. It is axiomatic that courts, legislatures, and the general populus expect parents to protect, nurture, and safeguard their children. Children naturally turn to their parents for support and guidance, and society encourages such behavior. When parents psychologically maltreat their children they fail dismally in their natural duty as caregivers and stewards, and inflict a subtle, yet not imperceptible wound on society. As constituents of a larger social order, caretakers must accept responsibility for the consequences of their choices. As such, sound public policy would demand that psychologically abusive parents compensate their children for emotional harms inflicted.

One function of tort is to moralize. Tort law similarly seeks to castigate wrongdoers, provide victims with a sense of justice and empowerment, and to deter socially undesirable conduct. Each of these goals would be well served by permitting maltreated children to sue psychologically abusive parents for emotional distress. Such an action in tort would provide an emotional catharsis for the victim, present a public acknowledgment of wrongdoing, and would educate the

206. See Kearney, supra note 8, at 428.
208. See generally Kearney, supra note 8, at 428.
209. Id. at 432.
210. Id.
211. Id.
212. Id.
213. See generally McMullen, supra note 10.
214. Id.
215. Id.
216. Ellman & Sugarman, supra note 7, at 1284.
217. Id.
218. Id. at 1287.
219. See generally Kearney, supra note 8, at 434-35.
public about the evils and adverse effects of psychological maltreatment.\textsuperscript{220}

Another primary function of tort law is to compensate the injured party.\textsuperscript{221} Considerations of fairness alone would mandate that children who bear the heavy burden of psychological abuse should be compensated for their loss.\textsuperscript{222} If maltreated children are not directly compensated by the aggrieving party, the loss will ultimately be borne by society in the form of social programs, or by a perpetuation of the chain of abuse.\textsuperscript{223}

A minor child, particularly a child from an abusive family environment, is not likely to have ready access to the legal system, nor is he likely to be in a position from which a tort suit against an abusive parent would immediately improve his lot in life.\textsuperscript{224} But at least one legal commentator has argued convincingly that under appropriate circumstances, a \textit{guardian ad litem} may sue a parent in tort in behalf of an unemancipated child.\textsuperscript{225} Moreover, while criminal statutes prohibiting child abuse typically focus on the punishment of the wrongdoer, child protective service statutes, alternatively, seek to remove the child from the abusive environment and to provide treatment for the parents with an aim toward eventual family reunification.\textsuperscript{226} Where unification is impossible or undesirable, a tort suit against the abusive caretaker could conceivably work in conjunction with the employment of a protective service statute to further ensure that the child is not forced to return to an abusive home.\textsuperscript{227} Suits against a parent for the infliction of emotional distress might also arise coincidentally with divorce proceedings.\textsuperscript{228} If a parent has been abusive toward a spouse, it is altogether likely that a child will have also been adversely affected by the parent's misconduct.\textsuperscript{229} Finally, in perhaps a majority of instances, a maltreated child could sue the abusive parent upon emancipation.\textsuperscript{230}

It is axiomatic that a tort suit cannot financially compensate the injured party

\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{See} Lanham, \textit{supra} note 8, at 112.
\textsuperscript{222} \textit{See generally} McMullen, \textit{supra} note 10.
\textsuperscript{223} \textit{See supra} notes 60-61 and accompanying text.
\textsuperscript{224} \textit{See generally} Karp \& Karp, \textit{supra} note 6; McMullen, \textit{supra} note 10; Lanham, \textit{supra} note 8; Kearney, \textit{supra} note 8.
\textsuperscript{225} \textit{See} Lanham, \textit{supra} note 8, at 116-18.
\textsuperscript{226} McMullen, \textit{supra} note 8, at 487.
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{See} Karp \& Karp, \textit{supra} note 6; \textit{see also} \textit{supra} notes 159-172.
\textsuperscript{229} \textit{See} \textit{supra} notes 156-176 and accompanying text.
\textsuperscript{230} \textit{See} Akers \& Drummond, \textit{supra} note 102, at 181.
if the tortfeasor lacks sufficient funds to pay the judgment. Some studies indicate that individuals in households with incomes of $15,000 or less are four times more likely to abuse their children than individuals in higher income brackets. As such, the typical victim of childhood abuse, it would ostensibly appear, would gain little from suing an impoverished parent. What then would be the point of such a lawsuit?

To begin, one might counter this reproach with the observation that families with incomes above $15,000 may be significantly underreported in proportion to the reporting of abuse in lower-income households. Individuals with favorable financial resources may be more cognizant of the need to hide child abuse and may find opportunity to do so. The ability of upper-income families to mask abuse renders it exceedingly difficult for individuals outside the home to detect the abuse. More important, the statistics generated typically deal with physical abuse and neglect, which is more readily proved, and make little mention of psychological and emotional abuse. The proliferation of psychological abuse may well be even higher in upper-income families than households in the lower-income bracket.

The existence of liability insurance may facilitate the ability of a child to

---

231. See generally Kearney, supra note 8, at 453-55.
233. See generally id.
234. See Kearney, supra note 8, at 453.
235. Id.
236. Id. at 453-54.
237. Id.
238. See generally Kearney, supra note 8, at 454;

Psychological maltreatment is often difficult to predict. Pencil-and-paper questionnaires designed to identify parents who will eventually maltreat their children have proved ineffective. Such instruments can identify most of the pool of families from which actual maltreatment cases will eventually come. But there are many mistakes: some parents who are maltreaters slip through ('false negatives'), and many parents who are not maltreaters are identified as such ('false positives'). No one source of information gathered 'objectively' is likely to succeed in screening. Rarely, even, can such pencil-and-paper questionnaires predict which individuals among a high-risk group will actually maltreat their children.

Similarly, it is difficult to determine whether or not a parent will continue to maltreat a child.

GARBARINO ET AL., supra note 15, at 73.
collect damages from an abusive parent. In two recent decisions, *Elliot v. Dickerson* and *Richie v. Richie*, the courts permitted daughters to recover from their mothers for the failure to shield them from the sexual abuse of their father and stepfather, respectively. In both instances, it was the mothers' home owners insurance policy which provided the means of recovery. Lastly, even if no substantial pecuniary gain will follow from a suit against a psychologically abusive parent, the plaintiff may reap asundery benefits such as a public declaration that what was done to the child was wrong, and the belief that such notoriety may deter similar psychologically abusive acts from occurring to others.

**IV. THE WIDE NETTING OF THE TORT**

Section I of this paper has substantiated the position that psychological and emotional child maltreatment is at least as detrimental to a child's long term development and overall well-being as physical or sexual abuse. Section II has evinced the claim that the law's current response to psychological child maltreatment is painfully inadequate and that new social and legal machinery is required to address the problem. Section III has outlined the civil actions available for the intentional and/or negligent infliction of emotional distress. This section further suggests that there are countless and all-too-common situations where parental misconduct would fall under the mantle of such an action in tort, and that there are a plethora of social policy arguments which would support the right of maltreated children to sue abusive parents for emotional distress. Is this civil action then the solution to the problem of psychological child abuse?

Regrettably, it appears that while suing psychologically abusive parents for the infliction of emotional distress will likely benefit many victims of childhood emotional trauma and will clearly serve the important social policy aims evinced in the previous section, the majority of childhood emotional abuse scenarios will likely fall unimpeded through the wide netting of the tort. While emotional distress claims will continue to be recognized as parasitic damages following upon a

---

239. See Kearney, *supra* note 8, at 454.
243. *Id.*
244. See *supra* notes 10-61 and accompanying text.
245. See *supra* notes 62-99 and accompanying text.
246. See *supra* notes 100-222 and accompanying text.
complete and separate domestic tort, the infliction of emotional distress alone is not likely to be welcomed *carte blanche* by the courts as an independent cause of action allowing children to sue their caretakers. To begin, there is a strong policy argument against expanding the reach and proliferation of emotional distress actions. As Crump has observed, "there are many socially desirable activities of which [even] the intentional causing of emotional distress is an essential part."\(^{247}\)

When a fire-and-brimstone preacher excoriates his parishioners from the pulpit, his intent is to cause sufficient emotional distress to deter them from future lives of sin, and he knows that at least some parishioners may suffer severe emotional distress as a result. When an honest business owner contacts a customer defaulting in payment of purchases bought on credit, his intent is to make his customer feel a responsibility to pay the bill, or in other words, to inflict at least a reasonable quantum of emotional distress. When a lawyer conducts a vigorous cross-examination of an ostensibly trustful child who has testified that her father sexually abused her, his intention is to induce confusion and denial in the child's testimony, which is likely to cause severe and lasting emotional distress. Finally, to give an example that is all too familiar to readers of this article, law professors unavoidably inflict considerable emotional distress upon students in their classes, and we have only recently begun to appreciate the duration and severity of the result.\(^{248}\)

No doubt, there are also numerous situations where a beneficent, informed, and optimally rational caretaker would intentionally inflict even severe emotional distress upon a child. A child playing with matches might be graphically informed of the horrors of death by fire; a child caught abusing a family pet might be enticed into compassion by suffering a corporal punishment similar to that which befell the animal; and a child found pilfering from his father's wallet might be sent to his room - in "solitary confinement" - for a substantial length of time. How does one draw the proper line of demarcation between a parental infliction of emotional distress that is warranted, corrective, and even morally therapeutic from the type of parental misconduct that effectively eviscerates the child's soul and leaves permanent wounds on the psyche? Clear examples of "outrageous" psychological child abuse are ever present and are easily demonstrated.\(^{249}\) But what about the subtle and more deeply covert parental actions which mentally devastate a particular child in ways and through means that no objective third party can comprehend? Actions for the negligent infliction of emotional distress upon a child

\(^{247}\) Crump, *supra* note 148, at 488.
\(^{248}\) *Id.*
\(^{249}\) *See supra* notes 100-113.
are likely to be received even less favorably than the intentional-infliction tort in light of the simple fact that even the most saintly of caretakers will inadvertently inflict a substantial amount of psychic distress upon the impressionable charges of their care.

Statistics have suggested that between 80-95% of individuals grew up in dysfunctional households and failed to receive the love, nurturing, and guidance necessary to form healthy relationships and to feel good about themselves and what they do.\textsuperscript{250} It is further evident that individuals typically learn parenting skills from their family of origin.\textsuperscript{251} But if the majority of judges and jurors were themselves maltreated as children, and thus continue to perpetuate the same dysfunctional parental patterns inculcated from their youth, how readily will they be able to distinguish healthy and acceptable forms of discipline and control from the "outrageous"\textsuperscript{252} or, at least, "unreasonable"\textsuperscript{253} forms of conduct required to trigger the emotional distress action?

More troublesome still, it appears that the majority of psychological child abuse scenarios will not be covered by the negligent infliction of emotional distress action.\textsuperscript{254} We have already seen that emotional abuse involves the destruction of the child's sense of self and "[b]ecause it does not involve bruises and broken bones, it is the hardest form of child maltreatment to define, identify, and prove."\textsuperscript{255} It is extremely difficult to make an effective case for legal action."\textsuperscript{256} We have also seen that one of the more forward-thinking definitions of psychological maltreatment was proposed by Garbarino, Guttman, and Seeley.\textsuperscript{257} Under their definition, psychological maltreatment results from a pattern of psychologically destructive behavior which may involve rejecting, isolating, terrorizing, ignoring, and

\textsuperscript{251} McMullen, supra note 10, at 499.
\textsuperscript{252} "Outrageousness" is the key element for recovery under an action for intentional infliction of emotional distress. See \textbf{RESTATEMENT (SECOND) OF TORTS} § 46 (1965); see also supra notes 124-128 and accompanying text.
\textsuperscript{253} See \textbf{RESTATEMENT (SECOND) OF TORTS} § 46 (1965) (requiring "outrageousness" for intentional infliction of emotional distress). \textit{Cf.} \textbf{RESTATEMENT (SECOND) OF TORTS} § 312 cmt. b (1965) (allowing for something less than extreme outrage for the negligent infliction of emotional distress).
\textsuperscript{254} See \textbf{RESTATEMENT (SECOND) OF TORTS} § 312 (1965).
\textsuperscript{255} \textbf{GRETA L. SINGER ET AL.}, CHILD WELFARE PROBLEMS: PREVENTION, EARLY IDENTIFICATION, AND INTERVENTION 68 (1983); see also supra notes 16-23 and accompanying text.
\textsuperscript{256} \textit{Id}.
\textsuperscript{257} See supra note 21 and accompanying text.
What is particularly telling, and even more disheartening, is that the authors also provide a series of case studies designed to enable the investigator to spot the various classifications of maltreatment. Sadly, few of the case studies presented would satisfy the requirements of an action in emotional distress. Case study three is illustrative:

Frank's mother was sixteen when he was born, and she did not want him. When he was two months old, she gave him to her parents and left town. After seven months Frank's grandparents decided that he was too much trouble for them to keep. They informed the local child welfare agency that they did not want him and placed him for adoption.

Frank is subject to persistent skin problems, and his dermatological problems (scaly, blotchy skin) have made it difficult to place him. The unwilling grandparents often left Frank alone, shut up in a room, for hours at a time. At eleven months of age, Frank is alternately listless and irritable. He sometimes cries when approached and sometimes seems oblivious to being left. The visiting nurse assigned to the case reports that Frank's intellectual and emotional development is delayed. Upon recommendation of the visiting nurse, the child welfare agency has now assumed custody of the boy.

The authors conclude the case study by observing that Frank's predicament "illustrates ignoring (the grandparents' long periods of inaccessibility to the child), rejecting (the mother's decision to abandon the child and the grandparents' decision to place him for adoption), and isolating (what appears to be a pattern of separating the child from social contact by leaving him shut up in a room alone for hours at a time)." Clearly the child is in emotional peril and may carry the subtle and lingering effects of maltreatment well into his adult years. But does this scenario present a prima facie case of intentional emotional distress? Could any jury truly be persuaded that under the circumstances either the mother or the grandparents acted "outrageously"? Even if we concede, arguendo, the very broad assumption

258. Id.
260. Id.
261. Id. at 2.
262. Id.
263. Id.
264. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).
265. Id.
that Frank's persistent skin problem is a direct somatic manifestation of emotional
neglect and maltreatment, could one argue, in good faith, that his caretakers
"intentionally and unreasonably" subjected the child to emotional distress which
they should have recognized "as likely to result in illness or other bodily harm" so
as to bring the case within the scope of the negligent infliction of emotional distress
tort? Few courts would be persuaded. Consider also, case study fifteen:

Teddy was separated from his mother at two and lived in a series of foster homes.
When he was seven, his mother came to ask him whether he would like to live with
her again. By this time he had a new half-brother and half-sister and a new
stepfather (the boy's and girl's father). Teddy said that he did want to live with her.
For a few months, everything was all right, but then the stepfather grew
increasingly resentful of Teddy. He made Teddy ask for permission before doing
anything—standing up, sitting down, or going to the bathroom. He refused to let
Teddy join the Boy Scouts or go to his friends' houses to play. Teddy's mother (a
problem drinker) did not want to take on any more trouble by opposing her
husband. She had had a hard enough time getting him to agree to take Teddy in the
first place. When the boy brought home things he made in school or when he
asked for help with his schoolwork, his stepfather made fun of his efforts or called
him stupid. At age eleven, after four years of this treatment, Teddy was admitted
to the emergency room of the local hospital because he had swallowed a can of
turpentine. His parents described it as an accident, but the emergency room staff
suspected that it had been a deliberate suicide attempt.

The authors contend that "Teddy's case illustrates rejecting (the stepfather's
refusal to accept the boy as part of the family), terrorizing (the constant belittling
and torment), and isolating (refusing to permit the boy to have a normal social
life)." Again, the child has been subject to extreme emotional maltreatment.
His suicide attempt at age eleven announces his pain to all compassionate listeners
in clear and unambiguous terms. Teddy's life must be a veritable hell upon earth
and his internal scars may last throughout his life. But what is to be done? Would
an action for emotional distress brought upon Teddy's emancipation prevail? Given
that the overwhelming majority of adults did not receive the proper amount of

266. See supra note 29 and accompanying text.
269. Id.
270. Id.
271. Id.
nurturing and love as children, would the stepfather's discipline be considered "outrageous" by an average member of the community? Is the child's mother somehow guilty of failing to properly protect the child from emotional abuse? Since "[e]motional maltreatment may be inflicted by body language, tone of voice, facial expression, and words, all of which are difficult to pinpoint," could any fact finding body appreciate or even understand the magnitude of the child's anguish?

CONCLUSION

The law and medicine became aware of psychological and emotional child abuse long after the "discovery" of physical child abuse and neglect. Despite the fact that psychological and emotional maltreatment is at least as debilitating to a child's long-term development as physical or sexual abuse, the law regarding psychological child maltreatment remains woefully inadequate. Recent years have witnessed a burgeoning in the law of domestic torts. While there is no dearth of commentary regarding the infliction of emotional distress or the overall

272. See supra note 192.
273. See Kearney, supra note 8 (arguing that tort liability should lie for the failure to protect a child from abuse).
274. See McMullen, supra note 10, at 508.
275. See supra note 81 and accompanying text.
276. See supra note 13-15, 27 and accompanying text.
277. See supra note 87-99 and accompanying text.
278. See supra note 102-114, 153 and accompanying text.
279. See supra note 4 and accompanying text.
problem of child neglect and maltreatment,\textsuperscript{280} it is now clearly incumbent to address the next obvious step in the development of domestic tort law: psychologically and emotionally abused children who might wish to sue abusive caretakers for the infliction of emotional distress. Upon analysis, it appears that while suing psychologically abusive parents for the infliction of emotional distress will undoubtedly benefit many victims of childhood emotional trauma and will further serve important social policy aims, the majority of childhood emotional abuse scenarios will not be amenable to an action in tort. While emotional distress claims will continue to be recognized as parasitic damages following upon a complete and separate domestic tort, the infliction of emotional distress itself is not likely to be welcomed \textit{carte blanche} by the courts as an independent cause of action allowing children to sue their caretakers.

\textsuperscript{280} See \textit{supra} note 5 and accompanying text.
THE ETHICS OF INTERNAL INVESTIGATIONS
IN KENTUCKY AND OHIO

by Edward C. Brewer, III

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 723

II. THE ETHICAL STRUCTURE OF AN INTERNAL INVESTIGATION .......... 726
   A. The Lawyer’s Ethical Responsibilities for the Participants
      in an Internal Investigation ..................................... 726
         1. Systems and Supervisory Responsibility .................. 726
         2. Reference to a Specialist .................................. 728
   B. Ethics Screens for Staff and Lawyers with
      Former-Client Conflicts .......................................... 730
   C. The Lawyer Whose Partner or Associate Is a Witness ............ 734
   D. The Lawyer’s Attorney-Client Relationships .................... 737
   E. The Internal Investigation Process ................................ 740
   F. Conflict of Laws .............................................. 746
   G. Hypothetical Illustration ...................................... 756

1. Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.
The author thanks Professor Richard A. Bales and his co-author Richard O. Hamilton, both of Chase, for their advice on the attorney-client privilege in Kentucky; Professor Bales for his advice and comments; James R. Adams and John S. Stith of Frost & Jacobs LLP of Cincinnati, Ohio, for their review and comments on the draft of the article; Professor Ljubomir Nacev of Chase for information on the accountant-client privilege; Professor Roger D. Billings, Jr. of Chase for his encouragement; Professors William H. Fortune and Richard H. Underwood of the University of Kentucky for their insight into legal ethics in Kentucky; John L. Latham of Alston & Bird, LLP, and Kenneth L. Millwood of Nelson Mullins Riley & Scarborough, LLP, both of Atlanta, for the opportunity to work with them on internal investigations in Georgia; and Karen Pape of Chase, for everything she does.

Portions of this article were originally presented as continuing legal education seminars sponsored by the firms of Alston & Bird, LLP of Atlanta, Georgia; Keating Muething & Klekamp PLLC, and Taft, Stettinius & Hollister, LLP, of Cincinnati, Ohio; and the Kentucky Bar Association, Corporate House Counsel Section. The author offers his appreciation for both the opportunities and the honoraria provided for those presentations. Finally, the author thanks Matt E. Mills, Kelly Walters Schulz, and the other editors and staff of the Northern Kentucky Law Review for their contributions to Chase and to this article. The author is responsible for all contents of the article, and the above contributions by others should not be taken as an adoption or approval of anything stated herein.
III. ETHICALLY PROTECTED INFORMATION IN AN INVESTIGATION .......... 757
   A. Generally .................................................. 757
   B. Ethical Protections for Client Information ......................... 759
   C. Ethical and Evidentiary Rules in Multi-State Investigations ........ 760
   D. Evidentiary Tests for the “Corporate” Attorney-Client Privilege ... 762
   E. The Upjohn Process ............................................. 768
   F. The Garner Fiduciary/Good Cause Exception .......................... 770
   G. The Crime-Fraud Exception ....................................... 774
   H. The Work Product Doctrine ....................................... 776
   I. Providing Information to Non-Attorney Experts ....................... 779

IV. DEALING WITH THIRD PARTIES IN AN INVESTIGATION ............... 787
   A. Constituents, Ethically Protected Information, and Prospective-Client Waivers ................................................. 787
   B. Conflicts of Interest with Organizational Constituents and Advance Waivers .............................................. 789
   C. Joint-Defense and Common-Interest Representations .................. 794
   D. Payment of Directors’ Fees by the Corporation ....................... 799
   E. Other Lawyers’ Communications with Constituents ................. 800

V. SAMPLE FORM LETTERS FOR CORPORATE COUNSEL’S USE IN REPRESENTING DIRECTORS ........................................ 806
   A. Availability of Form Letters and Request for Feedback ................ 806
   B. Upjohn Letters .................................................... 807
      1. Company to Corporate Counsel .................................. 807
      2. Corporate Counsel to Company .................................. 807
      3. Company to Constituent ........................................... 809
      4. Corporate Counsel to Constituent ................................ 810
   C. Letters Covering Interviews with Represented Persons ............. 811
      1. Directors-Only Counsel’s Letter Confirming Blanket Permission for Interviews with Constituents ..................... 811
      2. Directors-Only Counsel’s Letter Requesting Interviews with Constituents Deemed Represented by Company Counsel .......... 812
   D. Pre-Consultation Letter Waiving Disclosure of Ethically Protected Information (Confidences and Secrets) ............ 813
      1. Letter to Existing Client ........................................ 813
      2. Letter to Proposed Client ...................................... 815
I. INTRODUCTION

The rise of business ethics, preventive law, corporate compliance programs, and the Delaware Chancery Court's decision in *In re Caremark* have joined the securities laws and traditional good practice to make the internal investigation an


5. *In re Caremark Int'l Inc. Deriv. Action*, 698 A.2d 959 (Del. Ch. - New Castle 1996). Chancellor Allen expressly stated that his holding, that a director must make a good-faith effort to be informed about the organization's affairs, was an extension of the "suspicious circumstances" standard described in *Graham v. Allis-Chalmers Co.*, 41 Del. Ch. 78, 188 A.2d 125 (1963). It seems doubtful that, as stated in *White v. Panic*, 2000 WL 85046 (Del. Ch. Jan. 19, 2000) (Lamb, Vice Ch.), the *Graham* and *Caremark* standards are one and the same, even if they both pertain to the standard for a director's duty. A New York court rejected a *Caremark* claim for insufficient pleading in *Wilson v. Tully*, 243
increasingly important tool for a business organization, and for the organization’s in-house and outside lawyers. An internal investigation raises two sets of issues: the client’s substantive criminal liability and civil relations, and the lawyer’s ethical relations with the client and third parties. The substantive context in which an ethical issue arises frequently affects the ethical analysis, and almost always affects the client’s perceptions of the representation. Most generally, an investigation involving potential criminal sanctions against a client and one involving only civil liability may implicate or emphasize different concerns. The ethical analysis of an internal investigation is complicated enough in its own right, however, particularly where multiple jurisdictions are involved, and deserves separate consideration both for protection of the client and for protection of the lawyers. This Article therefore will focus on that ethical analysis, and will mention the substantive law only where necessary or illustrative.

The general principles of legal ethics found in the American Bar Association’s Model Code of Professional Responsibility ("Model Code") and Model Rules of Professional Conduct ("Model Rules") provide an important starting point for analysis of problems in legal ethics. Those principles must be further refined before they are applied, by reference to the ethical rules adopted by the state supreme court. A.D.2d 229, 676 N.Y.S.2d 531 (N.Y. App. Div. 1st Dept. 1998).


9. The term “ethical rule” will be used in this Article to apply either to a rule of professional conduct under the ABA Rules or to a disciplinary rule under the ABA Code, or under the
courts and other ethics authorities whose law will govern the attorney's actions. Compliance with either the Model Rules or the Model Code will accomplish nothing if the attorney is in violation of a specific state's ethical rules, and the same is true for compliance with one state's ethical rules where another state's rules apply also or instead. For that reason, a state-specific analysis of legal ethics is a necessary next step in determining the attorney's obligations in an internal investigation. These materials will focus on Kentucky and Ohio law, with references to the major concerns for investigations that involve other states, and to general law where no or few Kentucky and Ohio authorities are available.

The ethical framework of an internal investigation may be considered under three headings: the ethical structure of the investigation process itself; handling ethically protected information; and dealing with third parties during an investigation. Part II of this Article addresses a variety of structural concerns for the law firms and lawyers involved, the process of the investigation itself, and choice of law for ethical issues. It closes with a hypothetical example that may be useful for law firms' internal discussions of the issues raised by this Article. Part III addresses the attorney-client privilege and the work-product doctrine, with suggestions for structuring the investigation to maximize both. Part IV discusses communications and conflicts of interest involving the organization's constituents. Part V provides forms for drafting the documents necessary for managing the attorneys' receipt of information, formation of attorney-client relationships, and resolution of conflicts of interest.

Essential resources for handling internal investigations include the following: BRAD D. BRIAN AND BARRY F. MCNEIL, INTERNAL CORPORATE INVESTIGATIONS: CONDUCTING THEM, PROTECTING THEM (A.B.A. Litigation Section 1992); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (3d ed. 1997); JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES (West Group 1999); AMERICAN BAR ASS'N, TORTS & INSURANCE PRACTICE SECTION, ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION (Vincent S. Walkowiak ed. 1997); WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (Little, Brown 1996 & Supp. 1998); THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (Foundation Press 2000); GREGORY V. VARALLO & DANIEL A. DREISBACH, FUNDAMENTALS OF CORPORATE GOVERNANCE: A GUIDE FOR DIRECTORS AND CORPORATE COUNSEL (A.B.A. Business Law Section 1996). There are also numerous excellent hornbooks on legal ethics and professional responsibility.

This Article will not address the attorney's own criminal or civil liability for actions during an internal investigation.
The design and implementation of a plan of internal investigation occurs within the ethical framework that governs the lawyer’s actions. It depends heavily upon the facts learned by the lawyer in the first meeting with the client and subsequent review of documents and interviews with the organization’s constituents and third parties. A plan appropriate in one circumstance may not be appropriate in another, and a plan that seemed appropriate at first may become less so as the attorney becomes better informed about the matter. These usually platitudinous observations are ethically charged in an internal investigation. The speed and complexity of the process can result in action being taken before its ethical significance is assessed. A task that may seem rote to the lawyer, such as reviewing documents or (yawn!) accounting records, can provide information that changes the direction of the investigation and may require immediate communication to multiple lawyers and staff or decisions about dealing with governmental or private third parties. An interview with a witness for which proper groundwork has not been laid by letters from upper management and the attorneys, and for which adequate preparation has not been made through document review and other witness interviews, can result in the vitiation of the attorney-client privilege and even disqualification from representing the business organization. The feeling in an investigation that “you don’t know anything until you know everything” is greatly reduced by the lawyer’s awareness of the ethical framework in which the investigation takes place.

II. The Ethical Structure of an Internal Investigation

A. The Lawyer’s Ethical Responsibilities for the Participants in an Internal Investigation

1. Systems and Supervisory Responsibility

Kentucky Rules of Professional Conduct (“KRPC”) 5.1 through 5.3\textsuperscript{12} expressly provide for lawyers’ supervisory and systems responsibilities, and create both direct and vicarious ethical responsibility for law-firm partners, lawyers who supervise others, and lawyers who order or ratify others’ actions. A partner must make “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that all lawyers’ conduct conforms to the ethics rules, and that all non-lawyers’ conduct is “compatible” with those rules.\textsuperscript{13} A lawyer with direct

\textsuperscript{12} Ky. R. Prof. Cond. 5.1-5.3 [hereinafter “KRPC”].

\textsuperscript{13} KRPC 5.1(a), 5.3(a).
supervisory authority over another lawyer or a non-lawyer must make “reasonable
efforts” to ensure the same ends.\textsuperscript{14} A partner or direct supervisor who “knows of
the conduct at a time when its consequences can be avoided or mitigated but fails
to take reasonable remedial action” is responsible for the lawyer’s or non-lawyer’s
conduct.\textsuperscript{15} Finally, a lawyer who “orders or, with knowledge of the specific
conduct involved, ratifies the conduct involved,” has ethical responsibility for the
conduct.\textsuperscript{16} The Kentucky Supreme Court has imposed vicarious disciplinary
liability not only for subordinates’ financial defalcations,\textsuperscript{17} but also where the
attorney sent an untrained and uninformed representative to a hearing,\textsuperscript{18} and where
the subordinate used a criminal complaint to obtain an advantage in a civil matter.\textsuperscript{19}
The court also has held that an attorney may be held responsible for the actions of
a temporary attorney.\textsuperscript{20}

The Ohio Code contains relatively few provisions, and none so comprehensive
as the KRPC, on lawyers’ supervisory and systems responsibilities. Ohio Ethical
Consideration (“EC”) 3-6 provides that a lawyer may delegate “tasks to clerks,
secretaries and other lay persons” if the lawyer “maintains a direct relationship with
his client, supervises the delegated work, and has complete professional
responsibility for the work product.”\textsuperscript{21} Ohio Disciplinary Rule (“DR”) 4-101(D)\textsuperscript{22}
requires, and EC 6-2 counsels,\textsuperscript{23} reasonable care to prevent disclosure or misuse of
client confidences by other lawyers or non-lawyers with the firm. Beyond that, the
only other mandatory provision in the Ohio Rules for Government of the Bar is

\begin{footnotes}
\begin{enumerate}
\item KRPC 5.1(b), 5.3(b).
\item KRPC 5.1(c)(2), 5.3(c)(2).
\item KRPC 5.1(c)(1), 5.3(c)(1).
\item Knuckles v. Kentucky Bar Ass’n, 997 S.W.2d 460 (Ky. 1999): Curtis v. Kentucky Bar Ass’n,
969 S.W.2d 94, 213 (Ky. 1998) (suspension and readmission).
\item Kentucky Bar Ass’n v. Devers, 936 S.W.2d 89 (Ky. 1997).
\item Kelley v. Kentucky Bar Ass’n, 883 S.W.2d 492 (Ky. 1994).
(1 B. Mon.) 292, 1841 WL 2865 (1841) (principal’s liability for agent’s and subagent’s statutory tort).
\item Ohio Code of Professional Responsibility, Ethical Consideration 3-6 [hereinafter cited as
“OCPR” and “EC”].
\item OCPR, Disciplinary Rule 4-101(D) (hereinafter cited as “DR”).
\item OCPR, EC 6-2. The Ethical Considerations further note that a lawyer’s duty of confidentiality
requires attention to selection and training of non-lawyer employees, and that a lawyer’s duty of
competence includes “the careful training of his younger associates and the giving of sound guidance
to all lawyers who consult him.” OCPR, EC 4-1, 6-2.
\end{enumerate}
\end{footnotes}
limited to the shareholders of a professional corporation, who are required to ensure compliance by all employees with the requirements of the Ohio Code. The Ohio Supreme Court has imposed vicarious disciplinary liability under rule III(3)(C) of the rules on a majority shareholder of a legal professional association for the association’s attorney employees, and the first decision on the issue suggests that it might not limit the attorney’s liability to the circumstances described in the ABA Model Rules.

2. Reference to a Specialist

An internal investigation may require the services of an attorney knowledgeable in a specialty such as taxation, securities, environmental law, intellectual property, or criminal law, to name only a few examples. Similarly, other professionals such as accountants and auditors, investment bankers, or scientists may be needed for their expertise. If other professionals are involved, attention should be given as to whether it is appropriate to provide them with information protected by the attorney-client privilege or the work-product doctrine.

Ohio DR 6-101 provides that a lawyer who is not competent to handle a legal matter (and does not intend to become so) shall not handle the matter “without associating with him a lawyer who is competent to handle it.” EC 6-2 provides that the lawyer should do this “with the consent of his client.” The comments to

24. Ohio Gov. Bar. R. III, § 3(A); see Jack A. Guttenberg & Lloyd B. Snyder, The Law of Professional Responsibility in Ohio § 12.4, at 330 (1992). The Disciplinary Rules include other, general provisions that prevent a lawyer from aiding the unauthorized practice of law, dividing fees with a non-lawyer, and forming a partnership with a non-lawyer. Ohio Code DR 3-101, 3-102, 3-103; see, e.g., Columbus Bar Ass'n v. Agee, 175 Ohio St. 443, 196 N.E.2d 98 (Ohio 1994), cert. denied, 379 U.S. 7 (1964). All of those would include activities involving persons employed by the lawyer or law firm, but do not impose vicarious responsibility.

25. Cincinnati Bar Ass'n v. Schultz, 71 Ohio St. 3d 383, 643 N.E.2d 1139 (Ohio 1994).


27. See infra text accompanying notes 273-90 (work product doctrine); 291-338 (information provided to experts) and accompanying text.


29. OCPR, EC 6-2; accord OCPR, DR EC 2-21.
KRPC 1.1 suggest that "[c]ompetent representation can . . . be provided through the association of a lawyer of established competence in the field in question."30 Comment 4 to KRPC 2.1 advises that "[m]atters that go beyond strictly legal questions may also be in the domain of another profession. . . . [B]usiness matters can involve problems within the competence of the accounting profession or of financial specialists."31 Within a firm, the lawyer commonly establishes the relationship with the client and the representation in a matter. The retainer letter covers the staffing of the matter with attorneys having the necessary expertise, and sometimes with the retention of experts.32 If the firm does not have expertise in an area, it may be necessary to associate another firm, or perhaps to refer the matter to that firm.

The non-specialist lawyer's duty to refer a matter to a specialist was recognized in the California case of *Horne v. Peckham.*33 In *Horne,* the court held that a general practitioner should have referred a matter to an estate tax specialist, and held him to an expert standard of legal malpractice where he did not. A lawyer who holds herself out as a specialist or expert will be judged by a specialist standard; conversely, a lawyer's explanation of his expertise and disclaimer of being a specialist in collateral areas may avoid or help win a later dispute with the client over that issue.35 Whether there is a duty to refer the client to a different attorney,

30. KRPC 1.1, cmt. 2.
31. KRPC 2.1, cmt. 4. The comment goes on to point out that "[a]t the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts."
32. See OCPR, EC 4-2 (disclosure within firm); KRPC 1.6, cmt. 8.
34. Walker v. Bangs, 92 Wash. 2d 854, 601 P.2d 1279 (1979). Both Kentucky and Ohio have recognized that a different standard of care may apply where the defendant is a specialist. Blair v. Eblen, 461 S.W.2d 370 (Ky. 1970); Bruni v. Tatsumi, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976); Wurtz v. Gregg, No. 17682, 2000 WL 84660 (Ohio Ct. App. 2d Dist. Jan. 28, 2000). It bears mention that Kentucky recognizes only the traditional specialties in patent, trademark, and admiralty law. KRPC 7.40(1) and (2). Ohio recognizes the traditional specialties, Ohio DR 2-105(A)(1), and has approved a certified specialty in federal taxation. See OSBA Attorney Services, Specialization Information, accessed at http://www.ohiobar.org/public/certifiedspecs/.
or a duty to suggest the retention of a specialist in any area of law, is an issue beyond the scope of this article, but the attorney may want to help the client decide whether to bring in other attorneys who are specialists or experts. An attempt to do so is discussed in Mayo v. Engel, where the attorney contended that he had not held himself out as a specialist in trademark law but had discussed with the client the alternative of having trademark counsel undertake more detailed factual research as part of the client's representation.

B. Ethics Screens for Staff and Lawyers with Former-Client Conflicts

An "ethics screen," "ethics wall," "firewall," or "conflicts screen" isolates a staff employee or, in some states, a lawyer, in order to avoid disqualification of the law firm based on a former-client representation. More specifically, it is an attempt under Model Rule 1.10 or Disciplinary Rule 5-105(D) to avoid the imputation of former-client conflicts, based on either former representation or possession of a former client's ethically protected information, by isolating the staff employee or lawyer from a current client's matter and from the staff and lawyers working on that matter. Most jurisdictions permit the "screening" of a staff employee who represented or has information about a former client of the current firm or a client of the employee's former firm.

Kentucky Formal Ethics Opinion E-308 approves in principle the use of an ethics screen to permit a paralegal to be employed at a new firm where the paralegal had disqualifying information of a now-adverse former client. An Ohio court of appeals in Latson v. Blanchard approved the use of an ethics screen in a case involving a paralegal.

Most states will not permit a law firm to use an ethics screen to avoid a conflict of interest arising from an attorney's possession of the ethically protected information of a former client. In Kentucky, Formal Ethics Opinion E-354 gives

---

denied, 644 So. 2d 653 (La. 1994). In Fawer, a family-law attorney explained to the client that the attorney was not a patent-law specialist.

36. 733 F.2d 807 (11th Cir. 1984).

37. See, e.g., Herron v. Jones, 637 S.W.2d 569 (Ark. 1982). A former-client conflict based solely on former representation, and not on possession of ethically protected information, is rare. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). The Silver Chrysler decision has not been followed in all jurisdictions. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.6.3, at 400 & n.60 (Practitioners' ed. 1986).


40. CHARLES W. WOLFRAM, supra note 37, § 7.6.4.
a "qualified no" answer to whether an ethics screen will cure such a conflict, reasoning that KRPC 1.11 and 1.12 permit screening of former government lawyers and judges, but KRPC 1.10 does not extend that principle to lawyers changing firms in private practice.\textsuperscript{41} So far as litigation is concerned, the Sixth Circuit held in Manning v. Waring, Cox, James, Sklar & Allen\textsuperscript{42} that an ethics screen may avoid the imputation of a conflict, but applying that decision in the face of E-354 would be highly problematic at best.

Ohio recently approved, at least in principle, the use of ethics screens to avoid the imputation of conflicts under Ohio DR 5-105(D).\textsuperscript{43} In Kala v. Aluminum Smelting & Refining Co.,\textsuperscript{44} the Ohio Supreme Court, joining a minority of courts, held that an adequate and effective "ethics screen" may be used to avoid firm disqualification where an attorney leaves both a firm and the client and joins a second firm that represents an opposing party. The Ohio Supreme Court relied upon recent federal authorities, including decisions from the Sixth Circuit, and the Restatement of the Law Governing Lawyers, in support of its analysis.

The Ohio court created a three-part test to identify the need for an ethics screen (essentially consistent with general law) and a multi-factor test to assess its sufficiency. The three-factor test turns on (1) whether there is a substantial relationship between the prior and present representations; (2) whether the attorney shared in the confidences and representation in the prior matter (proof to the contrary is required to rebut that presumption); and (3) whether the new firm has rebutted the presumption of shared confidences by showing that an effective ethics screen has been utilized.\textsuperscript{45}

\textsuperscript{42} 849 F.2d 222 (6th Cir. 1988).
\textsuperscript{43} An earlier Ohio ethics opinion had suggested, citing Manning, that an ethics screen might cure a conflict for partners of an associate serving as county commissioner. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Adv. Op. No. 88-020, 1988 WL 508811 (Aug. 12, 1988).
\textsuperscript{44} 81 Ohio St. 3d 1, 688 N.E.2d 258 (Ohio 1998). The court stated its preference for the term "Chinese wall," \textit{id}. at 10 n.6, 688 N.E.2d at 266 n.6, in the face of commentary suggesting that "ethics screen" and similar terms are less likely to be offensive. \textit{See} Charles W. Wolfam, supra note 37, § 7.6.4 at 401 n.65.
\textsuperscript{45} In Majestic Steel Service, Inc. v. Disabato, 1999 WL 961465 (Ohio Ct. App. 8th Dist. Oct. 21, 1999), the court applied a "same general type of matter" test to hold that the former and present clients' matters were "substantially related," and held that a hearing is not required in all cases where a former-client conflict is at issue.
The Kala court devised seven substantive criteria for assessing the adequacy and effectiveness of the ethics screen, and four additional criteria to be applied in assessing the need for disqualification. The seven substantive criteria are as follows:

1. whether the law firm is sufficiently large;

2. whether the structural divisions of the firm are sufficiently large so as to minimize contact between the quarantined attorney and the others;

3. the likelihood of contact between the quarantined attorney and the specific attorneys responsible for the current representation;

4. the existence of safeguards or procedures which prevent the quarantined attorney from access to relevant files or other information relevant to the present litigation;

5. prohibited access to files and other information on the case, locked case files with keys distributed to a select few, secret codes necessary to access pertinent information on electronic hardware;

6. instructions given to all members of a new firm regarding the ban on exchange of information;

7. the prohibition of fees derived from such litigation.46.

The four additional criteria (the first of which is arguably a substantive criterion for the ethics screen, and the third of which is a general ethical requirement) are as follows:

1. the screening devices must be employed as soon as the disqualifying event occurs [some cases require that the screen and devices be in place prior to the firm-changing attorney’s arrival at the new firm];

2. the trial court may consider the hardship that the new firm’s client would incur in obtaining new counsel, although this “may no longer be persuasive” if there is hardship to the old firm’s client where the firm-changing attorney withdraws as lead or sole counsel [query whether this will be extended to significant second-chair counsel];

3. the new firm contemplating the employment of a firm-changing attorney also

46. 81 Ohio St. 3d 1, 10-11, 688 N.E.2d 258, 266 (Ohio 1998).
has "a duty to disclose to its own client that such a hiring may place the firm in conflict and could result in disqualification;"

4. the trial court should hold an evidentiary hearing on a motion to disqualify and must issue findings of fact if requested based on the evidence presented.\textsuperscript{47}

In characterizing its test, the court observed that "[a] very strict standard of proof must be applied to the rebuttal of this presumption [through use of an ethics screen], and any doubts as to the existence of an asserted conflict of interest much be resolved in favor of disqualification."\textsuperscript{48} The court also noted that its decision did not provide a "bright-line" test, and that the trial court is free to weigh issues of credibility as well as to balance the appearance of impropriety against the protections of an ethics screen.

Like most new decisions on important points of law, \textit{Kala} answers many questions and raises many more. One question is particularly troubling. With regard to balancing the appearance of impropriety, the court stated, "[f]or example, suppose a sole practitioner representing a plaintiff switches sides to a five-person defense firm representing the opposing party, leaving his former client to seek new counsel. The appearance of impropriety in such a fact pattern would be impossible to overcome."\textsuperscript{49} One hopes that the Ohio Supreme Court did not intend to establish one standard for sole practitioners and small firms and another standard for large firms.\textsuperscript{50} Unfortunately, both the above language and the first several factors of the seven-factor test suggests it may have done so (the court does not define small or large firms, nor does the decision suggest how medium-sized firms will be treated). Alternatively, the court may have intended to refer only to the egregiousness of the situation described, and to offer one example of how the notoriously vague "appearance of impropriety" test might apply to in a small-practice context. The court ended its opinion by concluding that the firm-changing attorney and his new firm had not satisfied the standard for ethics walls, grounding its conclusion largely in the appearance-of-impropriety rubric and prompting Justice Cook to complain in a lone dissent that the court would invalidate even an adequate and effective ethics screen in some circumstances. The manner in which the test works itself out

\textsuperscript{47} 81 Ohio St. 3d at 11-13, 688 N.E.2d at 266-67.
\textsuperscript{48} \textit{Id.} at 11, 688 N.E.2d at 266.
\textsuperscript{49} \textit{Id.}, 688 N.E.2d at 266.
\textsuperscript{50} Professor Wolfram has explained such a distinction on the ground that "it would have been more probable that general sharing of information within the firm would have involved that lawyer" behind the ethics screen. CHARLES W. WOLFRAM, \textit{supra} note 37, § 7.6.3 at 400.
in actual practice, of course, remains to be seen.

C. The Lawyer Whose Partner or Associate Is a Witness

The decision whether the same lawyers who regularly represent a business organization should conduct an internal investigation requires consideration of numerous factors, including those lawyers’ familiarity with the client’s affairs, the possibility that the lawyers themselves could become implicated in any allegations of wrongdoing,\textsuperscript{51} and the point at which the case may have to be handed over to litigation attorneys from the same or another firm where the business lawyers are witnesses in some aspect of the case. This section will discuss the last of these issues, taking an historical approach since the Ohio disciplinary rules differ from the Kentucky rules in the same manner that the earlier Model Code differs from the later Model Rules.

Ohio DR 5-101(B)(4), provides:

A lawyer \textit{shall not accept} employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

\begin{itemize}
  \item (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.\textsuperscript{52}
\end{itemize}

Ohio DR 5-102(A) provides:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he \textit{shall withdraw from the conduct of the trial} and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).\textsuperscript{53}

Ordinarily, disqualification in such a case is required.\textsuperscript{54} The Ohio Supreme

\textsuperscript{51} See generally Bruce A. Green, \textit{The Criminal Regulation of Lawyers}, 67 FORDHAM L. REV. 327 (1998).

\textsuperscript{52} OCPR DR 5-101(B)(4) (emphasis added); see OCPR, EC 5-9 to EC 5-11.

\textsuperscript{53} OCPR, DR 5-102(A) (emphasis added).

Court has applied DR 5-101(B) according to its terms.\textsuperscript{55} The Ohio Court of Appeals further has given a broad interpretation of DR 5-102(A) as applying both to trial and pretrial proceedings.\textsuperscript{56} An ABA informal opinion permitted a lawyer-witness to assist in appellate briefing, but required that the lawyer's testimony not be at issue and that there be no conflict of interest.\textsuperscript{57} ABA Formal Opinion 339\textsuperscript{58} addressed the "substantial hardship" requirement of DR 5-101(B)(4), and gave two illustrations that were "not all-inclusive," but apparently were directed to the separate circumstances addressed by DR 5-101(B) and DR 5-102(A). As to lawyer-witness cases generally, it states:

a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue.\textsuperscript{59}

The opinion went on to observe that "if it can be anticipated that the lawyer's testimony will be adverse to the client there will be very few situations in which accepting employment as trial counsel could be justified under the controlling standard of DR 5-101(B)(4)."\textsuperscript{60} As to lawyer-witness cases under DR 5-102(A), the opinion states:

where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps have to seek a delay of the trial.\textsuperscript{61}

Assuming that the business organization's regular attorneys or their firm plans to serve as the attorneys for the internal investigation, given Ohio's interpretation of DR 5-101(B), the attorney-witness and the firm may need to advise the client

\textsuperscript{55} Office of Disciplinary Counsel v. Collins, 71 Ohio St. 3d 310, 643 N.E.2d 1082 (Ohio 1994).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} (emphasis added).
about the potential need to change lawyers for trial, well in advance of the trial of the case. It would seem equally prudent to consider that issue at the beginning of the internal investigation process, or at least at an early date thereafter. The Ohio Board of Commissioners on Grievances and Discipline has observed that such a conflict should be disclosed to the client so that the client can make an informed decision. Ohio EC 7-8 states that “[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.” The added expense, delay, and potential prejudice of changing attorneys in the middle of litigation could be significant in its own right, and could have an adverse effect on the litigation. On the other hand, if the client wants to have its existing attorneys handle the case through a certain point in the pretrial proceedings, the client has the ability to make that choice.

KRPC 3.7 worked three substantial changes in the former Model Code-based lawyer-as-witness rule:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

* * *

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

The three changes in KRPC 3.7 are as follows: first, the lawyer-witness’s disqualification applies only at trial; second, the substantial hardship exception is relaxed; and third, the disqualification applies where the witness is another lawyer in the firm only where there is a conflict of interest under KRPC 1.7 or 1.9. The substantial hardship exception requires a balancing of the interests of the client in the lawyer’s representation and the opposing party’s interests. The lawyer-witness remains directly subject to conflict-of-interest rules, however, and another lawyer in the lawyer-witness’s firm may serve as advocate only if there is no

63. ORPC, EC 7-8.
64. KRPC 3.7.
65. KRPC 3.7, cmt. 4.
66. See KRPC 1.7, 1.9.
conflict. Although the question is somewhat less of concern in Kentucky than under the Ohio provisions, this subject should be communicated to the client at an appropriate point, prior to any litigation and perhaps at the beginning of the internal investigation. KRPC 1.4(b) provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

ABA Informal Opinion 89-1529 states that under Rule 3.7, an attorney may handle pretrial matters, with some limitations, even though it is expected that he will be unable to serve as trial counsel, provided that the client consents after full disclosure. Both opinions contemplate that the lawyer witness will have a plan of action for substituting new trial counsel, and that questions of efficiency and continuity of representation will be addressed (according to the ABA, and as suggested by ABA Rule 1.4(b), with the client). On the other hand, if there is a conflict of interest under KRPC 1.7 or 1.9, neither the lawyer-witness nor the firm may represent the client at trial, and such a conflict may arise because of adverse or inconsistent testimony by the attorney.

D. The Lawyer’s Attorney-Client Relationships

The first step in an internal investigation is to identify the entities or persons who may be clients of the lawyer. It is useful to begin by considering the lawyer’s past and present dealings and relationship not only with the company, but also with the various constituents of the organization that she is representing. The constituent may be the CEO and President of an established public company, and the relationship may go back to the early days of seed money and venture capital. The constituent may be a vice president or manager with substantial responsibility, who is accustomed to communicating with the lawyer as the entity’s attorney. The constituent may be a low-level staff employee who has never met the lawyer before.

67. KRPC 3.7, cmt. 5.
68. See supra text accompanying notes 62-63.
69. KRPC 1.4(b).
Each of these persons has different expectations about the relationship with the lawyer, and it is of critical importance that the lawyer manage those expectations in a manner that will preserve her ability to represent the organization and to protect its interests, in the event that the constituent has engaged or is engaged in action or inaction that could adversely affect the entity’s interests.

The identity of the client is particularly significant for entity counsel, who may deal with the organization’s constituents in a variety of settings. In *Montgomery Academy v. Kohn*, the court disqualified the lawyer for a private academy where there was an “implied” attorney-client relationship with the academy’s founder and director. The court found that, after stating that she would ask for the board’s approval to hire the lawyer to represent the academy but before following through, the founder had spoken with the lawyer about another matter, a past investment of the academy’s money in a Ponzi scheme, while under a reasonable belief that the lawyer represented her personally. The court held that the lawyer could not later represent the school in an action against the founder and others for breach of fiduciary duty arising out of the investment.

The lawyer involved in an internal investigation must not only identify his or her clients at the outset, but must communicate expressly and clearly with the organization’s constituents during the investigation to avoid the formation of new attorney-client relationships. The principles of dealing with the organization’s constituents as third parties, including the special ethical protections afforded so that they will not inadvertently or improperly rely on the organization’s lawyers to protect their interests, are discussed in part III. below.

KRPC 1.13(a) provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” The same is suggested by Kentucky Rule of Evidence 503, which states that an attorney-client privilege runs to the “corporation, association, or other organization or entity” that is obtaining or seeking professional legal services. KRPC 1.13(e) also provides that the lawyer “may represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7” on conflicts of interest. The Kentucky Supreme Court held in *Lovell v. Winchester* that a person may become a lawyer’s client simply by disclosing confidential information to the lawyer. Other courts have held that

73. KRPC 1.13(a).
74. Ky. R. Evid. 503.
75. KRPC 1.13(e).
76. 941 S.W.2d 466 (Ky. 1997).
an attorney-client relationship may be implied from conduct under an objective reasonableness test: in Perez v. Kirk & Carrigan, the court reversed a summary judgment on whether a corporate employee was a client of the employer's law firm, based on the employee's statement that he spoke with the lawyers only after being assured that they were his lawyers.

In Ohio, an attorney who represents a corporate "client" represents the entity and not its constituent shareholders, directors, officers, or employees. Ohio EC 5-18 provides as follows:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

As in Kentucky, the same is suggested by the definition in § 2317.021 of the Ohio Revised Code of the attorney-client privilege, which runs to "a person, firm, partnership, corporation, or other association." The formation of an attorney-client relationship does not require a formal (or even informal) agreement or "meeting of the minds" that the lawyer will represent the client in a matter. In Ohio, this principle was recognized in Taylor v. Sheldon, which holds that a person seeking legal advice may claim the privilege for confidences disclosed during an interview even if the lawyer does not ultimately

77. 822 S.W.2d 261 (Tex. Ct. App. - Corpus Christi 1991) (writ denied); see also Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (whether relationship exists viewed from perspective of reasonable prospective client).
78. This principle was suggested, although not rigorously defined, by Ohio DR 5-107(B) and ECs 5-18 and 5-24, and has been applied in Ohio. See Hile v. Firmin, Sprague & Huffman Co., 71 Ohio App. 3d 838, 595 N.E.2d 1023 (Ohio Ct. App. 3d Dist. 1991).
79. ORPC, EC 5-18.
represent that person. The leading Ohio treatise on legal ethics cites Taylor for the following related propositions:

In Ohio, a fiduciary relationship exists between a lawyer and a prospective client when the latter gives the lawyer confidential information with some intention of retaining him. . . . This fiduciary relationship precludes the attorney from disclosing confidential information of the prospective client and may preclude the attorney from representing other parties whose interests are implicated by the confidential information. 82

If (for whatever reason) the lawyer is faced with the constituent’s belief that the attorney represents him, what are the consequences of the lawyer’s receipt of confidential information from that constituent? KRPC 1.6 prevents the disclosure of information of a current client, and KRPC 1.8(b) provides that it may not be used to the client’s detriment; KRPC 1.9(c) is to the same effect as to a former client. Ohio DR 4-101(B)(2) and (3) prohibit using confidential information either to the detriment of the client or to the benefit of another party, including another client, 83 and that principle extends to a former client under Ohio EC 4-6 84 and such decisions as Phillips v. Haidet. 85 If the lawyer is deemed to be representing the constituent and the constituent’s interests are adverse to those of the entity, the lawyer may be in a conflict of interest under KRPC 1.7 or Ohio DR 5-101, and in either event may be required to withdraw from the entity’s representation. 86

E. The Internal Investigation Process

The lawyer in an investigation of present and future wrongdoing must follow the provisions of KRPC 1.13(b) and (c), which describe a five-step process:

(1) identifying the activity of a constituent of the organization;

(2) determining the nature and consequences of the activity;

---

82. JACK A. GUTTENBERG & LLOYD B. SNYDER, supra note 24, § 3.2, at 66.
83. ORPC, DR 4-101(B)(2), (3).
84. “The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.” ORPC, EC 4-6.
(3) measuring the lawyer’s response in its factual and legal context;

(4) observing limits on the lawyer’s response; and

(5) deciding when and whether to withdraw.

Many of the principles in the “third” and “fourth steps” of Rule 1.13 are useful in investigating allegations of past wrongdoing, and since there is no counterpart in the Model Code, Rule 1.13 is useful for lawyers in Ohio and other Model Code states. Comment 1 to the rule makes clear that its requirements “apply equally” to internal investigations in corporations and unincorporated associations. Subject to the rules on the “corporate” attorney-client privilege discussed in Part III D. and E. below, a properly conducted internal investigation can be treated as a privileged communication.

First Step: Identifying the Activity

KRPC 1.13(b) first provides for identification of the constituent and activity in question, by stating "[i]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation . . ." In-house and outside general counsel should expect that any “matter” that comes to their attention is within the scope of the representation. The obligations of a lawyer with a more limited representation (hopefully one previously defined in a representation letter), may be more limited, but the rules do not tie such a lawyer’s hands. Comment 5 to KRPC 2.1, on the lawyer as advisor, sheds light on the meaning of “scope of the representation” by distinguishing between “required” advice under KRPC 1.4 and permissible advice:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client’s course of action

87. KRPC 1.13, cmt. 1. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 (1991) states that the Model Rules treat partnerships as entities, and that internal investigations of partnership affairs are governed by rule 1.13.
89. KRPC 1.13(b).
is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.\textsuperscript{90}

Simply put, the lawyer must take action as to such matters within the scope of the representation, but she may take action with respect to problems “outside” the scope of the representation.

\textit{Second Step: Determining Its Nature and Consequences}

Rule 1.13(b) next focuses on the problem presented to the lawyer. The action that triggers the lawyer’s obligation is one which:

is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.\textsuperscript{91}

Thus, the action is subject to a two-part test: it may violate duties within the organization, for example, a breach of fiduciary duty or a self-dealing transaction; outside the organization, such as sale of non-conforming goods under a contract; or both, such as securities fraud against existing shareholders. The “substantial injury” prong applies both to internal and external breaches of duty, although it would seem unwise for a lawyer to quibble over whether a potential injury were “substantial” unless it was trivial or nearly so. The potential consequences to the lawyer’s relationship with the constituent vary with the circumstances, but the Rule clearly makes those secondary to the organization’s interests. Depending on the constituent’s place and power within the organization, the potential consequences to the lawyer’s relationship with the organization could be affected as well. This provides additional reasons for the lawyer’s exercise of the usual circumspection and judgment in acting on information affecting a client’s interests.

\textit{Third Step: Measuring the Lawyer’s Response}

KRPC 1.13(b) next provides for the attorney’s response:

In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent

\textsuperscript{90} KRPC 1.4, cmt. 5.

\textsuperscript{91} KRPC 1.13(b).
motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.\textsuperscript{92} The third step expressly reminds the lawyer that “the best interest of the organization,” not the constituent, is the focus under KRPC 1.13(b). It is at this point that the lawyer would do well to “take a deep breath” and find as much quiet as possible in which to reflect on the alternatives available, both for the lawyer and for the client.

Comment 4 spells out the relationship between the organization’s constituents and the lawyer in some detail. For example, the lawyer ordinarily should respect the decision of an officer or manager, even one about risk-taking behavior. The lawyer should respond to unlawful action that may result in substantial injury to the organization, but “[c]lear justification should exist for seeking review over the head of the constituent normally responsible for it.”\textsuperscript{93}

\textit{Fourth Step: Observing the Limits}

KRPC 1.13(b) goes on to place limits on any measures that the lawyer takes in response to the problems that have been identified:

Any measures shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.”\textsuperscript{94}

With regard to minimizing the risk of disclosing ethically protected information, it is worth noting that in \textit{Upjohn v. United States},\textsuperscript{95} as discussed in part III, the

\begin{flushleft}
\textsuperscript{92} Id.
\textsuperscript{93} KRPC 1.13, cmt. 4.
\textsuperscript{94} KRPC 1.13(b).
\textsuperscript{95} 449 U.S. 383 (1981).
\end{flushleft}
Supreme Court remarked that the employees involved in the investigation had in fact maintained the confidentiality of their communications with the company’s lawyers. The procedures required by Upjohn to protect the attorney-client privilege thus are similar to the duties of the investigation under KRPC 1.13(b) and the duties of confidentiality under KRPC 1.6.

With regard to “how high up” to take a particular matter, the rule presupposes that the lawyer will exercise some common sense. A failure to report a traffic accident need not command the president’s attention in a large organization, but might in a small one. On the other hand, a failure to include required information in a public company’s quarterly financial report might well require the lawyer to notify the board of directors if none of the officers are able to explain or willing to correct the problem. Having said that, comment 5 to KRPC 1.13 points out that it is “[i]n an extreme case” that the lawyer may be required to present the matter to the board of directors or other governing body of the organization, or to the independent directors of a corporation where the substantive law so provides.96

Fifth Step: Deciding on Withdrawal

Finally, KRPC 1.13(c) provides the following:

If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.97

It is critical to the proper application of KRPC 1.13(c)’s “may resign” language to understand that KRPC 1.16 provides for both permissive and mandatory withdrawal.98 KRPC 1.16(b)(1)-(3) provides for permissive withdrawal where the client is engaging in conduct the lawyer reasonably believes is criminal or fraudulent, uses the lawyer’s services to commit a crime or fraud, or pursues an objective the lawyer considers repugnant or imprudent.99 KRPC 1.16(a)(3)

96. KRPC 1.13, cmt. 5.
97. KRPC 1.13(c).
98. KRPC 1.16.
99. The crime-fraud permissive withdrawal in Kentucky may extend to cases where the client is engaged in an intentional breach of fiduciary duty, by analogy to Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991) (intentional breach of fiduciary duty is equivalent to fraud for purposes of the crime-fraud exception to the attorney-client privilege). The Steelvest decision is discussed infra notes 254-59 and accompanying text. To similar effect in Ohio is Moskovitz v. Mt. Sinai Medical Center, 69 Ohio St. 3d 638, 635 N.E.2d 331(Ohio), cert. denied, 513 U.S. 1059 (1994),
provides for mandatory withdrawal where "[t]he representation will result in violation of the rules of professional conduct or other law." 100 Sometimes the difference between permissive and mandatory withdrawal is a matter of timing and the stage of the client’s activity, but a premature permissive withdrawal can deprive the lawyer of a valuable opportunity to "discuss the legal consequences of any proposed course of conduct with [the] client and ... counsel or assist [the] client to make a good faith effort to determine the validity, scope, meaning or application of the law" 101 under KRPC 1.2(d); or, in the words of KRPC 2.1, render advice that refers "not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation." 102

The withdrawing lawyer should consider whether any disclosure is permitted, required, and/or warranted. KRPC 1.6(b)(1) provides that a lawyer "may" reveal information that the lawyer reasonably believes is necessary "[t]o prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm." 103 Rule 1.6(b)(2) provides that the lawyer may reveal information "[t]o establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." The former will seldom be applicable in a business setting. The latter ordinarily requires the assertion of a charge or claim, but not the actual filing of a proceeding. 104 In Meyerhofer v. Empire Fire & Marine Insurance Co., 105 a lawyer made a prophylactic disclosure to the Securities and Exchange Commission (and later to plaintiffs who included him as a defendant in a civil action) of information suggesting securities fraud by the client in a pending public offering. The decision is generally regarded as demarking the outer limits of disclosure since the S.E.C. had not asserted any wrongdoing by the client or the lawyer at the time that the lawyer made the disclosure. 106

---

100. KRPC 1.16(a)(3).
101. KRPC 1.2(d).
102. KRPC 2.1.
103. KRPC 1.6(b)(1). The Kentucky disclosure rules and the considerablly broader Ohio disclosure rules are discussed infra notes 175-84 and accompanying text.
104. See KRPC 1.6, cmt. 18.
If the lawyer may not make a disclosure under KRPC 1.6(b), the "noisy withdrawal" provisions of comments 15-17 to KRPC 1.6 may apply. Comment 17 suggests that the lawyer should attempt to follow the Rule 1.13 process before engaging in a noisy withdrawal. Comment 15 points out that the lawyer must withdraw where the client plans to use the lawyer's services in "materially furthering a course of criminal or fraudulent conduct." The reference to Rule 1.16(a)(1) seems to presuppose that the lawyer knows of the client's plans and knows that they are unlawful. Comment 16 explains that where the client's information does not come within an exception to Rule 1.6, "[n]either this rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and upon withdrawal the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."

F. Conflict of Laws

The multi-state nature of many internal investigations, and indeed the multi-state nature of many law practices, makes conflict-of-laws problems almost inevitable. Professor Charles Wolfram has pointed out that where state ethics principles vary or conflict, compliance with the strictest standard may work, but will not work where the standards impose conflicting and irreconcilable obligations. This is equally critical in the area of ethically protected information and the attorney-client privilege, where the client may be engaged in present or

States v. Sindona, 636 F.2d 792 (2d Cir. 1980) (Meyerhofer not applicable where information would not exonerate attorney), cert. denied, 451 U.S. 912 (1981); In re Friend, 411 F. Supp. 776 (S.D.N.Y. 1975) (suggesting motion for leave to disclose as appropriate to give client opportunity to object).

107. KRPC 1.6, cmt. 15.
108. KRPC 1.6, cmt. 16.
future misconduct, or where the client used the attorney's services to commit a crime or fraud.\textsuperscript{110} The Ohio Code, like the ABA Model Code, does not contain conflict-of-laws provisions, and the Kentucky Rules contain only part of the ABA Model Rules provisions.

Determining the applicable legal ethics principles in Kentucky and Ohio thus requires reference to general principles of conflict-of-laws, which differ significantly from the ethical provisions. Comment (3) to KRPC 8.4 states that "[w]here the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation." The more detailed provisions of ABA Model Rule 8.5(b)\textsuperscript{111} state as follows:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.\textsuperscript{112}

The difference in general conflict-of-laws principles is that the application of

\textsuperscript{110} The particulars of state variations on these issues are considered infra notes 166-84 (variants on ethical protection, attorney-client privilege, and work-product doctrine), 185-226 (corporate attorney-client privilege tests) and accompanying text.

\textsuperscript{111} KRPC 8.4 does not have the same number as Model Rule 8.5 because Model Rule 8.3, on reporting attorney misconduct, was omitted from the KRPC.

\textsuperscript{112} Model Rule 8.5(b).
state law under the First Restatement\textsuperscript{113} and the Second Restatement\textsuperscript{114} of Conflict of Laws does not turn on where the attorney is licensed, but on a multi-factor test that includes other factors. This is significant in an internal investigation, in part, because it is not beyond comprehension that an attorney might, while physically present in another state, make telephone calls or have other communications, or act (or fail to act) in a manner that had consequences in another state, that in both cases could subject the attorney to jurisdiction in another state without being admitted to the bar of that other state.

Section 6(2) of the Restatement (Second) provides a seven-factor test to determine choice of law where there is no statutory directive of the state. Those factors include the following:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justifiable expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.\textsuperscript{115}

Sections 145(a) on torts,\textsuperscript{116} 188 on contracts,\textsuperscript{117} and 291-93 on agency relationships,\textsuperscript{118} provide that the tribunal should apply the law of the state with the "most significant relationship" to the issues presented. The comments to section 6 itself point out that "the difficulties and complexities involved [in tort and contract cases] have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can be presently done in

\textsuperscript{113} American Law Institute, Restatement of Conflicts (1934).

\textsuperscript{114} American Law Institute, Restatement (Second) of Conflicts (1971).

\textsuperscript{115} Id., § 6(2).

\textsuperscript{116} Id., § 145(a).

\textsuperscript{117} Id., § 188.

\textsuperscript{118} Id., §§ 291-93.
these areas is to state a general principle ... which provides some clue to the correct approach but does not furnish precise answers." 119 Similarly, the best that this Article can hope to accomplish is to identify the Kentucky and Ohio rules,120 to discuss some of the conflicts decisions that involve legal ethics,121 and to outline the problem areas as they may arise in an internal investigation.122

Kentucky follows the modern "governmental interests" test of the Second Restatement in contract cases, under Lewis v. American Family Insurance Group.123 However, it follows a modified test in tort cases under Arnett v. Thompson,124 which the Second Restatement may apply in clear cases, but the primary question is whether there are sufficient contacts between the matter and the Commonwealth of Kentucky to justify applying Kentucky law. The difference was pointed out in Bonlander v. Leader National Insurance Co.,125 where the Kentucky Court of Appeals declined to apply the Kentucky contract-conflicts rule in a tort case. Apart from the observations that a disciplinary proceeding more nearly resembles a tort than a contract matter and that Kentucky could be expected to apply either its own or the stricter of two states' ethical principles to any attorney conduct either occurring or having an effect in Kentucky, it is difficult to draw many conclusions from the Kentucky conflicts principles about how it would handle choice of law in a disciplinary matter.

Ohio follows the Restatement (Second) tests both in contract cases under Nationwide Mutual Insurance Co. v. Ferrin,126 and in tort cases under Morgan v. Biro Manufacturing Co.127 It has also applied the "governmental-interests" test instead of the internal affairs doctrine to a shareholders’ dispute over a voting agreement, from Gries Sports Enterprises, Inc. v. Modell.128

---

119. Id., § 6, cmt. c., at 13.
120. See infra text accompanying notes 121-127.
121. See infra text accompanying notes 128-141.
122. See infra notes 142-149 and accompanying text.
123. 555 S.W.2d 579 (Ky. 1977).
124. 433 S.W.2d 109 (Ky. 1968) (explaining Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967)).
125. 949 S.W.2d 618 (Ky. Ct. App. 1996).
Fiberglas Corp. v. American Centennial Insurance Co., the trial court applied the law of the Ohio forum on the crime-fraud exception to the attorney-client privilege applicable to intracorporate communications, although the significance of the decision is open to question since the corporation was located in Ohio and there was no potential for applying another state's law.

The application of legal ethics principles to the conduct of attorneys is neither a matter of evidence nor of procedure, but instead of regulatory jurisdiction and agency law. Many states have tended to apply their own ethics principles to attorneys, regardless of the nature of the matter or where the attorney’s actions took place. While it would seem that in Model Rules states, at least, the ethics law of the attorney’s state of admission should control, the decisions have not uniformly so held.

The application of conflicts principles to litigation under ABA Model Rule 8.5(b)(1) seems simple enough, but even it contains some surprises. A Michigan opinion applies in-state rules to out-of-state attorneys involved in litigation, and the New Jersey decision in In re Prudential Insurance Co. of America Sales Practices Litigation applies the forum’s ethics rules to a litigation matter where the ex parte contact with witnesses took place in another state. Conversely, a Maryland opinion determined that an attorney admitted in Maryland, but representing a client in a District of Columbia court, could follow the District’s rule not requiring disclosure of fraud on the court, notwithstanding that Maryland’s rule did require disclosure.


See infra notes 148-65 and accompanying text (discussing conflicts rules applicable to attorney-client privilege).

See Charles W. Wolfram, supra note 37, § 2.61 at 50-51.


Frost, the New Jersey court applied the modern interest analysis to conclude that New Jersey law applied between a New Jersey attorney and a New Jersey client to the propriety of a contingency fee in a New York litigation matter. In In re Istim, Inc., the New York court held that it would apply the law of New York to a question of an attorney's lien between a New York attorney and a New York client in an Illinois litigation. New York's ethics rules are based on the Model Code and its conflicts principles on a pre-Second Restatement “grouping of contacts” test, so Model Rule 8.5(b) has no application. Considered by analogy to Model Rule 8.5(b), the result can perhaps be explained as a characterization of the issue as one of the attorney-client contract subject to subsection (b)(2) rather than as a “litigation matter” subject to subsection (b)(1). In terms of general conflicts principles, the result is to be anticipated under both the most significant relationships test of the Second Restatement and the lex loci contractus rule of the First Restatement. But one could readily imagine the New York court reaching a different conclusion in Bernick, Istim notwithstanding (i.e., applying the law of New York to the contingency fee), and the Illinois court reaching a different conclusion in Istim (i.e., applying the law of Illinois to the lien).

In transactional matters covered by Model Rule 8.5(b)(2), the authorities are scarce and less informative. Leaving aside the unauthorized practice of law where the lawyer is not admitted, the rule’s provision that the ethics law of the state of the lawyers admission where the conduct “clearly has its predominant effect,” will govern the lawyer’s conduct is neither a First nor a Second Restatement test, and while that may increase its novelty, it does nothing for its utility. An Illinois opinion provides that the location of the transaction determines the governing ethics law, and that where the transaction took place in Illinois, an Illinois lawyer was required to report misconduct by New York lawyers to the Illinois authorities.

138. See infra notes 159-60 and accompanying text.
139. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, supra note 114, § 188.
140. RESTATEMENT OF CONFLICT OF LAWS, supra note 113.
In *Potter v. Peirce*, the Delaware court held that a Pennsylvania attorney could enforce an oral fee division agreement with a Delaware attorney even though the Delaware ethics rules require a written agreement, since the Pennsylvania attorney’s reasonable expectations should be protected. Perhaps more probative in an internal investigation, however, is the ABA’s determination in ABA Formal Opinion No. 91-00144 that whether District of Columbia lawyers in partnership with non-lawyers may open a branch office in another state depends on the ethics law of the other state, even if the non-lawyers do not practice in the other state. By analogy, the laws of that other state would be applied in an internal investigation, even where the lawyer is from another state.

The real problems of conflict-of-laws analysis on a legal ethics issue will arise not in a litigation matter (although those may be bad enough), but in the case where an internal investigation is deemed a transactional matter because litigation has not yet been filed, and either the “predominant effect” provisions of Model Rule 8.5(b)(2) or the “most significant relationship” test of the Second Restatement is applied and the law chosen is that of a state other than that in which the attorney regularly practices. The most acute of those problems will arise in cases where the attorney is faced with present or future wrongdoing by the client, or past wrongdoing involving the attorney’s services, and where irretrievably conflicting rules must be applied. Compounding this problem will be that both the disciplinary authorities and private plaintiffs will be in a position to second-guess the attorney’s conflict-of-laws decisions, and to argue in litigation against the attorney or the attorney’s client that a different or more stringent rule, not followed or perhaps not contemplated by the attorney, should apply to conduct in the internal investigation. The Second Restatement admonition that there are no answers to many questions in this area seems ominously true for the attorneys involved.

The attorney’s ethical duties in disclosing client wrongdoing are closely related to, even if analytically distinct from, the attorney-client privilege. The conflict-of-laws rules in litigation have historically chosen the law of the forum for the attorney-client privilege because the privilege is an evidentiary doctrine, and also for the work-product doctrine because that principle is usually one of civil

---

143. 688 A.2d 894 (Del. 1997) (following Freeman v. Mayer, 95 F.3d 569 (7th Cir. 1996)).
145. It should be added that the pendency of related litigation is no guarantee that the internal investigation will be treated as a “litigation matter.”
146. This is by no means to discount the possible mischief that could result from the application of *lex loci delicti* to an attorney’s conduct.
147. *See infra* notes 174-84 and accompanying text.
procedure. Section 139 of the Second Restatement states that where information is “privileged under the local law of the state which has the most significant relationship with the communication” but not in the forum state, that privilege will be respected only where “there is some special reason why the forum policy favoring admission should not be given effect.” The only contrary examples suggested by the comments are the priest-penitent and the doctor-patient privileges, not the attorney-client privilege. For those reasons, it can be anticipated that the law of the forum usually will apply where the attorney-client privilege and the work-product doctrine are at issue.

One wonders, however, whether in some cases the principles underlying the internal affairs doctrine might counsel application, to the question of whether a business organization’s communication is privileged, of the law of the state of organization rather than that of the forum state. The importance of this question for

148. See generally Paul R. Rice, Attorney-Client Privilege in the United States §§ 12:1-12:21 (2d ed. 1999). In federal cases, the district court will apply either Upjohn in a case grounded in federal law, or Federal Rule of Evidence 501, which provides that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.” Fed. R. Evid. 501. The application of this rule is discussed in considerable detail in Edna Selan Epstein, supra note 10. Parenthetically, it should be noted that horizontal conflicts principles in a diversity case are resolved by reference to the forum state’s conflicts rules under Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 587 (1941).

149. Restatement (Second) of Conflict of Laws, supra note 114, §139.

150. Id. § 139(2).

151. Id. § 139, cmts. c. and d. Comment c. is directed to section 139(1), and states that the forum’s priest-penitent privilege might control over the other state’s lack of such a privilege, but the converse would seem equally true under subsection (2) and comment d.

152. Questions of whether one state court must respect the decision of another state court on a privilege issue are beyond the scope of this article. The Supreme Court has held that the full faith and credit clause has no application to questions of testimony, although the attorney-client privilege was not at issue in that case. Baker v. GMC, 522 U.S. 222, 238 n.10 (1998). One court has refused to respect another state court’s erroneous order requiring disclosure, Jadlowski v. Owens-Corning Fiberglas Corp., 283 N.J. Super. 199, 661 A.2d 814 (App. Div. 1995), but another applied not only full faith and credit (later discredited by Baker) but also comity in following a federal court order preventing disclosure of the same information. Keene v. Caldwell, 840 S.W.2d 715 (Tex. Ct. App.-Houston 1992).
multistate and international transactional and litigation matters has been noted, and one author has suggested that the law of the place of the communication should determine whether the attorney-client privilege applies.

The Texas Supreme Court has taken section 139 of the Second Restatement seriously as applied to the attorney-client privilege. In *Ford Motor Co. v. Leggat*, the court held that in a Texas action, the law of Michigan would govern attorney-client privilege claims for an attorney’s report and data provided in Michigan at the attorney’s request. Later cases in Texas are to the same effect.

A federal court in California held in *Connolly Data Systems, Inc. v. Victor Technologies, Inc.*, ruling on a California subpoena in a Massachusetts case, that California privilege law applied where the corporation was organized in California and the communications occurred there. In other cases, the applications of the governmental interests test and other post-First Restatement tests have resulted in the application of the forum’s privilege rules where the question cannot be avoided. In *Brandman v. Cross & Brown Co. of Florida, Inc.*, the New York...
court applied the "grouping of contacts" test to select New York law where the lawyer and client were from New York and the real estate involved in the lawyer's advice was located in Florida. In National Steel Products Co. v. Superior Court, the court applied California law on waiver of the privilege to an expert report prepared for litigation in New York where the expert was named as a trial witness in the California case. These results are not surprising, given the governmental interests at issue and the nature of the geographic contacts, and Brandman at least, if not National Steel also, could be cited in support of the application of another state's law in the factual circumstances presented by Leggat and Connolly Data.

The governmental interests analysis does not end with the foregoing, however. It seems likely that where the question presented is whether the crime-fraud exception to the attorney-client privilege applies, the courts are likely to apply the law of the forum rather than the law of the corporation's state or organization or the place of the communication. For example, the court in Owens-Corning Fiberglas Corp. v. Watson applied Virginia law on fraud on the court to hold that an attorney-client communication was admissible in Virginia where the fraud on the court occurred in Texas, because to do otherwise would be to perpetuate the Texas fraud. The decision in Owens-Corning Fiberglas Corp. v. American Centennial Insurance Co. appears to have turned on the law of the forum, and to have recognized the Virginia court's approach as valid. Given the similarity of the crime-fraud exception in most states, the choice-of-law analysis will seldom produce different results, but the fact that internal affairs arguments may involve issues of fraud or breach of fiduciary duty directed at persons located in other states needs to be kept in mind when arguing the section 139 issue. The seeming certitude of a uniform crime-fraud exception is all but an illusion, however, once the question

160. The New York center of gravity test, see Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), was a precursor to the governmental interests analysis of the RESTATEMENT (SECOND) OF CONFLICTS § 6 (1971), and bears some resemblance to it.
163. 74 Ohio Misc. 2d 347, 660 N.E.2d 812 (Ct. Com. Pl.-Lucas Cty. 1995) (as noted supra text accompanying note 129); However, the corporation in question was located in Ohio.
164. The Steelvest rule in Kentucky and the Moskovitz rule in Ohio are examples of an important exception. See infra notes 254-59, 267-68 and accompanying text.
shifts from whether the attorney may be compelled to testify under the crime-fraud exception, to the varying state ethics rules on whether the attorney may have the ability or the obligation to disclose the client's actions under an exception to the Kentucky, Ohio, and other state variants of ABA Model Rules 1.6(b)(1) and 4.1(b) or Model Code DR 4-101(C)(3) and 7-102(B)(1).165

G. Hypothetical Illustration

The application of KRPC 1.13 is illustrated by the following hypothetical: Medical Billing Software Associates, Inc. ("MBSA") is engaged in the highly competitive business of writing billing software for hospitals and physicians. Its number one project is the fast-track development of the OMNIDOC system, which will comply with all current HMO, POS, PPO, Medicare and Medicaid billing requirements, and will interface with insurers' in-house systems to provide on-the-spot coverage determinations, prescription approvals, and requests for medical review. Thomas ("Trey") D. Marke III of Lee, Wright & Marke, L.L.P., is MBSA's copyright lawyer; his partners Patton T. Lee and Cynthia Phillips ("C.P.") Wright handle trademark/corporate and patent matters, respectively, and the firm handles the company's day-to-day legal matters as well.

Lucille Furr is the CEO and President of MBSA; she founded the company and developed the business from one home computer to its present size of about 30 employees. Michael D. Angell is MBSA's Executive Vice President for Product Development. He was recently hired from Medical Protocol Software Applications L.L.C. ("MPSA"), a small Silicon Valley medical software firm, just after its acquisition by MacroHard in a cash deal. Angell did not have an employment agreement with his firm, so he came to MBSA with no strings attached. Marke and a LW&M associate negotiated Angell's employment agreement on behalf of MBSA, and Angell was represented by his own attorney.

One Monday morning, Marke and Angell are sitting at a conference table going over the final details of the copyright applications for MBSA's billing software. Lee and Phillips are in the next room with Furr, working through the SEC's comments on the draft prospectus for the company's public offering. Marke reviews the billing and interface source code attached to the OMNIDOC applications, notices that there are the usual blacked-out areas for trade secret information, and asks Angell whether the corporate protocols for trade secret protection are being observed for that information. Angell says that they are, and displaying a DVD-ROM disk in a case marked "MBSA," adds, "I keep this in the

165. See infra notes 175-84 and accompanying text.
safe when not working with it, and nobody else has ever seen it.

Angell has made a mistake in excerpting the source code, and Marke asks him to go get the complete source code from the safe so that they can review it together. While Angell is gone, Marke pops in the DVD-ROM disk into the conference-room computer, chooses a file labeled “DRG Interface, 1 of 6,” pulls up the file, and is shocked to find the header, “Medical Protocol Software Applications L.L.C., 1999.” Hands shaking, he copies the file to the computer’s hard drive, exits the program, and looks in disbelief at the DVD-ROM case. He notices that the “B” in “MBSA” is a “P” in “MPSA” that has been carefully inked in to form a “B.” He puts the disk back into the case just before Angell comes back with the source code. Marke points out that he has already redacted the trade secrets, so the two men copy the pages needed for the attachments, assemble the applications, and turn to the lunch that has been brought in just at noon. They plan to meet with Lee, Phillips and Furr at 5:00 that afternoon for a status conference, once the latter have completed their drafting session. Lee wants to get the prospectus back to the S.E.C. staff at 9:00 the next morning.

How should Marke proceed?

III. ETHICALLY PROTECTED INFORMATION IN AN INVESTIGATION

A. Generally

The management of ethically protected information is at the heart of all investigation strategy. This is true whether the investigation involves past, present, or future wrongdoing, or some combination thereof. There are three protections for a client’s information: the rules of legal ethics and agency law, the attorney-client privilege, and the work-product doctrine. This section will consider those protections in general; as they arise for business organizations, particularly corporations; as applied in multistate investigations; and as applied to communications with non-attorney experts in an internal investigation. It is useful to begin with four points by way of overview.

First, any investigation requires that the lawyer pay attention to the elements and processes for protecting the entity attorney-client privilege under *Upjohn v. United States*,166 and related state decisions. The existence of two primary tests for the corporate attorney-client privilege, the “subject-matter” test in Kentucky, Ohio, most other states, and federal courts, and the “control group” test in Illinois,

counsels that a corporate investigation or interviews be planned, or “staged,” wherever the matter may have any connection to Illinois. Similarly, in all states and circumstances, the attorney should interview witnesses whose communications are subject to the attorney-client privilege before obtaining information from persons whose communications may be subject only to the work-product doctrine, to take maximum advantage of disclosure rules under ethical, evidentiary, and discovery provisions.

Second, an investigation of present or future wrongdoing requires that the lawyer consider both the ethical and evidentiary exceptions to protection of a client’s information. In Kentucky, these consist of the future “serious crimes” and self-defense exceptions of KRPC 1.6(b)(1) and (2); and the “crime-fraud-intentional-breath-of-fiduciary-duty” exception to the attorney-client privilege of Steelvest, Inc. v. Scansteel Service Center, Inc.167 In Ohio, these consist of the “any crime” and self-defense exceptions of Ohio DR 4-101(C)(3) and (4); the crime-fraud exception to the attorney-client privilege under State ex rel. Nix v. City of Cleveland;168 and the mandatory disclosure provisions for a client’s prior fraud under Ohio DR 7-102(B)(1) and a non-client’s fraud under Ohio DR 7-102(B)(2).169 The attorney may also wish to consider whether the developing “self-evaluative privilege” or “self-critical analysis” doctrine may serve to protect investigations by non-attorneys, but because of the doctrine’s inherent risks and limitations, the question is best reserved for non-attorney investigations already completed, and not for the continuation or commencement of a non-attorney investigation.170

167. 807 S.W.2d 476 (Ky. 1991).
168. 83 Ohio St. 3d 379, 700 N.E.2d 12 (Ohio 1998).
169. Both Ohio DR 7-102(B)(1) and 7-102(B)(2) seem to require on their face disclosure of a fraud on a tribunal, and thus to be consistent with Office of Disciplinary Counsel v. Heffernan, 58 Ohio St. 3d 260, 569 N.E.2d 1027 (Ohio 1991). The Heffernan decision has, however, been criticized as inconsistent with an Ohio ethics opinion, Supreme Court of Ohio, Bd. of Grievances and Discipline, Adv. Op. 90-07 (1990), which speaks to the lawyer’s withdrawal but not to the disclosure issue. See J A C K A. G U T T E N B E R G & L L O Y D B. S N Y D E R, supra note 24, § 9.5(C)(1) at 246-48. For an attorney faced with a client’s crime or fraud before a tribunal, leaving aside the merits of the two arguments, respect for the potential consequences of Heffernan is probably the better part of valor so far as disclosure is concerned.
170. The self-evaluation privilege or self-critical analysis doctrine is discussed in numerous authorities. Some of the more useful include MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 501.1 (4th ed. 2000) (discussing status of doctrine in, among others, employment, defense contractor, accounting, securities, medical malpractice, and products liability cases); RALPH C. FERRARA ET AL, SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD § 10.08 (2000); Brad...
Third, where information is provided to non-attorney experts, such as accountants, the attorneys should be aware that it may lose some or all of its protection under the above principles. The accounting profession has obtained federal protection for an accountant-client privilege before the Internal Revenue Service, but that is not likely to be applied in Kentucky or Ohio, where there is no state accountant-client privilege.171

Fourth and finally, the ethical principles governing corporate counsel’s conduct and the evidentiary and procedural law governing the protection of client information sometimes differ depending upon whether counsel represents both the Company and its Directors, or represents only one or more Directors. The primary differences in the role of counsel who represents the Company as well as one or more Directors (“Company” counsel) and outside counsel who represents only Directors (“Directors’” counsel) is in the areas of communication with corporate employees and the protection afforded those communications by the attorney-client privilege. Company counsel’s interviews are subject to the attorney-client privilege if the principles of *Upjohn* are followed, while Directors’ counsel’s interviews probably are not. For Directors’ counsel, the joint-defense or common-interest doctrine and the work-product doctrine assume particular importance where the attorney-client privilege does not cover non-client corporate interviews.172

B. Ethical Protections for Client Information

A current client’s “information relating to the representation” is protected under KRPC 1.6, or as the client’s “confidences and secrets,” under Ohio DR 4-101.173 A former client’s ethically protected information is protected under the Ohio Code by DR 4-101, EC 4-6, and Canons 5 and 9, and under the Kentucky Rules by KRPC 1.8(b) (as to clients about whom the attorney has information from a former firm),

---

171. See infra notes 308-15 and accompanying text.
172. The joint-defense and common-interest doctrines are addressed in part IV.C. under the heading of Dealing with Third Parties in an Investigation. See infra notes 369-96 and accompanying text.
173. “Confidential information” under Ohio DR 4-101 is matter subject to the attorney-client privilege. A “secret” is information that the client has asked the attorney not to disclose, or whose disclosure would be embarrassing or prejudicial to the client. Ohio DR 4-101(A).
and 1.9(c) (as to former clients). The ethical protections for a client’s information are broader than either the attorney-client privilege or the work-product doctrine: information about a client may be protected by KRPC 1.6, or by Ohio DR 4-101 as a “secret,” even though it is neither privileged nor work product.

C. Ethical and Evidentiary Rules in Multi-State Investigations

In a multi-state internal investigation it is critical to be aware of all potentially applicable ethical and evidentiary rules governing client communications, confidentiality, and permissive and mandatory disclosure. The exceptions to ethical protection that create problems are those for certain future crimes or frauds, past crimes or fraud involving the lawyer’s services, and fraud on a tribunal. These exceptions vary widely from state to state, and a lawyer familiar with the law in one state is very likely not going to be familiar with that in another state, absent careful study. Some examples of these principles, and the problems they can create for the lawyer, are described below.

Future (and Ongoing?) Crimes or Fraud. KRPC 1.6(b)(1) permits disclosure of a client’s confidences only to the extent reasonably necessary “[t]o prevent the client from committing a criminal act the lawyer reasonably believes is likely to result in imminent death or serious bodily injury.” Ohio DR 4-101(C)(3), on the other hand, permits disclosure of “any crime” the client is about to commit. Both are narrower than the crime-fraud exception to the attorney-client privilege, which includes not only criminal actions but also civil fraud and, in Kentucky under Steelvest, Inc. v. Scansteel Service Center, Inc., and Ohio under Moskovitz v. Mt. Sinai Medical Center, an intentional breach of fiduciary duty that amounts to fraud. Whether these exceptions extend to “ongoing” or “continuing” crimes as well as future crimes is beyond the scope of these materials, and it should be noted that Professor Wolfram has observed that the law as to a lawyer’s obligations to disclose a client’s “continuing criminal offenses” is in “an unsatisfactorily unsettled state.”

174. See supra notes 109-165 and accompanying text (conflict of laws analysis).
175. The question of revealing a client’s ongoing crime raises difficult ethical issues because the client may have already committed at least one “past crime” protected by Rule 1.6 or DR 4-101 that may not be disclosed. See infra note 178 and accompanying text.
176. 807 S.W.2d 476, 487-88 (Ky. 1991); see infra notes 254-59 and accompanying text.
177. 69 Ohio St.3d 638, 635 N.E.2d 331 (Ohio 1994), cert. denied, 513 U.S. 1059 (1994); see infra notes 267-68 and accompanying text.
Many states, however, vary significantly from the Model Rule and Model Code provisions that are in force in Kentucky and Ohio. Twelve states require the lawyer to reveal a "serious crime,"179 and two states (also among the twelve) require the lawyer to reveal "any" crime.180 Two states require the lawyer to reveal non-criminal fraud,181 and nine states permit the lawyer to reveal non-criminal fraud.182 Allowing for overlapping provisions among the foregoing, there are eighteen states in which either conflicting ethical rules or exposure to civil liability under broader permissive disclosure provisions may exist.

Past Wrongs Involving Lawyer’s Services. The problems only get worse where the issue involves the lawyer’s disclosure of past client wrongdoing involving the lawyer’s services. Many states, including Ohio, have mandatory and permissive disclosure rules that are broader than Kentucky’s. Two states, one of which is Ohio, provide that a lawyer “must disclose” a prior fraud by the client using the lawyer’s services.183 Sixteen states provide that the lawyer “may disclose” such


180. Florida and Virginia. See ALAS Chart, supra note 177.

181. New Jersey and Wisconsin. Id.

182. Alaska, Hawaii, Maryland, Massachusetts, Nevada, North Dakota, Pennsylvania, Texas, and Utah. Id.

183. Ohio DR 7-104(B); see ALAS Chart, supra note 177. The other state is Hawaii. See id.
a prior fraud. This involves a total of eighteen states; again accounting for overlap with the conflicting provisions on disclosure of future crimes, this list of eighteen adds four more states to the list of "problem jurisdictions," for a total of twenty-two jurisdictions where different ethics rules may create ethical or liability problems for a Kentucky or Ohio lawyer involved in a multi-state investigation.

D. Evidentiary Tests for the "Corporate" Attorney-Client Privilege

The existence of a "corporate" attorney-client privilege is determined under one of two evidentiary tests. One is the "control group" test, which is followed in Illinois. Illinois applies a "two-tier" test in which both top management's and their direct advisors' communications are within the privilege. Texas recently amended its rules of evidence to apply a subject-matter test instead of the former strict, "one-tier" control-group test theretofore applied. The new exception was narrowly interpreted in In re Monsanto Co. The Illinois test must be accounted for where any aspect of an investigation or litigation matter may involve that state.

The second test is the "modified subject-matter" test, under which the protection of the attorney-client privilege in the corporate context requires compliance with the principles of Upjohn Co. v. United States for federal-law


186. TEX. R. EVID. 503(a).


188. 998 S.W.2d 917 (Tex. Ct. App.-Waco 1999).

189. 449 U.S. 383 (1981); see Stanley A. Freedman, Corporate Attorney-Client Privilege Since
purposes, and with analogous provisions of state law where applicable.\(^{190}\) The historical, pure subject-matter test may have protected any communication between a constituent and an attorney about the subject-matter of that constituent's responsibilities, even where the constituent was a lower-level employee and a "mere witness" to the actions of others.\(^{191}\) The *Upjohn* decision, relying in part on *Diversified Industries, Inc. v. Meredith*,\(^{192}\) stated additional requirements for protection of the privilege, but does not address the "mere witness" issue.

A line of post-*Upjohn* authorities that may constitute a third variant of the "corporate" attorney-client privilege (unless one reads *Meredith* and *Upjohn* to say the same thing) holds that the attorney's communications with a corporate employee who is a "mere witness" is not within the privilege. Minnesota is among the states that follow this rule,\(^{193}\) and one could expect the issue to arise in any subject-matter state, including Kentucky. The Minnesota court held in *Wiggin v. Apple Valley Medical Clinic*\(^{194}\) that the statements of a physician employee whose act could not be imputed to the defendant entity, were not privileged.

The *Upjohn* principle may extend to non-employees of the business organization where the non-employee agent has "a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject

---

\(^{190}\) On the application of the attorney-client privilege in federal court where the federal and state rule differ, see Edna Selan Epstein, *supra* note 10, at 17-19.


\(^{192}\) 572 F.2d 596 (8th Cir. 1977).


\(^{194}\) 459 N.W.2d 918 (Minn. 1990).
of legal services." This view may not be universally shared, and the law that may resolve the question of communications with non-employee agents may be related both to the earlier English rule on the corporate attorney-client privilege, discussed below, and to the post-"Hickman v. Taylor" work-product cases. For present purposes, this article does not resolve that issue but recommends the assumption that an attorney’s communications with a non-employee agent may well not be protected by the attorney-client privilege, except as the Kentucky and Ohio cases hold (or at least strongly suggest) that they are.

Kentucky, Ohio, and most other states follow Upjohn or a substantially similar test. The attorney-client privilege is rule-based in Kentucky and statutory in Ohio. Kentucky Rule of Evidence 503(b) provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a


196. See infra notes 198-226 (attorney-client privilege), 291-338 (expert witnesses) and accompanying text.

197. See infra text accompanying notes 273-90.

198. The law of Delaware is discussed infra notes 212-26 and accompanying text.

confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."\textsuperscript{200} The communication is covered by the privilege in Kentucky if it is "(1) Between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; (2) Between the lawyer and a representative of the lawyer; . . . (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client.” The client’s “representative” is defined as follows:

(2) “Representative of the client” means:

(A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or

(B) Any employee or representative of the client who makes or receives a confidential communication:

(i) In the course and scope of his or her employment;

(ii) Concerning the subject matter of his or her employment; and

(iii) To effect legal representation for the client.\textsuperscript{201}

The burden of establishing the privilege, both substantively and procedurally, is on the organization seeking the protection of the privilege.\textsuperscript{202}

Ohio Revised Code section 2317.02(a) provides that an attorney shall not testify concerning a communication made to the attorney by a client in that relation or the attorney’s advice to the client . . . .\textsuperscript{203} The term “client” is defined as follows:

a person, firm, partnership, corporation, or other associate that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him in his professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney . . . . Where a corporation or association is a client having the privilege and

\textsuperscript{200} Ky. R. Evid. 503(b).
\textsuperscript{201} Ky. R. Evid. 503(a)(2).
\textsuperscript{202} See Shobe v. EPI Corp., 815 S.W.2d 395 (Ky. 1991).
\textsuperscript{203} O.R.C. § 2317.02(a) (1996 & Supp. 1999).
Consistent with this definition, the Ohio courts have protected communications between a university attorney and university employees, and between a government corporation’s attorney and its employees.205

Despite the definitions of “client” and “representative” contained in the Kentucky and Ohio statutes, the organization (or its incumbent board of directors or other managers) may not control the privilege in certain circumstances. If the organization is in bankruptcy, the bankruptcy trustee controls the privilege.206 Other legal persons who may control the privilege as against the board of directors or managers are a conservator,207 a liquidator,208 a receiver,209 and a subrogator.210 Related to the question of control is the ability of shareholders and former directors to obtain access to information within the organization’s attorney-client privilege.211

The law of Delaware on the corporate attorney-client privilege is ambiguous, and that state is sufficiently important in corporate law that the ambiguity should be carefully noted. The decision in Graham v. Allis-Chalmers Mfg. Co.212 suggests, with considerable ambiguity, that Delaware applies a subject-matter test. Graham involved four non-director employees who had given statements to the

205. State ex rel. Thomas v. Ohio State Univ., 71 Ohio St. 3d 245, 643 N.E.2d 126 (Ohio 1994) (university attorney’s communications with employees); State of Ohio v. Today’s Bookstore, Inc., 86 Ohio App. 3d 810, 621 N.E.2d 1283 (Ohio Ct. App.-2d Dist. 1993) (communications by government corporation’s employees); see also In re Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (Ohio 1948) (applying English rule of attorney-client privilege to agent’s communications for use of attorney); Ex parte Schoepf, 74 Ohio St. 1, 77 N.E. 276 (Ohio 1906) (same).
206. CFTC v. Weintraub, 471 U.S. 343 (1985), rev’g 722 F.2d 338 (7th Cir. 1984); accord United States v. Campbell, 73 F.3d 44 (5th Cir. 1996) (limited partnership).
211. See infra notes 231-53 and accompanying text.
212. See 41 Del. Ch. 78, 188 A.2d 125 (Del. Ch. 1963).
company’s lawyers, which probably would have been protected both by the attorney-client privilege and by the work-product doctrine. Graham distinguished Hickman v. Taylor, and relied upon Wise v. Western Union Telegraph Co. for the proposition that under the “English rule,” statements taken by the attorneys from the agents of the clients, in that case non-director defendants, were “privileged documents obtained by reason of an attorney-client privilege.” Wise was later cited in Phillips v. Delaware Power & Light Co. as the leading Delaware case on the attorney-client privilege, in support of the Phillips court’s conclusion that statements prepared by subordinate employees for presentation to the company’s attorney were privileged.

There is a contrary view of Delaware law. The District of Delaware stated in Ortiz v. H.L.H. Products Co. that Graham applied the control-group test. Curiously, the conflict between Graham and Wise on the one hand and Ortiz on the other must be resolved by reference to the history of the attorney-client privilege and the work-product doctrine. Further complicating the analysis is that in Johns v. City of Wilmington, which involved pictures prepared by an insurance adjuster for presentation to a corporation’s attorney, the same judge who decided Phillips stated that Phillips involved not the attorney-client privilege, but the work product doctrine. These conflicts suggest that Graham and Wise can be best understood in their historical context.

Professor Wigmore noted early on that the attorney-client privilege as applied to agents’ communications was frequently confused in England and Canada with the work-product doctrine applicable to witness statements provided in anticipation of litigation. He noted that the United States decisions generally had kept the distinction straight. In Hickman v. Taylor itself, the Supreme Court noted that the broad English rule applied to both employee and non-employee agents of the

214. 36 Del. (6 W.W. Harr.) 456, 178 A. 640 (Del. Sup.-New Castle 1935). Interestingly, the Wise court cited the Ohio decision in Ex parte Schoepf, discussed supra note 203. That citation, Schoepf itself, and the Ohio decisions discussed infra notes 287-90, 330-38 and accompanying text, suggest that the old English rule may have some remaining force in Ohio.
217. 228 A.2d 571 (Del. Sup.-New Castle 1967).
219. Id. at 620-21, 625 (citing Wise in a note on page 626).
client.221 The best sense made of the Wise decision is to be found in Frank C. Sparks Co. v. Huber Baking Co.,222 where the court pointed out that Wise contains two rules, the attorney-client privilege and the work-product doctrine,223 and held that statements of a third-party investigator were not subject to the former but required to be produced under the latter. In Reeves v. Pennsylvania Railroad,224 Winter v. Pennsylvania Railroad225 and Empire Box Corp. v. Illinois Cereal Mills,226 the courts noted that the adoption of civil procedure rules in Delaware did not change the result in Wise and reached contrary results from Huber Baking, although the Empire Box court suggested that Wise should perhaps be limited for third-party statements in light of Hickman v. Taylor.

It follows from the foregoing that Delaware would apply a subject-matter test were the issue squarely framed in a modern case. Since both Wise and Graham apply the attorney-client privilege to statements by subordinate employees to, or for presentation to, the client’s attorneys, Delaware has applied the attorney-client privilege in a manner fully consistent with the Upjohn rule on non-control-group members’ communications with attorneys. The Ortiz decision thus must be reckoned to be, if not fashioned from whole cloth, at best inconsistent with Wise and Graham and thus of dubious authority on the question.

E. The Upjohn Process

The “corporate” attorney-client privilege under Upjohn Co. v. United States227 is a common-law privilege under Federal Rule of Evidence 501,228 and as such must be presumed to be encrusted with all of the teachings and requirements of earlier decisions. Many of the seemingly descriptive passages in Upjohn involve

221. 329 U.S. at 510 n.4.
223. Professor Wigmore probably would have said that Wise included one confused muddle of two separate rules.
224. 8 F.R.D. 616 (D. Del. 1949). Reeves was decided by the same judge who decided Wise, and was predicated on applying Delaware privilege law under Klaxon v. Stentor Mfg. Co., 313 U.S. 487 (1941), an approach later validated by Federal Rule of Evidence 501.
228. FED. R. EVID. 501.
actions taken during the investigation that are required by earlier caselaw,\textsuperscript{229} and the Supreme Court’s repeated citation of \textit{Diversified Industries, Inc. v. Meredith}\textsuperscript{230} lends support to that approach to \textit{Upjohn}. The \textit{Upjohn} test demands attention to both substantive elements of the attorney-client privilege as well as procedural or practical approaches to ensure that the privilege is preserved, so the substantive and procedural aspects of the decision will be addressed in turn.

\textit{Upjohn} and earlier decisions on the “corporate” attorney-client privilege state the following substantive elements of the privilege:

\begin{enumerate}
\item communications to or from an attorney [other elements of privilege must exist];
\item at the behest of corporate officers or directors \textit{[compare control group theory]};
\item because information not available from upper management is needed for legal advice to the corporation;
\item concerning specified issues;
\item about matters within the scope of the lower-level employees’ duties;
\item the employees are told (a) that the communication is for legal advice to the corporation, and (b) that the communication should remain confidential; and
\item the communications in fact remain confidential (compare trade secret “need to know” disclosure limitations).
\end{enumerate}

\textit{Upjohn} and earlier decisions require or counsel that the following steps be taken to preserve the privilege during an internal investigation:

\begin{enumerate}
\item a letter from a control-group member (see item (2) in preceding list);
\item stating that the attorney is conducting an internal investigation;
\item of certain issues (specified where appropriate to do so);
\item so that the organization may obtain legal advice;
\end{enumerate}

\textsuperscript{229} Some of the pre-\textit{Upjohn} decisions are addressed at length in \textit{Edna Selan Epstein, supra} note 10, and that informative discussion is not repeated here.

\textsuperscript{230} 572 F.2d 596 (8th Cir. 1977).
(5) referencing the potential for litigation where appropriate (see discussion of work product doctrine);

(6) and instructing the employee to treat the communications as confidential and to discuss them with other employees only as necessary or per instruction from superiors;

(7) control-group member’s communication may enclose questionnaire as in Upjohn, but this may better come directly from in-house or outside lawyer;

(8) interviews of lower-level employees conducted by lawyers (or by paralegals, and preferably not corporate managers).

In general terms, the Upjohn privilege and its state equivalents impose all of the traditional and familiar requirements of the attorney-client privilege. Some of the rules particularly important in an internal investigation will be discussed below.

F. The Garner Fiduciary/Good Cause Exception

The former Fifth Circuit held in Garner v. Wolfinbarger that the shareholders of a corporation may show that the corporation should not be permitted to assert the attorney-client privilege in a shareholders’ derivative action, depending upon factors including the following:

(1) the number of shareholders and the percentage of stock they represent;

(2) the nature of the shareholders’ claim and whether it is obviously colorable;

(3) the apparent necessity or desirability of the shareholders’ having the information;

(4) the availability of the information from other sources;

(5) whether the shareholders’ claim is of wrongful action by the corporation;

(6) whether the communication is of advice concerning the litigation itself; and

(7) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Most courts that have considered the issue have applied the Garner rationale.

or something similar to it.\textsuperscript{232} The Fourth Circuit collected the cases applying \textit{Garner} in \textit{Sandberg v. Virginia Bankshares, Inc.}\textsuperscript{233} The court in \textit{In re IBM Corp. Sec. Litig.}\textsuperscript{234} noted that \textit{Sandberg} described \textit{Garner} as stating "accepted doctrine."

Both the Sixth Circuit in \textit{Fausek v. White}\textsuperscript{235} and another district court have applied the decision to shareholders' non-derivative litigation against corporate directors and officers.\textsuperscript{236} The Delaware Chancery Court applied the \textit{Garner} principle in \textit{Kirby v. Kirby}\textsuperscript{237} to dissident directors' attempts to obtain privileged information in a dispute over the right to control the organization over the objection of a majority of the board, and the latter's refusal to provide the information through regular corporate channels. The Eastern District of Pennsylvania held likewise as to a former officer seeking privileged communications created while he was an officer, in \textit{Carnegie Hill Financial, Inc. v. Krieger}.\textsuperscript{238}

The authorities on \textit{Garner} are not all positive. One district court has questioned


\textsuperscript{234} 1993 WL 760214 (S.D.N.Y. Nov. 30, 1993).


the continued viability of Garner, contending (incorrectly, given Kirby and Krieger) that the decision has been limited to its shareholder-derivative context.\textsuperscript{239} The Ninth Circuit held in Weil v. Investment/Indicators, Research & Management, Inc.,\textsuperscript{240} that the Garner principle does not apply where the shareholder is seeking damages from the organization. The district courts in Bushnell v. Vis Corp.\textsuperscript{241} and Milroy v. Hanson\textsuperscript{242} disagreed with the Kirby rationale, and a Texas court sided with Milroy in In re Marketing Investors Corp.\textsuperscript{243} The Kirby principle also has no application where the plaintiff is an employee suing in her own interest.\textsuperscript{244} One court has suggested, however, that Kirby and Garner are two different tests, and that Garner is the more flexible of the two.\textsuperscript{245}

Other limitations on Garner have arisen from changes in shareholder litigation itself. In Delaware under Zapata Corp. v. Maldonado,\textsuperscript{246} and in New York under Auerbach v. Bennett,\textsuperscript{247} a corporation may obtain dismissal of a shareholder derivative action where an independent litigation committee of the board of directors concludes that the litigation is not in the best interest of the corporation. The intermediate appellate courts in Kentucky and Ohio have suggested that they would adopt the more deferential Delaware approach,\textsuperscript{248} and two panels of the Sixth Circuit have suggested, respectively, that the Ohio Supreme Court would follow the Delaware approach and the less deferential New York approach.\textsuperscript{249} In

\begin{itemize}
  \item 240. 647 F.2d 18 (9th Cir. 1981).
  \item 246. 430 A.2d 779 (Del. 1980).
\end{itemize}
In re Perrigo, \(^\text{250}\) a panel of the Sixth Circuit held that the plaintiffs were entitled to see the report for purposes of opposing the company’s motion to dismiss, but that its disclosure for that limited purpose did not vitiate its protection as work product from disclosure to unrelated third parties.

The Kentucky Supreme Court made an inconclusive reference to Garner in Shobe v. EPI Corp., \(^\text{251}\) where the court described Garner as stating “the ‘good cause exception’ to the attorney-client privilege.” The court did not decide whether Garner applies in Kentucky, since the corporation opposing production had not sought in camera review or a protective order and thus had failed to meet its burden for protecting the privilege, and since review on writ of prohibition is limited to whether “great injustice and irreparable injury” will result from a denial of the writ. The court suggested that a party who fails to seek those procedural remedies not only will have failed to meet its burden but also will have waived the privilege, and that the trial court is under no obligation to act in the absence of a proper motion.

The standard of review on petitions for extraordinary writ sometimes seems to affect the result that the court reaches in decisions on the attorney-client privilege. \(^\text{252}\) These materials cannot pursue the questions of Kentucky appellate practice presented by such decisions as Shobe, and it is unclear whether the writs are being used out of necessity or because no one wants to “bell the cat” of a contempt order. The writs may be unavoidable in some cases, but where available, the classic approach of refusing to comply with an order compelling disclosure, suffering contempt, and appealing from the contempt order, perhaps should be considered.

The Ohio courts have not cited Garner for its famous proposition. In Moskovitz v. Mt. Sinai Medical Center, \(^\text{253}\) however, the court held that neither the attorney-client privilege nor the work-product doctrine could be asserted by the insurer in an insured’s action for bad faith refusal to settle. The relationship of those parties bears some resemblance to that between a corporation and its shareholders, at least in the context of the duty of good faith, so the Moskovitz decision may suggest that the Ohio Supreme Court would follow Garner in an appropriate case.

\(^{250}\) 128 F.3d 430 (6th Cir. 1997).
\(^{251}\) 815 S.W.2d 395 (Ky. 1991).
\(^{252}\) See also infra notes 410-13 and accompanying text (discussion of University of Louisville v. Shake, 5 S.W.3d 107 (Ky. 1999)).
\(^{253}\) 69 Ohio St. 3d 638, 635 N.E.2d 331 (Ohio), cert. denied, 513 U.S. 1059 (1994).
G. The Crime-Fraud Exception

Kentucky Rule of Evidence 503(d)(1) provides that the attorney-client privilege does not apply to a communication “[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” The provision presumably was intended to continue the common-law requirement that, for the privilege to apply, the client’s communication with the lawyer must not have been in furtherance of the crime or fraud. It has been observed that the crime-fraud exception does not require that the attorney know of the client’s crime or fraud.

In Steelvest, Inc. v. Scansteel Service Center, Inc., the court interpreted the crime-fraud exception as it existed under former K.R.S. § 421.210(4) to include intentional breaches of fiduciary duty within the concept of fraud. This is unremarkable to the extent that the two were the same thing at common law, although other courts have disagreed over whether a fiduciary breach is the equivalent of fraud for purposes of the crime-fraud exception. It is remarkable, however, in that Kentucky Rule of Evidence 503(d)(3), which was promulgated in 1990 and renumbered in 1992, refers only to a “crime or fraud” by the client, and does not expressly expand the exception to intentional breaches of fiduciary duty as such, or to other torts. Given the multifacility of factual and legal settings in which breaches of fiduciary duty can arise in the corporate setting, it may be worth considering whether there are some intentional breaches of fiduciary duty that do not rise to the level of fraud. The Kentucky Court of Appeals applied Steelvest to discovery in a fraud action in Morton v. Bank of the Bluegrass and Trust Co., but

254. KY. R. EVID. 503(d)(1).
the decision is inconclusive on this point since the insurance company whose communications were at issue was not a fiduciary.

In Ohio, the court held in Golner v. Ohio\textsuperscript{260} that attorney-client communications in furtherance of an ongoing crime are not privileged, and to the same effect in Hayes v. Lindquist\textsuperscript{261} as to a proposed future fraud. In State ex rel. Nix v. Cleveland\textsuperscript{262} the court held that the communication must be one “undertaken for the purpose of committing or continuing a crime or fraud.” In Kracht v. Kracht\textsuperscript{263} the appeals court applied the same rule to an attorney’s and client’s knowingly serving a notice of hearing at the opposing party’s former address. The opinion in State v. Ventura\textsuperscript{264} suggests that in Ohio, consistent with the general rule,\textsuperscript{265} the attorney need not know about or be involved in the crime or fraud so long as that is the client’s knowledge and intent. Finally, Judge Dykes’s concurring opinion in State v. Spencer\textsuperscript{266} suggests that Ohio should follow the federal approach of in camera proceedings where the crime-fraud exception is sought to be proved.

In Moskovitz v. Mt. Sinai Medical Center\textsuperscript{267} the court extended the crime-fraud exception to “unlawful” actions, in that case an insurance company’s alleged breach of the good-faith duty to settle. As a species of crime-fraud, the Moskovitz decision is perhaps best explained under a Garner fiduciary rationale because of the relationship of the insured and insurer\textsuperscript{268} and the intentional nature of the insurer’s

\textsuperscript{260} 39 Ohio C.C. 290, 19 Ohio C.C. (n.s.) 317 (1912); see United States v. Skeddle, 989 F. Supp. 890 (N.D. Ohio 1997) (planned or continuing crime or fraud); In re Bostwick, 43 Ohio App. 76, 11 Ohio L. Abs. 259, 181 N.E. 905 (Ohio Ct. App. 2d Dist. 1931), appeal dism’d, 125 Ohio St. 182, 180 N.E. 713 (Ohio 1932).

\textsuperscript{261} 22 Ohio App. 58, 5 Ohio Law Abs. 276, 153 N.E. 269 (Ohio Ct. App. 6th Dist. 1926).

\textsuperscript{262} 83 Ohio St. 3d 379, 387-88, 700 N.E.2d 12, 16 (Ohio 1998); see also In re Original Grand Jury Investigation, No. L-98-1146, 1999 WL 518837 (Ohio Ct. App. 6th Dist. July 23, 1999).

\textsuperscript{263} Nos. 70005, 70009, 1997 WL 298265, at *9 (Ohio Ct. App. 8th Dist. June 5, 1997).


\textsuperscript{265} See In re Grand Jury Proceedings (Appeal of the Corporation), 87 F.3d 377 (9th Cir. 1996); H. Lowell Brown, supra note 256, 87 Ky. L.J. at 1187-98.

\textsuperscript{266} 126 Ohio App. 3d 335, 341, 710 N.E.2d 352, 355-36 (8th Cir. 1998).

\textsuperscript{267} 69 Ohio St. 3d 638, 635 N.E.2d 331 (Ohio), cert. denied, 513 U.S. 1059 (1994).

\textsuperscript{268} In Ohio, an insurer is a fiduciary for purposes of the duty of good faith and fair dealing, the breach of which involves an intentional tort. See Motorists Mut. Ins. Co. v. Said, 63 Ohio St. 3d 690, 694, 590 N.E.2d 1228 (Ohio 1992), overruled in part on other grounds, Zoppo v. Homestead Ins. Co., 71 Ohio St. 3d 552, 644 N.E.2d 397 (Ohio 1994); Tippel v. R.C. Miller Refuse Serv., Inc. No.
tort. But it is uncertain how far the court would extend the exception, and the potential ramifications of the decision are just as broad as those of Steelvest.

Three further points bear mention. First, an Ohio court of appeals suggested in In re Grand Jury Investigation (Helnick)\(^{269}\) that when an attorney makes a good-faith claim of attorney-client privilege as a ground for refusing to comply with a subpoena, any contempt sanctions should be stayed pending appeal and the attorney should not be penalized. Second, the crime-fraud exception in most jurisdictions includes both future and ongoing crimes or frauds.\(^{270}\) Third, other jurisdictions have expanded the "crime-fraud" exception to include other intentional torts. Numerous decisions are collected in the treatises\(^{271}\) and law review articles\(^{272}\) on the crime-fraud exception.

H. The Work Product Doctrine

The work-product doctrine is created for federal litigation by Rule 26(b)(3) of the Federal Rules of Civil Procedure,\(^{273}\) Hickman v. Taylor,\(^{274}\) United States v. Noble,\(^{275}\) and Upjohn.\(^{276}\) The doctrine is created for state-court litigation by the Kentucky equivalent, Rule 26.02(3) of the Kentucky Rules of Civil Procedure\(^{277}\)


270. See Edna Selan Epstein, supra note 10, at 254-58; Charles W. Wolfram, supra note 37, § 6.4.10, at 280-81.
274. 329 U.S. 495 (1947) (civil).
277. KY. R. CIV. P. 26.02(3).
and Commonwealth v. Melear. In Ohio the corresponding provisions are rule 26(B)(3) of the Rules of Civil Procedure, and rule 16(B)(2) of the Rules of Criminal Procedure. All such provisions require that the material be prepared "in anticipation of litigation or for trial." Most internal investigations look forward to some sort of civil or criminal litigation, and the question thus arises how best to use the doctrine for protection of the client's litigation-related information.

The work-product doctrine is not as secure a protection as the attorney-client privilege, because although it has been held to apply to litigation other than that for which the material was created, the litigation in which the doctrine is asserted must have been anticipated. The Kentucky Supreme Court has twice observed that work-product from one litigation matter is not necessarily work-product in another. In Meenach v. General Motors Corp., the court so stated expressly. In Morrow v. Brown Todd & Heyburn, the court noted that the Duplan analysis has not been adopted by all courts, raising some question whether the court would apply Duplan if called upon to do so. Of course, if no litigation is anticipated, the doctrine does not apply at all.

The Ohio work-product doctrine may still have some remnants of the old English rule that attorney communications with a business organization's employee and third-party agents are subject to the attorney-client privilege. In In re Klemann, the court held that an insured's incident report that was transmitted to

279. OHIO R. CIV. P. 26(B)(3).
280. OHIO R. CRIM. P. 16(B)(2); see State v. Fairchild, 84 Ohio St. 3d 310, 703 N.E.2d 796 (Ohio 1999); State ex rel. Steckman v. Jackson, 70 Ohio St. 3d 429, 639 N.E.2d 83 (Ohio 1994) (applying work product exception of records act, O.R.C. § 149.43); see also State ex rel. Master v. City of Cleveland, 76 Ohio St. 3d 340, 667 N.E.2d 974 (Ohio 1996).
283. 891 S.W.2d 398 (Ky. 1995).
284. The court cited Terrell v. Western Cas. & Sur. Co., 427 S.W.2d 825 (Ky. 1968), which involved a bad-faith claim against an insurance company.
285. 957 S.W.2d 722 (Ky.1997).
287. See supra notes 212-26 and accompanying text (discussion of Delaware corporate attorney-client privilege).
288. 132 Ohio St. 187, 5 N.E.2d 492 (Ohio 1936); accord Breech v. Turner, 127 Ohio App. 3d 243,
the insurance company and then to the attorney was subject to the attorney-client privilege. The same conclusion might be drawn from State v. Richey, where the court suggested that a non-testifying expert’s communications may be within the attorney-client privilege. Against this interpretation must be weighed the apparent trend toward separation of the privilege and the work-product doctrine, as evidenced by Hickman v. Taylor and Professor Wigmore’s arguments. The attorney must decide whether the apparently anachronistic character of the broad English rule and its incompatibility with the modern provisions of Ohio’s rule 26(B)(4)(a) counsels against too much reliance on the attorney-client privilege in this context.

The consequences of the foregoing for an internal investigation are fairly straightforward, once the scope of the non-employee attorney-client privilege is factored into the plan of action. The attorney in an internal investigation should, in order to maximize the benefits of the work-product doctrine, obtain information and interview witnesses whose communications are clearly covered by the attorney-client privilege before proceeding to “mere witness” employees and non-employee third parties in an internal investigation. The privileged interviews will assist the attorney in identifying potential litigation, which can then be used as a predicate for later assertion of the work-product doctrine in a broader range of matters than might otherwise have been possible.

There are two further points of note. First, it may be desirable for other reasons to interview “mere witness” employees prior to interviewing certain upper management who may prove difficult or uncooperative, for whatever reason. Second, the decision of whether to mention specific potential litigation matters in any letter to employees under the Upjohn procedures is a judgment call that probably falls, in most cases, on the side of memorializing the issue among the attorneys and with upper management but not being specific with lower-level employees.

712 N.E.2d 776 (Ohio Ct. App. 4th Dist. 1998) (also applying work-product doctrine to deny production of statements); In re Heile, 65 Ohio App. 45, 18 O.O. 274, 29 N.E.2d 175 (1939). This rule appears to have had its origins in Ex parte Schoepf, 74 Ohio St. 1, 77 N.E. 276 (Ohio 1906), which has been overruled on other grounds but is still cited as good authority in Ohio. See Kenneth J. Smith, Evidence and Witnesses § 836, 44 OHIO JUR. 3D (1983).

289. 64 Ohio St. 3d 353, 595 N.E.2d 915 (Ohio 1992), cert. denied, 507 U.S. 989 (1993), abrogated in part on other grounds, State v. McGuire, 80 Ohio St. 3d 390, 686 N.E.2d 1112 (Ohio 1997); see infra notes 333-38 and accompanying text.

290. See supra notes 218-26 and accompanying text.
I. Providing Information to Non-Attorney Experts

Ethically protected information about a client should not be provided to non-attorney experts until the immediate and longer-term effects on the attorney-client privilege and the work-product doctrine have been carefully considered, and then only with the client's express, and perhaps written, consent.291 The only expert to which ethically protected information may be given with any degree of safety is a non-testifying litigation expert,292 that is, an expert who is and was initially293 "retained or specially employed . . . in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial."294 Even in that case, it is not certain that the information will be protected from disclosure in all circumstances.295 For planning purposes, it may be well to retain non-testifying, consulting experts as part of the internal investigation process, and to retain other testifying experts at the same time or as the issues become better identified and framed. Thus, for example, an attorney might have an accountant with whom to consult about the accounting issues presented in the investigation, knowing that those consultations are better protected from disclosure to opposing governmental

291. KRPC 1.6(a), OCPR, DR 4-101(C)(1).
292. The term "non-testifying litigation expert" as used in this Article is intended to distinguish this type of expert from a "non-litigation advising or consulting expert" of the client, who also may be a "non-testifying expert" but whose work is not subject to the attorney-client privilege or the work-product doctrine. This distinction is critical under the Kentucky and Ohio cases.
293. See 24 WRIGHT & MILLER ON FEDERAL PRACTICE & PROCEDURE, EVIDENCE § 5482 (1986 & Supp. 1999) (expert retained as testifying expert may not be "converted" to non-testifying expert for work-product purposes).
294. FED. R. Civ. P. 26(b)(4)(B); KY. R. Civ. P. 26.02(4)(b); OHIO R. Civ. P. 26(B)(4)(a). All three rules provide for exceptions to non-disclosure, either where the opposing party shows "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means," (federal and Kentucky rules), or where the opposing party shows that it is "unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice"(Ohio rule).
or private parties, and then later hire another accountant, auditor, or other specialist who will present testimony on those issues at trial. The expense of non-testifying litigation experts must be weighed against the attorney's general understanding of the client's matter, the time available for completing the investigation and formulating a strategy, the nature of the client's business, the apparent or ambiguous character and the complexity of the activity and alleged wrongdoing, the potential for distracting confusion or disputes among multiple independent experts, the types and depth of specialization that may be required of the experts, and the potential consequences for the client that the matter presents.²⁹⁶

In federal court, communications with a non-attorney expert are not subject to the attorney-client privilege unless the expert is acting as an agent of the attorney.²⁹⁷ An accountant's communications have been treated as privileged in that circumstance,²⁹⁸ but more often not, as where the accountant's communication did not contain client confidences²⁹⁹ or the information was prepared for or used in preparing the client's tax return.³⁰⁰ It seems likely, in view of the exceptions to

²⁹⁶ The subject of using non-testifying experts always requires mention of the ethical issues that arise when such an expert is used to help the attorney prepare a testifying expert for testimony in a hearing or trial. (Many attorneys may believe that this goes without saying, but there are no ethical principles that go without saying.) Simply put, the attorney should ask whether, in the particular context of the matter that the attorney is handling, the use of the non-testifying expert to help assess, prepare, or filter information or working theories to be provided to the testifying expert could be seen by the court or opposing parties as involving the attorney or either expert in the presentation of untruths, half-truths, or factual assumptions lacking candor and completeness. See KRPC 3.3, 3.4, 4.1, 8.3 (MR 8.4); OCPR, DR 1-102, 7-102. These ethical issues are of equal or greater importance than the strategic issue of putting any expert up with less than complete information or analysis, which opens the expert's testimony to damage on cross-examination and rebuttal.


²⁹⁸ In United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Friendly, J.), the accountant participated in client communications so that the client's accounting information could be put into a form usable by the attorney. See also United States v. Mancuso, 387 F.2d 376 (4th Cir. 1967), cert. denied, 390 U.S. 955 (1968); United States v. Judson, 322 F.2d 460 (9th Cir. 1963); United States v. Mierswicki, 500 F. Supp. 1331 (D. Md. 1980); United States v. Jacobs, 322 F. Supp. 1299 (C.D. Cal. 1971).

²⁹⁹ In re Grand Jury Proceedings (Sutton), 658 F.2d 782 (10th Cir. 1981); United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932 (1972); Himmelfarb v. United States, 175 F.3d 924 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

³⁰⁰ United States v. Cote, 456 F.2d 142 (8th Cir. 1972); In re Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Smith, 373 F. Supp. 14 (S.D. Miss.1974). In United States v. Frederick, 182 F.3d 496
rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, that more is required to make a non-testifying litigation expert an "agent" of the attorney, but what that "more" may be is beyond the scope of this Article.301

If an expert is likely to testify as a fact or expert witness in federal court, it should be assumed that anything shown to the expert will be subject to discovery.302 In Johnson v. Gmeinder,303 the court quoted the following passage from the 1993 Advisory Committee Note to the Rule 26(b)(4) amendments:

The [testifying expert’s] report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or

(7th Cir. 1999) (Posner, J.), the court held that communications with an attorney for the purpose of preparing a tax return are not subject to the attorney-client privilege. Compare United States v. Higgins, 266 F. Supp. 596 (S.D. W. Va. 1966) (attorney acting as accountant, work papers privileged) with United States v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952) (same, work papers not privileged).

301. A non-testifying expert’s “agency” for the attorney includes, at a minimum, the use of the expert solely to advise the attorney: permitting the non-testifying expert to provide advice to the client (as opposed to receiving information from the client and then using it to help the attorney understand the factual and legal issues) could create risks of unprotected communications. On the relationship of the agent to the attorney or to the legal matter in the “go-between” cases, see 1 PAUL R. RICE, supra note 148, § 4:19; compare In re Bieter Co., 16 F.3d 929 (8th Cir. 1994) (non-attorney agent whose employment included both managerial and attorney-communication duties) with In re Lindsey, 332 U.S. App. D.C. 357, 373-76, 158 F.3d 1263, 1279-82 (D.C. Cir.) (privilege may cover government attorney who served as intermediary between government official and private attorney), cert. denied, 525 U.S. 996 (1998).


otherwise protected from disclosure when such persons are testifying or being deposed.304

The federal courts disagree over whether an opposing party is entitled to see attorney opinion work product protected by rule 26(b)(3) when it has been given to a testifying expert: prohibiting such disclosure are Bogosian v. Gulf Oil Co.305 and Magee v. Paul Revere Insurance Co.,306 but permitting disclosure is Intermedics, Inc. v. Ventritex, Inc.307 During the internal investigation, providing attorney opinion work-product to a potential testifying expert should occur only where absolutely necessary.

A recent amendment adding section 7525 to the Internal Revenue Code provides extremely limited protection in a limited context to communications constituting "tax advice" between a client and "any federally authorized tax practitioner," consisting of "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney."308 This amendment is all but misleading on its face, and it is difficult to understand how or why anyone other than an individual taxpayer in the simplest and least problematic of tax matters should ever attempt to rely on it. These definitely harsh observations are based on three points. First, the protection that section 7525 purports to create applies (albeit expressly so) only in a non-criminal tax matter before the Internal Revenue Service or before a federal court.309 Second, both the historical attorney-client privilege and this new tax-practitioner protection are significantly compromised in tax matters in the first place.310 Third, the protection has no

305. 738 F.2d 587 (3d Cir. 1984).
310. The legislative history points out that the privilege may not apply where an attorney is retained to prepare a tax return, or where the information is communicated for purposes of inclusion in the return. See STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1998, 86-87 (Nov. 24, 1998).
application to other federal agencies, state agencies, or private parties. Burying these tidbits of information in the legislative history instead of stating them plainly in the statute simply creates an accident waiting to happen for any tax practitioner or taxpayer who is not familiar with the details of the attorney-client privilege, or who does not consider the availability of the communications to other federal and (presumably) state agencies.

Many states have an accountant-client privilege, usually broader than section 7525. Those privileges have their own limits: they may apply in state proceedings or in federal court a diversity case, but not in a proceeding under federal law where no federal privilege exists. Neither Kentucky or Ohio has an accountant-client privilege, however, and a recent attempt to create one in Ohio appears to have failed.

The Kentucky courts have addressed all three primary types of experts, that is, testifying experts, non-testifying experts retained for litigation, and non-litigation advising or consulting experts. Under Urban Renewal & Community

311. The legislative history states that “[t]he privilege may not be asserted to prevent the disclosure of information to any regulatory body other than the IRS. The ability of any other regulatory body, including the Securities and Exchange Commission ("SEC"), to gain or compel information is unchanged by the provision. No privilege may be asserted under this provision by a taxpayer in dealings with such other regulatory bodies in an administrative or court proceeding.” Id. at 87-88; see also Research Institute of America, RIA’s Complete Analysis of the Internal Revenue Service Restructuring and Reform Act of 1998 ¶ 5038, at 1963-65 (1998) (House report).


316. On the general differences among the categories of experts, see supra notes 291-95 and
Development Agency v. Fledderman, an expert not specially retained in anticipation of litigation or trial, and whose communications are not subject to a recognized privilege, may be called as a witness without limitation by the opposing party. The expert in Fledderman was a real estate appraiser who had examined the property for the defendant agency to appraise the property for condemnation purposes.

The Kentucky Court of Appeals held in Morrow v. Stivers that the client’s communications with a non-testifying expert retained in anticipation of litigation or trial are not subject to disclosure. There is some inaccuracy of whether the holding is based on the attorney-client privilege or the work-product doctrine. The court relied in part on rule 26.02 of the Kentucky Rules of Civil Procedure, and in part on its earlier decision in Newsome v. Lowe. Simply put, the court’s reliance on Newsome creates as many problems as it solves.

The Newsome court’s holding must be addressed in two steps, the first its holding on non-testifying experts, the second its holding on testifying experts. The expert in Newsome was first retained as a non-testifying expert, at which time he wrote an opinion letter, and only later was designated a testifying expert. First, the court reasoned that the expert “pre-litigation consultant’s” “consultative evaluation reports” are “certainly within the orbit of privileged matters.” The court relied for this proposition on Civil Rule 26.01’s reference to “any matter, not privileged,” supporting the inference that the privilege in question is the accompanying text. The word “primary” here is intended to exclude the minor variants of expert witness such as the expert whose information includes direct knowledge of the underlying facts, which are treated in most evidence texts. See Advisory Committee Note to Rule 26 Amendments, 48 F.R.D. 487, 503 (1970) (treating a “facts-only” expert as an ordinary witness).

317. 419 S.W.2d 741 (Ky. 1967).
318. Id. at 743. On the other hand, the court in Grindell v. American Motors Corp., 108 F.R.D. 94 (W.D.N.Y. 1985), that a “dual purpose” expert who worked both on a litigation matter and on product development, was subject to rule 26(b)(4)(B).
320. 699 S.W.2d 748 (Ky. Ct. App. 1985).
321. Id. at 751-52. It is not entirely clear whether the court’s terms “consultative” and “evaluation” were intended to have analytical significance: it may be that by “consultative” the court intended to suggest the pre-litigation or non-testifying aspect of the expert’s service when the report was created.
322. Id. at 752. The decisions in Raine v. Draisin, 621 S.W.2d 895 (Ky. 1981), and Daugherty v. Runner, 581 S.W.2d 12 (Ky. 1978), address only the admissibility of expert witness testimony, and their citation in Newsome is not germane to analysis, appearing rather to be a makeweight to support the court’s conclusions.
attorney-client privilege, not the work-product doctrine. Second, the *Newsome* court held that the pre-litigation report was not subject to discovery even though the expert had later been designated as a testifying expert, reasoning that so long as the opposing party was provided with the substance of facts and opinions that the expert would testify to, the rule had been satisfied.

The second holding in *Newsome* is probably vitiated in its entirety by the later decision in *Sanborn v. Commonwealth*, although anyone wanting to rely on *Newsome* will note that *Sanborn* is distinguishable on factual and (although barely) on analytical grounds. The expert in *Sanborn* was a minister; the defense attorney originally retained the minister for testimony, but later decided not to call him as a witness. The Kentucky Supreme Court held that the distinction to be drawn for purposes of the privileges under rule 503 of the Kentucky Rules of Evidence is whether the expert is a testifying or a non-testifying expert, and that since the minister was originally retained to testify, it was not contemplated that his communications would be confidential. The court cited both the opposing party’s right of cross-examination under rule 705 of the Kentucky Rules of Evidence and its decision in *Foster v. Commonwealth*, where the opposing party was entitled to obtain the facts known to the expert. Both of those conditions will exist for “converted” testifying experts who were originally retained as non-testifying experts. Thus the *Sanborn* decision creates a significant risk that the expert’s purpose at the time that discovery is sought will determine whether the expert’s information and communications, whenever they occurred, will be subject to disclosure. Put another way, a document created by a non-testifying expert may well be discoverable if that same expert is later designated to testify at a hearing or trial. If *Newsome* is relied upon the face of *Sanborn*, further caution should be observed since the holding is contrary to the rule in the federal courts, probably in Ohio, and perhaps in other states as well.

---

323. 892 S.W.2d 542 (Ky. 1994).
324. Ky. R. Evid. 503.
325. Ky. R. Evid. 705.
326. 827 S.W.2d 670, 678-79 (Ky. 1992).
327. See supra notes 297-307 and accompanying text.
328. See infra notes 330-38 and accompanying text.
The Ohio courts likewise have addressed all three primary types of experts. For a testifying expert, under City of Bucyrus v. Strauch,330 “full disclosure of their opinions and the foundation upon which they rest are [sic] essential to adequate litigation, subject to the court’s power to control the timing, scope and other protective steps.” In State v. Fears,331 the court held that statements to a psychologist were not subject to the psychologist-patient privilege, but refused to require production of a defense medical expert’s interview notes. The court did not elaborate, but the work-product doctrine provides a potential rationale for the latter holding. In other cases, the Ohio courts have held that whether an advising expert not retained for litigation purposes may disclose protected information when called by the opposing party depends upon whether the retaining party has waived the privilege in question.332 This, of course, will not be an issue for internal investigations in Ohio unless and until an accountant-client privilege is created by statute.

In State v. Richey,333 the Ohio Supreme Court noted that the state’s use of a non-testifying defense expert “could infringe” the defendant’s attorney-client privilege.334 The court cited several other states’ decisions that protect communications between attorneys and non-testifying experts,335 and Richey may suggest that the broad English rule including the attorney’s communications with the client’s non-employee agents within the attorney-client privilege is alive and well in Ohio.336 Supporting this view in dicta is State v. Post,337 where the court

---

331. 86 Ohio St. 3d 329, 715 N.E.2d 136 (Ohio 1999).
333. 64 Ohio St. 3d 353, 595 N.E.2d 915 (Ohio 1992), cert. denied, 507 U.S. 989 (1993), abrogated in part on other grounds, State v. McGuire, 80 Ohio St. 3d 390, 686 N.E.2d 1112 (Ohio 1997).
335. Two of the decisions are Miller v. District Court, 737 P.2d 834 (Colo. 1987), and State v. Mingo, 77 N.J. 576, 392 A.2d 590 (N.J. 1978).
336. See supra text accompanying notes 273-90 (work-product doctrine generally). To this must be added the caveat that if it is, there is a risk that the necessity exception of the work-product doctrine may apply in Ohio to the attorney-client privilege as well. Compare State v. Boehm, No. 73492, 1998
cited approvingly the decisions of other states protecting disclosures to polygraph experts. Supporting this view by analogy is *Foley v. Poschke*, where the court held that a client’s communications to the attorney in the presence of a private detective were privileged.

**IV. DEALING WITH THIRD PARTIES IN AN INVESTIGATION**

The law on the attorney-client relationship discussed in part II.A. of this Article boils down to a simple proposition: the lawyer for a business organization must take care in forming attorney-client relationships with constituents of the organization, and must manage the constituents’ expectations so that such relationships are formed only intentionally and where to do so is in the organization’s best interest. How does the attorney manage the expectations of the constituent? If (for whatever reason) the lawyer is faced with the constituent’s belief that the attorney represents him, what are the consequences of the lawyer’s receipt of confidential information from that constituent? In part, this is a matter of planned and straightforward communications with the constituents involved, but there are important ethical distinctions that underlie those communications, and the consequences for the business corporation if their failure results in inadvertent receipt of a constituent’s ethically protected information can be quite serious. Part IV of this Article will provide an ethical framework for planning and implementing those communications.

**A. Constituents, Ethically Protected Information, and Prospective-Client Waivers**

The ethics rules govern the attorney’s dealings with constituents of a business organization in two regards: the attorney’s dealings in general with constituents, and the attorney’s receipt of confidential information. These issues may arise in

---

337. 32 Ohio St. 3d 380, 513 N.E.2d 754 (Ohio 1987).
338. 66 Ohio App. 227, 32 N.E.2d 858 (Ohio Ct. App. 8th Dist. 1940) aff’d, 137 Ohio St. 593, 31 N.E.2d 845 (Ohio 1941).
two contexts: in the process of interviewing of the organization's employees, even where no joint representation is contemplated; and the process of deciding whether the organization's lawyer may represent a director, officer, or other employee of the organization.\textsuperscript{339}

At the outset, the rules place a higher duty on the attorney dealing with a constituent than on the attorney who is dealing with an (unrelated) unrepresented person. KRPC 1.13(d) requires that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."\textsuperscript{340} KRPC 4.3 provides, by contrast that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding."\textsuperscript{341} The difference is that the entity lawyer's duty to communicate turns on the existence of adverse interests, whereas the lawyer's duty in other cases turns on the non-client's apparent misunderstanding.\textsuperscript{342}

Second, the receipt of information from a prospective client who is not ultimately represented by the lawyer may give rise to a confidentiality or conflict-of-interest problem. Under KRPC 1.6 (current clients), 1.8(b) (clients from attorney's former firm), and 1.9(c) (as to former clients); Ohio DR 4-101(B)(2)-(3), EC 4-6,\textsuperscript{343} and Canon 9; and general agency principles\textsuperscript{344} the attorney is prohibited

\textsuperscript{339} A joint representation may be desirable in an SEC investigation, for example, where the organization's lawyer wants to be present at the SEC's examination of the personnel involved in the securities transaction. The SEC only permits the examinee and that person's attorney to be present at the examination. In securities matters, reference should be made in conflict-of-interest situations to SEC v. CSAPO, 174 U.S. App. D.C. 339, 533 F.2d 7 (D.C. Cir. 1976), aff'g without prejudice 1974 WL 432 (D.D.C. 1974).
\textsuperscript{340} KRPC 1.13(d).
\textsuperscript{341} KRPC 4.3.
\textsuperscript{342} Useful discussions of these issues may be found in John F. Savarese & Carol Miller, Protecting Privilege and Dealing Fairly with Employees While Conducting an Investigation, CORPORATE COMPLIANCE 1999 (1121 PLI/Corp. 525, Order No. B0-008W); and Kathryn W. Tate, Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection than the Model Rules Provide?, 23 IND. L. REV. 1 (1990).
from using confidential information either to the detriment of the present or former client or to the benefit of another party, including another client. If the lawyer is deemed to be representing the constituent and the constituent’s interests are adverse to those of the entity, the lawyer may be in a conflict of interest under KRPC 1.7 or Ohio DR 5-105, and in either event may be required to withdraw from the entity’s representation.

ABA Formal Ethics Opinion 90-358 addresses the confidentiality and disqualification issues that arise when information is received from a prospective client. The opinion recommends the following four steps to avoid disqualification:

1. Identify conflicts prior to undertaking representation;

2. Limit information obtained from prospective client to that necessary to check for conflicts of interest;

3. Obtain waivers of confidentiality, "[w]here practicable," and advise the prospective client that information obtained will not be confidential, and will be subject to disclosure and use according to the interests of existing clients; and

4. Screen the attorney who receives information from further disclosure, which may affect disqualification in some jurisdictions (an ethics screen is not available in Kentucky, but may be in Ohio).

A form of waiver from a constituent of a business organization is set forth in the form letters provided as part of these materials.

B. Conflicts of Interest with Organizational Constituents and Advance Waivers

The conflicts rules provide for withdrawal from all representations by an attorney faced with a conflict of interest, unless the conflict is waivable and all clients consent to the representation after disclosure or consultation. The

346. On the use of ethics screens in Ohio, see supra notes 43-50 and accompanying text.
347. A further resource, which provides several useful alternative approaches, is ABA SECTION OF LITIGATION, COMMITTEE ON PRETRIAL PRACTICE AND DISCOVERY, THE LEGAL BEAUTY CONTEST: RECOMMENDATIONS AND PROPOSED GUIDELINES FOR PRELIMINARY INTERVIEWS BETWEEN ATTORNEYS AND PROSPECTIVE CLIENTS (1996).
terminology of the KRPC differs from that of the Model Code. KRPC 1.7 speaks in terms of conflicts involving direct adversity and material limitations on the representation, and permits waiver where the "reasonable lawyer" would conclude that the other client or the representation will not be adversely affected, and the client consents after a consultation that includes explanation of the implications of the common representation and the advantages and risks involved.\textsuperscript{348} The Supreme Court of Kentucky has, however, superimposed the "appearance of impropriety" standard from Canon 9 of the ABA Model Code, formerly in force in Kentucky, as an independent ground of attorney disqualification.\textsuperscript{349} Ohio DR 5-105 speaks of conflicts involving differing interests or affecting the lawyer's exercise of independent professional judgment, and permit waiver only where it is "obvious" that the lawyer's judgment will not be affected and the client consents after full disclosure of the possible effect of the conflict on his or her judgment.\textsuperscript{350} Ohio has applied Ohio DR 4-101, EC 4-6 and Canon 9 to former-client conflict situations using a substantial-relationship test.\textsuperscript{351}

The disclosure of existing and reasonably foreseeable conflicts to the Company and/or the Directors requires a front-end assessment of the matter presented, the Company's position, and the Directors' various roles in the events that gave rise to the internal investigation, litigation, or administrative proceedings in question. Comment 6 to KRPC 1.7 observes that "[a]n impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."\textsuperscript{352} An action alleging breach of fiduciary duty by the Board as a whole may not present significant conflicts issues.\textsuperscript{353} But in an action against the Company and all Directors based upon a failure to follow generally accepted auditing standards, there

\textsuperscript{348} KRPC 1.7(a) (direct adversity), (b) (material limitation).
\textsuperscript{350} OCPR, DR 5-105(A) (undertaking representation), (b) (continuing representation). On conflicts of interest generally, see CHARLES WOLFRAM, supra note 37, ch. 7.
\textsuperscript{352} KRPC 1.7, cmt. 6. Ohio EC 5-14 to EC 5-20 are not so specific as to the reasons that a conflict may arise, but are useful to read when thinking through a conflict in an internal investigation.
\textsuperscript{353} See Bell Atl. Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993).
may be a potential conflict involving Audit Committee members that is not presented as to the other Directors. And if a Director has been specifically and personally accused of a wrongdoing and there appears to be some substance to the allegations, a non-waivable conflict may well exist. The problems are exacerbated in degree, if not in kind, where criminal proceedings are a possibility. Comment 6 to KRPC 1.7 states that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one defendant.”

Although due regard needs to be given to the frequent problems with multiple representations in criminal cases, this is not an ironclad rule, and the federal courts, the Kentucky Supreme Court, and the Ohio courts have approved conflicts waivers in criminal cases.

The practical difficulties of anticipating all potential conflicts, particularly in complex corporate and securities disputes, has led to attempts to obtain “advance waivers” by a client and prospective clients involved in a multiple representation. An “advance waiver” is in part an effort to avoid the “hot potato” rule, which states that a lawyer may not drop one client in preference for another when a conflict arises. Early advance waivers included attempts to obtain waivers of “all future conflicts” by the client to be dropped as the “hot potato,” but that approach is no longer useful to the extent that it ever may have been.

The ABA addressed the topic of advance waivers in ABA Formal Opinion No. 93-372, which imposes three salient requirements: first, the future-conflict waiver must “contemplate that particular conflict with sufficient clarity so the

354. KRPC 1.7, cmt. 6.
358. See, e.g., GATX/Airlog Co. v. Evergreen Int’l Airlines, Inc., 8 F. Supp. 2d 1182 (N.D. Cal. 1998), vacated as moot sub nom. GATX/Airlog Co. v. United States District Court, 192 F.3d 1304 (9th Cir. 1999).
359. One New York law firm’s letter consisted of about four lines, stating to the general effect that “we represent X, and if your interests become adverse to those of X or our representation of X’s or your interests becomes materially limited by the other representation, we will continue to represent X and will no longer represent you.”
client’s consent can reasonably be viewed as having been fully informed when it was given.” Second, a separate waiver with regard to the use and disclosure of information is required, since the conflicts waiver does not extend to a waiver of confidentiality (in the broad sense of “confidences” as well as “secrets”) “unless such disclosure or use is explicitly agreed to.” Third, the opinion strongly suggests that in many cases, a contemporaneous waiver may be required despite the attorney’s having obtained an advance waiver of a future conflict. Several states have addressed advance waivers as well.\(^\text{361}\)

Advance waivers have not been treated with kindness by the courts, even where the waiver is relatively specific. In Worldspan, L.P. v. Sabre Group Holdings, Inc.,\(^\text{362}\) the court held that under the Georgia Standards, which are based on the ABA Model Code, “absent informed consent, a conflict situation cannot be resolved after the conflicted representation has occurred by the law firm’s withdrawal from the least desired representation.” The court refused to enforce an advance waiver where the law firm represented a party in litigation adverse to a client in nominally unrelated state and local tax matters. The factors considered by the court included the following: (1) the advance waiver was ambiguous and did not clearly identify future directly adverse litigation against a current client, whereas representation in directly adverse litigation against another is “a matter of . . . an entirely different quality and exponentially greater magnitude, and . . . unusual”; (2) the litigation client was not a current client of the firm at the time the advance waiver was sought;\(^\text{363}\) (3) the tax client adverse in the litigation was not specifically identified; (4) information obtained in the tax representation could provide an advantage against the tax client in the litigation; (5) the effect of the firm’s access to the tax client’s information on the litigation would be “difficult, if not impossible, to predict”; (6) the disqualification issue was raised at the outset of the litigation and was not a tactical maneuver; (7) a different firm, not the firm with the conflict, was the litigation client’s lead counsel; and (8) the litigation client’s right to choose counsel was not significantly impaired because other lawyers were available.\(^\text{364}\)


\(^{363}\) This is likely to be the case in most advance-waiver situations.

A conflicts waiver, like a prospectus or offering statement, is only as good as the disclosure (or “consultation”) that it contains. The disclosure of existing and reasonably foreseeable conflicts can be provided based upon any complaint, order for investigation, demand letter, or other information that gives rise to an internal investigation. A complaint subject to the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 or the Racketeer-Influenced and Corrupt Organizations Act should provide detailed information about the nature of the claims and the various Director defendants’ alleged roles. These allegations can, in turn, be used to consider whether a conflict exists and whether the conflict is waivable.

An effective advance waiver of future unforeseen conflicts may be all but impossible to achieve in many cases, although the waiver’s life expectancy can be improved where the attorney gives careful consideration to separate representation for Directors who pose significant risks or uncertainties as to conflicts of interest. The future-unforeseen-conflict provisions of the draft conflicts letters in part VII address this problem in two ways, and to that extent are not a finished work but only a “think piece” about how to strengthen advance waivers of future conflicts. First, the drafts state that the attorney will attempt to anticipate conflicts and to avoid receiving confidences or secrets about the conflicted matter. The theory of this provision is that the severity of the conflict would be minimized, and perhaps more “reasonably” waived (although perhaps no longer “obviously” waivable if the Ohio standard is a stricter rule) where the conflicted Director is faced with “only” a waiver of the duty of loyalty, and not a waiver of the duty of confidentiality and its prohibitions on the use and disclosure of ethically protected information. The operative word here is “attempt,” since the attorney’s best-laid plans and diligent efforts may be insufficient to avoid non-waivable conflicts in a fast-moving, constantly changing investigation or a hotly disputed litigation matter.

Second, the drafts attempt, perhaps quixotically, to protect the organization’s interest in continued representation (or in the case of a Directors-only representation, to condition the agreement to advance expenses) through the Company’s statement of position that the Directors have a fiduciary obligation to avoid prejudice to the Company by helping to manage conflicts and avoiding the

disclosure of information that might render a conflict non-waivable, and ultimately to consent to the Company's continued representation by its outside general counsel in the event of a non-waivable conflict. The rationale for such an argument is that if the attorney has successfully anticipated a conflict, avoided the receipt of privileged information that is personal to the Director, and timely obtained and educated successor counsel for the Director (and has done so without other prejudice to the Director), there is no prejudice to the Director's interests. The rubs in the argument, of course, are that the attorney's continued representation of the organization may result in an arguable breach of the duty of loyalty to the Director, and whether a matter of loyalty or confidentiality, the apparent fairness of an advance waiver is compromised where the Director is subject to personal civil liability that may not be indemnifiable by the organization, and even less force where the Director is subject to personal criminal liability. But both efficiency and fairness, and arguably lawyer fidelity as well, support a broader advance waiver of loyalty where the attorney has prepared the Director for the possibility and has not received client information about the unanticipated matter creating the conflict. The author would be interested in any further research that anyone using these materials conducts into these issues, or in any non-privileged documents, descriptions or results of attempts to use these ideas, in actual practice.

C. Joint-Defense and Common-Interest Representations

The common term "joint defense" refers to two related concepts in multiple-client, multiple-party litigation. One is a "joint-client" representation in which one lawyer or firm represents multiple clients, and the other is a "common-interest" relationship in which multiple clients have their own lawyers but are working together on a matter in which they have common interests. Both may exist in the same circumstances, as where one lawyer jointly represents multiple clients who are involved in a common-interest relationship with other clients who have their own lawyers. These concepts require reference to conflict-of-interest rules in their formation and maintenance, but their greatest importance is in the protection of information subject to the attorney-client privilege or the work product doctrine that the lawyer may wish to share with other participants in an investigation or a litigation matter.

A considerable literature has developed on joint-client and common-interest analysis. The decisions on the elements of the common-interest doctrine are

368. On an attorney's duties in withdrawing from a client representation, see KRPC 1.16 and ORPC, DR 2-110.
discussed in depth in *United States v. Weissman*.\(^{369}\) *Government of the Virgin Islands v. Joseph*\(^{370}\) is an important case requiring the existence of an express agreement among the parties, but *Weissman* discusses contrary authorities. The privilege is discussed in the context of an SEC investigation in *In re LTV Sec. Litig.*\(^{371}\) There are a number of useful secondary sources as well.\(^{372}\) Reference to this material is strongly encouraged prior to forming a joint-defense or common-interest representation in a particular matter, since the law is developing rapidly and existing Kentucky and Ohio law leaves many questions unanswered.

Kentucky Rule of Evidence 503(b)(3) provides for the attorney-client privilege in a common-interest relationship. The privilege includes communications "[b]y the client or a representative of the client or the client’s lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein."\(^{373}\) This provision may be combined with Rule 503(b)(1), which applies the privilege to a client’s communication with its own attorney (and representatives of each),\(^{374}\) to provide full coverage for communications between one client on the one hand and its own attorneys, and the attorneys for another client in a matter of common interest, on the other.

Kentucky Rule of Evidence 503(d)(5) provides for an exception to the attorney-client privilege in a common-interest relationship. The privilege includes communications "[b]y the client or a representative of the client or the client’s lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein."\(^{373}\) This provision may be combined with Rule 503(b)(1), which applies the privilege to a client’s communication with its own attorney (and representatives of each),\(^{374}\) to provide full coverage for communications between one client on the one hand and its own attorneys, and the attorneys for another client in a matter of common interest, on the other.

---

370. 685 F.2d 857 (3d Cir. 1982).
373. KY. R. EVID. 503(b)(3).
374. KY. R. EVID. 503(b)(1).
client privilege, that a communication among "joint clients" that is "relevant to a matter of common interest" is not within the privilege "when offered in an action between or among any of the clients." The provision seems to assume that joint clients of the same lawyer may communicate in confidence in the presence of one another: although the rule does not specifically say so, such is the clear implication of the Kentucky Court of Appeals' statement of the common-law rule in *Taylor v. Roulstone*.

Section 2317.02 of the Ohio Revised Code does not create joint-defense or common-interest protections, but the Ohio courts might create such protection if squarely faced with the question. In *Emley v. Selepchak*, the court held that where an attorney represented two client jointly, statements made to the attorney by the two clients were not privileged. In dicta, the court quoted at length from Professor Wigmore's explanation of that rule, that there is an exception to the privilege "when the same attorney acts for two parties having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the two original parties." The later decision in *Netzley v. Nationwide Mutual Insurance Co.* quotes both Wigmore and *Emley* in dicta in holding that the statements are not privileged as between the joint clients. The decision in *Knowlton Co. v Knowlton* suggests that an attorney's communications on behalf of one client may remain privileged even if other communications on behalf of multiple clients are not privileged as among them. Finally, in *Owens-Corning Fiberglas Corp. v. Allstate Insurance Co.*, the court held that the attorney must represent both parties before statements of one party are subject to disclosure to the other party. The OCF decision cites with approval decisions from other decisions on privilege in the joint representation context, but distinguishes them on other grounds. None of these decisions so holds, but the dicta in *Emley* and *Netzley*, and the court's willingness to look to the law of other jurisdictions on point, provides some hope that in an appropriate case, Ohio would

375. *Ky. R. Evid. 503(d)(5)*.
378. 76 Ohio App. 257, 63 N.E.2d 919 (9th Dist. 1945).
379. 76 Ohio App. at 262, 63 N.E.2d at 922 (quoting 8 WIGMORE ON EVIDENCE § 2312 (3d ed.)) (emphasis supplied).
381. 10 Ohio. App. 3d 82, 10 Ohio B. 104, 460 N.E.2d 632 (Ohio Ct. App. 10th Dist. 1983).
recognize a joint-defense or common-interest representation, and protect communications between the clients and the own and other group members’ attorneys.

Where a common-interest relationship terminates in the middle of litigation, the lawyer’s possession of ethically protected information belonging to the other parties can frequently lead to disqualification, as illustrated by the leading decision in *Wilson P Abraham Construction Corp. v. Armco Steel Corp.* Related authority in *Kevlik v. Goldstein* holds that a lawyer who has confidential information obtained from a defendant in a matter of common interest with a co-defendant may not represent an adverse party against the co-defendant. The attorney managing an internal investigation can expect to see these arguments raised in motions to disqualify in contemporaneous or subsequent based on attorney-client relationships with constituents, even where those representations have been terminated by the time the litigation is filed. Such motions are sometimes filed by strangers to the representation, raising questions of standing that are beyond the scope of this Article.

The caselaw on common-interest relationships suggests that both clients may be present at the time any given client speaks to the attorneys for those clients. In the leading decision of *Hunydee v. United States*, the Ninth Circuit held that one client’s admissions, made in a meeting involving both clients and both lawyers, were subject to the privilege and could not be introduced at trial by the other client without the first client’s consent. To similar effect is *Schmitt v. Emery*, where the court held that a statement remained privileged when communicated to a co-defendant for preparation of an argument in which both parties were interested.

The joint-defense or common-interest doctrine presents a number of confidentiality problems in the context of a corporation and its directors. Where the attorney represents both the organization and one or more Directors, both the organization and the Directors will be able to assert the attorney-client privilege.

---


384. 724 F.2d 844 (1st Cir. 1984).

385. Federal Rule of Criminal Procedure 44 would suggest, at least by analogy, that a federal trial judge should inquire into former-client conflicts in criminal litigation involving corporate defendants.

386. 355 F.2d 183 (9th Cir. 1965).

387. 211 Minn. 547, 2 N.W.2d 413 (Minn. 1942).

388. See *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990); *Maleski v. Corporate Life Ins. Co.*
Where the organization and the Directors are represented by different attorneys, the joint-defense or common-interest doctrine may permit the information to remain protected at the behest of all parties to that relationship. A number of cases require the consent of all parties before joint-defense or common-interest information may be subjected to a waiver, but other courts permit individual parties to waive as to themselves without working a waiver as to other parties, and some courts have declined to require all clients to waive where there is no pending or contemplated litigation. Delaware and California law, the latter by statute, provide that a client may waive the privilege, but may not use the information against the other client. Finally, an additional layer of complications is introduced by ABA Formal Opinion No. 95-395, which suggests that the lawyer to a joint-defense or common-interest arrangement does not acquire ethical obligations to non-client participants, but may have other fiduciary obligations that might have similar consequences.

The draft letters attempt to resolve these problems by an agreement permitting each client to waive confidentiality as to information it provided, but not as to information that other clients provided, and not as to secrets that affect more than one client’s interests. That result may not be practicable in many cases, because of


390. See, e.g., In re Auclair, 961 F.2d 65 (5th Cir. 1992) (prospective-client interviews); In re Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990) (multiple representation); In re Blinder, Robinson & Co., 140 B.R. 790 (D. Colo. 1992); Western Fuels Ass’n v. Burlington N. R.R., 102 F.R.D. 201 (D. Wyo. 1984).


the information-management issues that arise. If the attorney decides not to adopt that solution, further thought will have to be given to the circumstances in which (and the information as to which) the Company and an individual Director will be permitted to waive or assert the privilege.

To the extent that a client’s right to waive or assert the privilege were curtailed by the formation of a multiple representation or joint-defense arrangement (particularly the organization’s potential loss of unilateral control over information that the directors already had a fiduciary obligation to provide to it and for its benefit), the disclosure of that fact as a detriment of the multiple representation might need to be included in the conflicts letter. That question would require a determination (not reached by these materials) whether the director’s right to control his or her own defense of a civil (or more critically, a criminal) matter is superior to his or her duty to act in the corporation’s best interests.396

D. Payment of Directors’ Fees by the Corporation

The substantive aspects of a corporation’s advancing legal fees and expenses for its directors and officers and indemnifying them for liabilities are governed by complex federal and state law beyond the scope of this Article. The ethical rules do not differentiate between mandatory and permissive advancement of expenses, and it is not entirely clear that they cover true indemnification for fees and expenses that is paid to the director and not directly to the attorney. The prudent approach is to provide the disclosure and obtain the consent contemplated by the retainer letters in these materials, recognizing that such may not literally be required by the rules. At least one state bar association has recognized the likely propriety of a corporation’s payment of its directors’ legal fees and expenses.397 Insurance carriers’ payment of fees and expenses likewise is universally familiar, although a reservation of rights by the D & O carrier may counsel (if not require) the need for consent because of the conflicts of interest that may arise,398 and a diminishing-balance policy in which the attorneys’ fees and expenses are charged against the policy limits, leaving a reduced amount available for indemnification, can create a need for careful planning of the investigation and litigation, and for equally

396. Some authorities that may assist in answering these questions are discussed in Edna Selan Epstein, supra note 10, at 171-73.
careful weighing of alternative strategies with the client.

KRCP 1.8(f) provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) Such compensation is in accordance with an agreement between the client and the third party or the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) Information relating to representation of a client is protected as required by Rule 1.6.” 399 The provision for compensation under “an agreement between the client and the third party” is a non-standard provision, which provides more flexibility where only Kentucky law applies. There is no real reason for the lawyer to omit his or her advice to the client about the third-party fee arrangements, however, and every reason to memorialize it separately. Where the law of another state is potentially applicable, the lawyer should follow the standard provisions of ABA Model Rule 1.8(f) requiring express client consent. Ohio follows the standard ABA Model Code provisions: Ohio DR 5-107(A)(1) and (2) provide that the lawyer may not “[a]ccept compensation” or “anything of value” for his legal services “from one other than the client,” 400 and DR 5-107(B) provides that the lawyer “shall not permits a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.” 401

E. Other Lawyers’ Communications with Constituents

The lawyer conducting the internal investigation may wish to control other persons’ ability to obtain information both from the lawyer’s clients and from other constituents whom the lawyer does not represent. This issue arises in two contexts: where the constituent is represented (either as part of the organization or independently), and where the constituent is unrepresented. Further complications appear based on the relationship of the constituent to the organization and the matter in question. The law in Ohio is considerably simpler than that in Kentucky, so Ohio law will be addressed first.

In Ohio, under Ohio DR 7-104(A)(1), an attorney may not communicate with a management employee or the advisors to such persons, or with an employee whose acts or omissions are attributable to the corporation, without the consent of the corporation’s attorney; consent is not required for interviews with former

399. KRCP 1.8(f) (emphasis added). See also KRCP 5.4(c) (non-interference with lawyer’s professional judgment).
400. OCPR, DR 5-107(A).
401. OCPR, DR 5-107(B).
employees. The law as to present employees is substantially to the same effect in a majority of the jurisdictions, but the jurisdictions are split on former-employee interviews. These authorities appear generally consistent with the position taken by Professor Wolfram, that different policies support the non-communication restrictions than the attorney-client privilege, and that the former ought therefore to protect a narrower class of persons.

Under KRPC 4.2, a lawyer for an opposing party or another corporate constituent may not communicate with a client of a lawyer without the latter’s

402. Supreme Court of Ohio, Bd. of Comm’rs on Grievances & Discipline, Opinion No. 96-1 (1996); Supreme Court of Ohio, Bd. of Comm’rs on Grievances & Discipline, Opinion No. 90-20, 1990 WL 640515 (Aug. 17, 1990). This rule does not apply to communications about other matters “independent” of the matter in which the client is represented, but the ethics opinion that says so urges caution in supposing that a matter is independent. Supreme Court of Ohio, Bd. of Comm’rs on Grievances & Discipline, Opinion No. 88-32 (1988).


405. CHARLES W. WOLFRAM, supra note 37, at 613.
In the organizational context, KBA Opinion E-382 held that this prohibition applies to (i) management employees, (ii) non-managerial employees whose act or omission in connection with the matter may be imputed to the organization, and (iii) employees whose statement may constitute an admission of the organization, but does not include (iv) non-managerial employees who do not fit any of those descriptions. The Kentucky Supreme Court had held likewise as to a managerial employee in Shoney's, Inc. v. Lewis. Under KRPC 4.3 and KBA Opinion E-382, the other lawyer is free to communicate with any constituent who is not represented either by the organization’s lawyer or by the constituent’s own lawyer, and who does not fit one of the three categories described in the latter opinion.

The application of KRPC 4.2 to former employees is more problematic. The opinion in KBA Opinion E-381 states that a lawyer may communicate with a former employee of an organization without consent or notification. In University of Louisville v. Shake, however, the Kentucky Supreme Court was presented with but did not decide whether an opposing lawyer’s communications with a former university board member who was on the board when matters in litigation occurred, instead resolving the case by holding that there was no showing of irreparable injury as required for a mandamus petition. The Kentucky Court of Appeals observed that KBA ethics opinions are persuasive authority in Humco, Inc v. Noble, but the question must be regarded as unsettled until the Kentucky Supreme Court addresses the former-employee issue.

---

409. 875 S.W.2d 514 (Ky. 1994).
411. Accord A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991) (followed in KBA E-381). It was suggested that the E-381 opinion might not be accepted by the Kentucky Supreme Court in William H. Fortune, Professional Responsibility, 86 Ky. L.J. 849, 869-70 & n.137 (1998). Professor Fortune is of the view that the court could extend KRPC 4.2 to certain former employees, or to all current employees.
412. 5 S.W.3d 107 (Ky. 1999).
413. 1999 WL 1207051 (Ky. Ct. App. Dec. 10, 1999) (citing Shoney’s and American Ins. Ass’n v. Kentucky Bar Ass’n, 917 S.W.2d 568 (Ky. 1996)).
In *Shoney's, Inc. v. Lewis*, the Kentucky Supreme Court held that a lawyer who violates KRPC 4.2 must be disqualified, and the information from the improper communication must be “suppressed.” In *K-Mart Corp. v. Helton*, the court held that KRPC 4.2 does not prohibit the communication where the other lawyer does not know that the employee is represented by the organization’s attorneys. The Kentucky Court of Appeals extended this principle in *Humco, Inc v. Noble*, holding that a letter from the corporation’s president copied to its in-house lawyer did not provide actual knowledge that the corporation was represented for purposes of KRPC 4.2, where the letter did not state or imply that the corporation was in fact represented. Any letter directed to an opposing lawyer by the lawyer conducting the internal investigation thus should state explicitly in its text that the organization is represented by an attorney and provide the attorney’s name, address, and other contact information. The *Shake* decision discusses in some detail the letter used in that case.

The next question is whether, and to what extent, the lawyer for the organization may request that such persons not communicate with a lawyer for an opposing party. ABA Model Rule 3.4(f) speaks to this matter directly, providing that the lawyer may not request a non-client to refrain from voluntarily giving relevant information to another party unless the person is a relative, employee or agent, and the lawyer believes the person’s interests will not thereby be adversely affected. Model Rule 3.4(f) is as much a safe harbor as it is a prohibitory provision, in that it offers guidance to the lawyer about whether an unrepresented employee may be asked not to talk with opposing parties or lawyers. The “safe-harbor” feature of the rule may permit some action to protect information in the hands of the organization’s constituents, but that does not address the question of requiring or asking such persons not to communicate with other lawyers at all, and the question is complicated by the lack of a rule 3.4(f) provision in either Kentucky or Ohio.

---

414. 875 S.W.2d at 516. The use of the suppression concept drew a dissent, and it is not entirely clear whether the court meant that the evidence could not ever be used for any purpose by the party whose (eventually former) lawyer had violated KRPC 4.2. After disqualification, the general rule is that the new lawyer for the party should not receive any information from the first lawyer that led to the disqualification in the first place.
415. 894 S.W.2d 630 (Ky. 1995).
418. ABA Model Rule 3.4(f).
There are three bodies of law in Kentucky and Ohio that bear consideration in answering the question whether to ask an organization’s constituents not to communicate with other parties’ attorneys: the ethics rules and opinions, the obstruction-of-justice laws, and the whistleblower statutes. The first two will be considered separately, and the whistleblower statutes will be treated together.

KRPC 3.4(a) provides that a lawyer shall not “[u]nlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

Kentucky did not include in its Rule 3.4, however, the provisions of ABA Model Rule 3.4(f), raising the question of whether the lack of subsection (f) is significant. KBA Opinion E-381420 suggests, despite the lack of the rule 3.4(f) provision, that the organization might enter into confidentiality agreements or seek protective orders against communications by former employees who have privileged information.

Ohio Advisory Opinion No. 92-7421 relies in part upon ABA Model Rule 3.4(f), analogizing it to Ohio DR 1-102(A)(5)’s provisions on conduct prejudicial to the administration of justice, and concluded that a government lawyer should not give “blanket instructions” to agency personnel to refuse to communicate with an attorney representing a party adverse to the agency. The opinion leaves unclear, however, whether the ethics authorities would apply Model Rule 3.4(f) by analogy to permit such instructions where the rule is literally satisfied.

Sections 524.045 and 524.050 of the Kentucky Revised Statutes, which prohibit witness tampering, apply to improperly influencing a witness as to an “official proceeding,” but the former provides that the proceeding need not be pending or even contemplated at the time of the influence. The Kentucky decisions have involved inducing a witness not to testify in an official proceeding. Kentucky Bar Ass’n v. Zeman involved a temporary suspension pending disciplinary proceedings following a federal conviction for obstruction of justice, arising from an attempt to persuade a person against testifying in an official proceeding. Forgey v. Commonwealth involved a criminal prosecution for inducing a witness to

419. KRPC 3.4(a).
422. KY. REV. STAT. ANN. §§ 524.045 and 524.050 (Michie 1999).
423. 828 S.W.2d 609 (Ky. 1992).
424. 215 Ky. 703, 286 S.W. 101 (Ky. 1926).
leave the state. The broader implications of *Averbeck v. Hall*,425 which involved an illegal contract to terminate a prosecution, suggest that it may be illegal to ask a witness not to talk voluntarily with a prosecutor or law enforcement official. The resolution of this problem is beyond the scope of these materials, but it is a significant point of caution in dealing with non-client constituents of the organization in an internal investigation.

Sections 2921.02 through 2921.04 of the Ohio Revised Code426 prohibit bribery and intimidation of witnesses, and are framed in broad terms. The bribery provision states that no person “with purpose to corrupt a witness or improperly to influence him with respect to his testimony in an official proceeding, either before or after he is subpoenaed or sworn, shall promise, offer, or give him or another person any valuable thing or valuable benefit.”427 The intimidation provision states that no person “knowingly and by force, by unlawful threat of harm to any person or property, . . . shall attempt to influence, hinder, or intimidate a . . . witness in the discharge of the person’s duty.”428 A person becomes a “witness” for this purpose as soon as he or she obtains knowledge of material facts.429 Although most of the state decisions involve more egregious conduct,430 the attorney needs to communicate carefully with a business organization’s employees to make certain that there is no suggestion of benefit or intimidation.

The federal431 and Ohio state whistleblower protection statutes may potentially apply to employees of private business organizations who may become witnesses, but the Kentucky statute does not.432 There is a narrow provision in Kentucky that


431. The identification of specific federal whistleblower protection statutes will not be undertaken here.

432. Worthy of note in general terms is the “public policy wrongful discharge,” which could include witness intimidation. *See generally* Gregory G. Sarno, Annot., *Liability for Retaliation Against At-
prohibits retaliation for giving information to a law enforcement officer.\textsuperscript{433} The Kentucky whistleblower protection act only applies to public employees.\textsuperscript{434} In \textit{Davis v. Powell's Valley Water District},\textsuperscript{435} the court held that an employee of a water district was an employee of a political subdivision within the meaning of the statute. Ohio under Ohio Revised Code sections 4113.51-4113.53, as well as other states, include both public and private employees within the whistleblower protection. An employee who communicates with the authorities about a matter within an internal investigation may be within such a statute, and should be dealt with accordingly.

V. SAMPLE FORM LETTERS FOR INTERNAL INVESTIGATIONS

\textbf{A. Availability of Form Letters and Request for Feedback}

The form letters may be obtained in WordPerfect 8.0 or Word 97 format by sending a 3.5” disk to the author or by e-mail to brewerec@nku.edu, specifying which software is preferred. The author would appreciate receiving from users, to the extent this may be done without compromising any client’s interests or disclosing ethically protected or privileged information, different versions of the letters that reflect different approaches to the problems presented in an internal investigation.

For drafting purposes, when using form letters obtained on software, the letters should be carefully “flyspecked” to remove all brackets. Brackets are used in these forms to indicate both alternative ethical provisions (some letters contain unbracketed material taken from the Kentucky Rules) and matters that require specific attention, and the presence of a bracket in a letter may indicate matter that should not be communicated outside the law firm. The author apologizes for any inconvenience that this may cause, but in support of the approach offers the general principle that no form should ever be used without a detailed review and consideration of each and every provision.


\textsuperscript{433} KY. REV. STAT. ANN. § 524.055 (Michie 1999).

\textsuperscript{434} KY. REV. STAT. ANN. §§ 61.101-61.103 (Michie 1999).

\textsuperscript{435} 920 S.W.2d 75 (Ky. Ct. App. 1995).
B. Upjohn Letters

1. Company to Corporate Counsel

This letter requests that you represent [or, confirms that you will represent] [name of client] (the "Company") in connection with an internal investigation, litigation, and administrative proceedings in [describe matter]. [This letter may also contain a request that the attorney represent one or more Directors, or investigate whether that may be possible, but such a request could later become relevant to a court's interpreting ambiguous communications that the Director claims were privileged.]

We have identified those directors, officers, and employees who may need to be asked to provide information and/or interviewed in connection with this matter. We request that you obtain that information and conduct those interviews promptly, and in a manner that will preserve the Company's ability to assert the attorney-client privilege, the work-product doctrine, and (as applicable) the joint-client, joint-defense or common-interest doctrine as to information obtained or generated in the investigation and litigation process.

[Closing paragraph and signature line.]

2. Corporate Counsel to Company

This letter responds to your letter of [date of Company to Outside Counsel letter] with specific regard to the conduct of an internal investigation, and the protection of the Company's interests under the attorney-client privilege, the work-product doctrine, and (as applicable) the joint-client, joint-defense or common-interest doctrine in that investigation and any litigation or administration proceedings. We refer to our letter of even date regarding [subject of other retainer, confidentiality, and/or conflict letters.]

Attached to this letter are form letters for communications by the Company and outside counsel with directors, officers, and employees who will be asked to provide information or be interviewed in connection with this matter. It may be useful for us to explain the legal context in which these letters will be used.

The attorney-client privilege is subject to either one or two general rules, with some variants, depending upon the jurisdiction where the privilege is asserted. The "control-group" test (presently applicable only in Illinois) protects the communications between the attorney and upper management, and the "subject-matter" test protects the communications between the attorney and those directors, officers and employees of a corporation whose communications meet the test set forth by the Supreme Court in *Upjohn Co. v. United States*. In some federal courts,
the \textit{Upjohn} test has been refined to a seven-factor test:

(1) the communication was requested by a member of the control group and made by the employee for the purpose of securing legal advice for the corporation;

(2) the employee making the communication did so at the direction of his corporate superior;

(3) because information not available from the control group was necessary for the representation of the corporation

(4) concerning specified issues;

(5) the subject-matter of the communication is within the scope of the employee’s corporate duties;

(6) the employee is told that the request is made so that the corporation could obtain legal advice, and is instructed to keep the communication confidential; and

(7) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

There are two caveats to the \textit{Upjohn} principle. First, it is unclear whether a corporate officer, director, or employee who has independent corporate authority to communicate with corporate counsel about a legal matter and act upon that advice fits literally within the subject-matter test described above. Although the answer probably is that such a person’s communications are privileged, it is prudent for communications with upper-level management that we either confirm that a written direction to handle legal matters exists (such as a job description or memo authorizing such action on an ongoing basis), or that a memo be prepared for that purpose in this matter. Second, it is unclear whether communications between the corporation’s attorney and an employee who is a “mere witness” to the actions of other persons are protected communications.

[The law of other states should be discussed where multiple states are involved.]

Based upon the above principles, we propose to proceed with the investigation as follows: [describe course of investigation that will maximize scope of the privilege and the communications that it protects, in as many jurisdictions as possible.]

Prior to each interview, a copy of the letters from the Company and from outside counsel should be provided to the interviewee. The latter letter, as drafted, includes a statement to the employee that the interviewee may wish to obtain an
independent attorney to advise him or her, and if so time will be permitted for such
an attorney to be retained. This raises three issues: first, whether the Company will
pay for any such attorneys; second, whether the time constraints of this
representation permit delays that may be occasioned by such a suggestion; and
third, whether the Company may wish either to delete the suggestion of counsel
entirely, or use it only in those cases where it is clear that the interviewee is or may
be adverse to the Company, or may be subject to individual civil liability to third
persons, or federal or state criminal or regulatory liability. [Specific
recommendations may be appropriate, depending on the level of understanding at
the time this letter is sent.]

Finally, the enclosed draft letter from us as outside counsel contains a form of
"corporate Miranda" statement in which the employee can be advised, as
appropriate, that the Company believes its interests to be consistent with, adverse
to, or uncertain vis-a-vis the interviewee. We can discuss the form that this
statement should take in light of each interviewee's individual circumstances. We
are obligated by KRPC 1.13(d) [in Ohio, "counseled by Ohio EC 5-18 and good
practice"] to inform an employee where it is apparent that the Company's interests
are adverse to those of the employee. We can discuss the tone of this letter: a
warning to employees is not required as an ethical matter, nor to protect the
Company's attorney-client privilege, but it could prove useful if the Company is
later called upon to respond to charges that unfairness somehow affected the
interviewing process or the Company's dealings with the employee.

[Closing paragraph and signature line.]

3. Company to Constituent

This letter is written to you in your capacity as [director, officer, employee] of
[name of client] (the "Company"), with regard to the Company's internal
investigation of [describe matter]. We refer to the letter of even date from [name
of outside counsel], to which you should make reference.

You are hereby directed to communicate with [name of outside counsel], who
is serving as the Company's attorney in to the above matter. [Describe interview or
questionnaire process, as appropriate; if the interviewee is to communicate with a
paralegal or expert working subject to the attorney's direction and control, that
should be stated here.]

The Company's purpose in having you communicate with [name of outside
counsel] is to secure legal advice with regard to this matter, and we direct you to do
so in furtherance of that purpose. The subject-matter upon which you will
communicate with the Company's attorney is believed to be within your corporate
duties, although you should communicate with the attorney regardless of whether you believe that to be the case.

This matter is highly confidential, and you should not communicate with anyone inside our outside the Company about this matter, other than General Counsel for the Company [or outside counsel], or your own attorney. You should respond to any questions about your communications with the Company’s attorney, that such information is privileged and you will not disclose it, and you should inform the Company’s attorney and the undersigned immediately (particularly if a court order is involved)

If you retain your own attorney in this matter, please so advise us immediately so that the Company’s attorney may communicate with him or her. The Company hereby directs you that you should be careful to protect the Company’s interests in the confidentiality of all information belonging to the Company, and that you should ask your attorney to communicate with the Company’s attorney if there is a need to provide information about the Company to third parties or the government. This needs to occur so that the Company’s attorney can protect the Company’s interests in the information, and the failure to follow this instruction could have significant consequences both for the Company and for you.

Please direct any questions about this letter to [General Counsel or corporate officer], or to the Company’s outside attorney.

[Signature line]

4. Corporate Counsel to Constituent

We have been asked to serve as attorneys for [name of client] (the “Company”) in an internal investigation and litigation or administrative proceedings connection with [describe matter]. The Company has asked that we obtain information from or interview you with regard to the above matter, and we refer to the letter of even date to you from [name of person writing letter for the Company].

Your interview is presently scheduled for [date, time and place]. We have prepared a questionnaire to expedite that process, which may require that you obtain information from files and records in this matter. We would appreciate your bringing the completed questionnaire and any such information with you to the interview.

The purpose of our interview is to obtain information relating to matters within your corporate duties. We may also ask you questions about matters that you observed while in the exercise of your corporate duties. It is necessary that we interview you about these matters in representation of the Company’s interests. As the Company explains in its letter, we represent the Company, and are interviewing you so that we may provide the Company with legal advice and protect its interests
this matter. Conversely, we do not represent you, and this interview is not intended to determine whether we might represent you in the future. You may wish to obtain legal counsel, and if you do, we will be happy to communicate with your attorney on an expedited basis so that this investigation may proceed as quickly as possible. We ask that you make this determination as far in advance of the interview as practicable.

Any information that you may provide to us as the Company’s attorneys may be subject to the attorney-client privilege at the Company’s election, but since we are not your attorneys, you will not be able to claim the privilege for yourself. Whether the information you provide is consistent with or adverse to your interests, the information may be used to protect or assert the Company’s interests in this matter, either in relation to third parties or in relation to you. The Company has directed us to advise you that [state the Company’s position with regard to its intended use of information].

[Closing paragraph and signature line.]

C. Letters Covering Interviews with Represented Persons

1. Directors-Only Counsel’s Letter Confirming Blanket Permission for Interviews with Constituents

This letter pertains to our proposed interviews with certain directors, officers, and employees of [name of corporation] (the “Company”) in our capacity as attorneys for [names of client Directors] (the “Directors”).

[Kentucky, Model Rules] Rule 4.2 of the Kentucky Rules of Professional Conduct provides that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” We understand that the Company is willing to have us interview any and all directors, officers, and employees of the Company on behalf of the Directors whom we represent, and request your written permission so that we may comply with our ethical obligations.

[Ohio, Model Code] Disciplinary Rule [“DR”] 7-104(A)(1) of the Ohio Code of Professional Responsibility provides that “[d]uring the course of his representation of a client a lawyer shall not (1) Communicate with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent

436. This letter ordinarily will be directed to General Counsel for the Company.
of the lawyer representing that party, or is authorized by law to do so.” We understand that the Company is willing to have us interview any and all directors, officers, and employees of the Company on behalf of the Directors whom we represent, and request your written permission so that we may comply with our ethical obligations.

Some interviewees probably will not be persons “having managerial responsibility on behalf of” the Company, or persons “whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.” In such cases, written permission to interview them may not be ethically required, but we believe that permission for all interviews will permit the Company and the Directors to avoid having to address such questions unnecessarily.

We look forward to hearing from you, and ask that you call the undersigned if you would like to discuss the foregoing.

[Signature Line]

2. Directors-Only Counsel’s Letter Requesting Interviews with Constituents Deemed Represented by Company Counsel

This letter pertains to our proposed interviews with certain directors, officers, and employees of [name of corporation] (the “Company”) in our capacity as attorneys for [names of client Directors] (the “Directors”). We refer to the list of proposed interviewees attached to this letter [if it is proposed to use questionnaires, those should be attached].

[Kentucky, Model Rules] Rule 4.2 of the Kentucky Rules of Professional Conduct provides that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” We understand that the Company is willing to have us interview the persons on the attached list, and request your written permission so that we may comply with our ethical obligations.

[Ohio, Model Code] Disciplinary Rule [“DR”] 7-104(A)(1) of the Ohio Code of Professional Responsibility provides that “[d]uring the course of his representation of a client a lawyer shall not (1) Communicate with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent of the lawyer representing that party, or is authorized by law to do so.”

437. This letter ordinarily will be directed to General Counsel for the Company.
understand that the Company is willing to have us interview the persons on the attached list, and request your written permission so that we may comply with our ethical obligations.

Some of the persons on the list may not be persons “having managerial responsibility on behalf of” the Company, or persons “whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.” In such cases, written permission to interview them may not be ethically required, but we believe that permission for all interviews will permit the Company and the Directors to avoid having to address such questions unnecessarily.

We look forward to hearing from you, and ask that you call the undersigned if you would like to discuss the foregoing.

[Signature Line]

D. Pre-Consultation Letter Waiving Disclosure of Ethically Protected Information (Confidences and Secrets)

1. Letter to Existing Client

As you know, we are attempting to determine whether we may properly represent both your [or “the Company”] interests and the interests of [prospective client] in connection with [describe matter]. This involves a two-step process, in which we first obtain and disclose to all clients and prospective clients the information necessary to permit each to decide whether to consent to a joint representation, and in which, second, each client and prospective client either consents (or does not consent) to that representation. This letter pertains to the first step, and specifically to the need for disclosure of certain information belonging to you [or “the Company”] that may be subject to protection under Rule 1.6 of the Kentucky Rules of Professional Conduct (“Rule” or “KRPC”) as the information relating to our representation of you [or “the Company”] as a client [under Disciplinary Rule 4-101 of the Ohio Code of Professional Responsibility as confidences or secrets belonging to you [or “the Company”] as our client].

Please review the attached draft letter to [prospective client], with particular

438. Although the approach would create marginal risks for the lawyer, this information may be delivered orally, and the letter may be omitted, if the client signs off on a final draft of the conflicts letter sent to the prospective client.
attention to the information belonging to you [or "the Company"] that may be subject to protection. If you are [or "the Company is"] willing to consent to the disclosure of that information to [prospective client] and the use of that information in the future, please indicate your [or "the Company’s"] consent in the space provided at the end of this letter. If you are [or "the Company is"] not so willing, please advise us so that we may decide how to proceed further.

The ethical standard applicable to multiple-client representations, KRPC 1.7, requires that we consult with you [or "the Company"] as to the implications of the proposed joint representation and the advantages and risks involved, and it is our practice to include consultation on the effect on the attorney-client privilege. [Ohio, DR 5-105(C), "full disclosure of the possible effect of the representation upon the attorney’s exercise of independent professional judgment on behalf of each” client.] At this stage, this involves, in part, the disclosure of the information belonging to you [or "the Company"]. In the event that you do not [or "the Company does not"] wish to disclose that information, or any part of it, and to permit the use thereof in connection with our representation of [prospective client], we will need to decide whether the ethical standards will permit us to seek the consent of [prospective client] without disclosing that information, or whether we will be unable to include [prospective client] in the proposed joint representation.

We will undertake further consultation on the use and disclosure of information relating to the representation [Ohio, “confidences and secrets”] in our separate letter involving conflicts of interest, in the event that we are able to proceed toward a joint representation of your and [prospective client’s] interests.

[Closing paragraph and signature line.]

Consent to Disclosure and Use

I have reviewed the attached draft letter to [other person or entity], and [if applicable, “on behalf of the Company in my capacity described below”] consent to the disclosure of the information belonging to me [or "the Company"] that may be subject to protection as confidences or secrets of a client or prospective client, and to the use thereof in the proposed joint representation of [prospective client]. I further consent to the disclosure of such information on behalf of [other person or entity], in the event that the proposed joint representation is formed (and so long as it may continue) to third parties, including private and governmental persons and administrative and judicial tribunals.

Dated this _____ day of ______________________, 20___.

[Client’s Signature Line]
2. Letter to Proposed Client

As you know, we are attempting to determine whether we may properly represent both the interests of our existing client [name of client: this letter may involve either Company-Director representation or multiple-Director representation; where applicable, add (the "Company") and your interests in connection with [describe matter]. This involves a two-step process, in which we first obtain and disclose to all existing and prospective clients the information necessary to permit each to decide whether to consent to a joint multiple-client representation, and in which, second, each client and prospective client either consents (or does not consent) to that representation.

We have not yet obtained from you information necessary to the resolution of these questions about representation because of the ethical standards applicable to our receipt and disclosure or use of information belonging to a client, prospective client, or third person. This letter pertains to whether and under what circumstances we will obtain information from you, whether you will consent to the disclosure of that information to [name of existing client] and its use in our future representation of [name of existing client], and whether you will consent to our continued representation of [name of existing client] and related use and disclosure of information in the event that the decision is made that we will not represent you in this matter. To the extent that your alternatives may include separate representation by another attorney, you could obtain legal representation in this matter without needing to disclose your confidential and secret information to any other person or entity, including us.

[If (where contractually and ethically permissible) the Company has conditioned payment of legal fees and expenses on the directors’ use of the Company’s counsel or the directors’ agreement to use as few outside counsel as possible, it may be appropriate to point out the advantages of disclosure but to conclude that the choice is the prospective client’s.]

Our preliminary investigation into the facts of this matter suggests that there may be no conflicts of interest in our representation of [name of existing client] and you, or that if there are, it would be ethically proper for us to seek waivers of the

439. A written consent to disclosure is preferable in dealing with a prospective client, and a written waiver of later representation of another person or entity to which disclosure was made is highly desirable. Cf. KRPC 1.5(b), Ohio EC 2-19 (written fee agreement required where lawyer has not regularly represented the client). References to an “existing client” may be replaced with references to another prospective client where none of the persons or entities is an existing client.
conflicts from all persons or entities involved. [If it is apparent that there may be waivable conflicts, those should be described and explained here.] You need to decide whether any potential conflicts that have been identified thus far, or the possibility that conflicts may appear in the future, make you unwilling to disclose information in pursuance of the proposed joint representation, or whether you are willing to provide information that could later be disclosed or used in connection with our representation of [name of existing client] in the event that we do not represent your interests. You may, for example, know facts that you would not want to have disclosed to [name of client] or to have disclosed or used in its representation, in which case you would not want to provide that or any other information to us, nor would you want to pursue a joint representation any further.

Rule 1.6 of the Kentucky Rules of Professional Conduct ["Rule" or "KRPC"] requires that a lawyer maintain information relating to the representation of a client in confidence [Disciplinary Rule ["DR"] 4-101 of the Ohio Code of Professional Responsibility requires that a lawyer maintain the confidences and secrets of a client], and that the lawyer not disclose or use such information except in certain defined circumstances, one of which is that of client consent after full disclosure. Similar rules apply to a prospective client (your present status in relation to us) to the extent that ethically protected information is [Ohio, "confidences and secrets" are] provided to the attorney during the process of establishing the representation. A prospective client’s information similarly cannot be used later in the representation of another client (such as [name of client]), unless the prospective client consents after full disclosure. The nature of the present investigation and the terms upon which the Company is proposing a possible joint representation are such, however, that these protections may not be available to you if it is decided that we will not represent your interests.

Our existing client [name of existing client] has agreed to permit us to attempt to form a multiple representation that includes our representation of your interests, but only upon the condition that we take the steps necessary to protect its interests. Specifically, [name of existing client] requires that we be permitted to continue representing [name of existing client] in the event that the decision is made that we will not represent you, and to disclose and use information received in the process of investigating the possibility of multiple representation. For present purposes that means that we cannot obtain confidential or secret information from you unless you consent to the disclosure of that information to [name of existing client] and also agree to waive any objection to our later use of that information during our representation of [name of existing client] in this or in other matters. This waiver applies, not only if we do represent you in a joint representation with [name of existing client], but also if we do not represent you in this matter.

With regard to the disclosure and use of any information that we may receive
from you, we can state at present that it would be our duty, as instructed by [name of existing client] to disclose and use any and all information received from you to the extent necessary for the representation of [name of existing client's] interests. We cannot describe more particularly the potential significance of our later disclosure or use of information in our representation of [name of existing client] because, of course, we do not know what information you have, nor do we yet know what would need to be disclosed to move forward in the multiple-representation process. It may be that the information would not be adverse to you, but it may be that the information would be adverse to you, such that its later disclosure or use could be harmful to your interests. If you now believe that the latter is the case, as noted above we believe it would be inappropriate for us to obtain any information or to address a multiple representation any further. Otherwise, you may wish to obtain the advice of an attorney on the question whether to attempt to form a joint representation with [name of existing client].

Please consider carefully whether you want to provide information to us in these circumstances, including most particularly the need for a waiver of our disclosure or use of the information in our representation of [name of existing client]. If you decide to provide the information to us, consent to its disclosure to and use for [name of existing client], and provide a waiver, we ask that you so indicate by signing this letter in the space provided. If you decide to obtain independent advice on this issue, we ask that you have that attorney communicate with us expeditiously, and in any event no later than [deadline], so that we may decide how to proceed.

[Closing paragraph and signature line.]

Agreement to Provide Information, Consent to Disclosure and Use, and Waiver as to Use of Information

I have reviewed the foregoing letter and considered whether to provide information to [name of firm] that may constitute ethically protected information belonging to me, in connection with a potential joint representation with [name of existing client] in this matter. I consent to the disclosure to [name of existing client] and to third parties, including private and governmental persons and administrative and judicial tribunals, of any information that I provide to that firm or its attorneys. I further waive any and all objections to the use of that information for the representation of [name of existing client] in this or any other matter. Finally, I further consent to the continued representation of [name of existing client], and waive any and all objections of conflicts of interest. These consents and waivers are fully applicable not only where [name of firm] represents my interests in a joint representation with [name of existing client], but also in the event that
E. Conflicts Letters

1. Initial Conflicts Letter Waiving Conflicts of Interest (Company and Directors)

This letter pertains to our representation of [name of client] ("the Company") and our potential joint representation of one or more of the Directors to whom the letter is addressed, and possibly additional Directors, in connection with [describe matter]. We will provide the consultation [Ohio, "disclosure"] that is necessary and desirable for your evaluation of the proposed representation, and if appropriate, your consent thereto. We also will address the question of possible termination of the representation of clients other than the Company based upon future contingencies, for which we also will request your consent. We do not now anticipate the need for any such termination, but the Company has directed that we provide for that possibility at the outset.

As you know, we have represented the Company as outside general counsel [describe nature, scope and duration of representation], and represent or have represented [describe any present or former Director representations]. We advise you that we are not presently aware of any facts that would raise actual conflicts of interest, either now existing or reasonably foreseeable, which would interfere with our ability to effectively represent each of you [modify to the extent that potential conflicts are apparent, and explain in body of letter]. It is possible for conflicts of interest to arise among multiple clients of the same attorney or law firm, whatever the nature of the matter, and internal investigations and corporate or securities litigation are not exceptions. The purpose of this letter is to ensure that you are fully informed of all conflict situations that might arise in this representation, and further to advise you of the ethical standards protecting confidential and secret information that are inherent in this proposed representation. Upon that basis, you may then decide whether it is in your best interest for us to represent your interests along with those of the Company.

440. This exemplar assumes that the outside attorneys are already representing the Company as a client.
Multiple Representation

[Kentucky, Model Rules.] The ethical guidelines that control a law firm’s representation of multiple clients are set out in Rule 1.7 of the Kentucky Rules of Professional Conduct ("Rule" or "KRCP"). Rule 1.7 provides that an attorney may not represent a client if that representation is directly adverse to that of another client, or if the representation will be materially limited by the lawyer’s responsibilities to another client, a third person, or the lawyer’s own interests. The client’s consent to a multiple representation may be sought if “the lawyer reasonably believes the representation will not be adversely affected,” and if the client consents after a consultation that includes an “explanation of the implications of the common representation and the advantages and risks involved.” It is our practice also to include consultation on the effect on the attorney-client privilege of the proposed joint representation, which is under a separate heading in this letter.

[Ohio, Model Code.] The ethical guidelines that control a law firm’s representation of multiple clients are set out in Disciplinary Rule ["DR"] 5-105 of the Ohio Code of Professional Responsibility. Those standards provide, in summary, that an attorney shall decline or withdraw from representation of a client “if the exercise of his independent professional judgment is behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment.” If the multiple representation may result in an adverse effect on the attorney’s judgment, the attorney may represent the multiple clients “if it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effect of such representation on the exercise of his [the lawyer’s] independent professional judgment on behalf of each. [Alternatively, DR 5-105 may be quoted in full or in pertinent part.]

The scope of the matter in which this multiple representation is proposed, and the facts to which we apply the above standards in this matter may be summarized as follows. [State scope of matter and known facts, identify unknown facts that may raise conflict concerns, and explain potential conflicts arising from either. In Kentucky and Model Rules jurisdictions it is required, and in Ohio and other jurisdictions it is recommended, that this discussion include the implications, advantages, and risks of the common representation.]

Non-Existence [Existence] of Present Conflict of Interest

Based upon the above information, we have no information suggesting that a conflict of interest exists or is likely to arise in our representation both of the Company and of yourself. [Alternatively, explain existing and reasonably foreseeable conflicts of interest, and state and explain the conclusion that it is “reasonable” to conclude (Kentucky, Model Rules) or “obvious” (Ohio, Model
Code) that the attorney can represent the interests of all clients. It is possible, of course, that in the course of an internal investigation or litigation, new facts could come to light that would create an actual conflict or increase the potential for conflicts to arise still later. If an actual conflict were to arise between the interests of the Company and any of the Directors, under the above standards we might potentially have to withdraw from representing all clients in this matter, including the Company.

The Company has determined, in the exercise of the Board of Directors’ business judgment, that it is willing to advance expenses to the Directors in this matter, conditioned upon the representation being conducted in the most efficient manner possible given the ethical standards applicable to conflicts of interest. [If advance of expenses is mandatory but there are legal standards or guidelines for the advance, those should be stated as the ground for any proposed or continued-representation provisions.] The Company accordingly has determined that it will advance expenses conditioned on the Directors’ acceptance of representation by our firm, which also represents the Company as outside general counsel. The advance is conditioned upon the Directors’ waiver of existing and reasonably foreseeable conflicts of interest as described in this letter, and is further conditioned upon the Directors’ understanding and agreement that, in the event of a future conflict that has not been or cannot be waived, the Company’s position will be that we would continue to represent the Company and those Directors as to whom no conflict exists. As to conflicts that are not now reasonably foreseeable, the Company has directed that we point out to the Directors the Company’s position that their fiduciary duties to the Company may well counsel, if not require, that the Directors provide waivers of conflicts to the extent that may be accomplished under the applicable ethical standards, and that it will request such a waiver to the extent that any now-unforeseeable conflict arises in the future.

It is possible that other internal investigations, other civil litigation, administrative proceedings, or even (although we regard this as unlikely) criminal investigations and proceedings could arise in the future in connection with this matter. Similarly, it is possible that conflicts of interest among the Company and one or more Directors may arise out of those new circumstances. The existence of conflicts of interest must be addressed at all stages of a matter, and we will do so if and as the need arises. The Company has directed that we make clear, however, that if a non-waivable or unwaived conflict developed as to one or more Directors, we would withdraw from the representation of any such client and continue to represent the Company and the remaining Directors. The proposed consent to our continued representation of the Company and non-conflicted Directors includes such scenarios as well as continued representation in the present internal investigation and litigation. The Company believes that it is appropriate to leave
until such later time the question of an advance of expenses on behalf of any Director as to whom there arises a non-waivable conflict of interest, but has directed us to caution that such an advance should not be assumed.

One feature of a joint representation, which arises from the law governing the attorney-client privilege, the work product doctrine, and ethical protection of information, is that information may be shared among the multiple clients for purposes of facilitating the representation. The law applicable to the sharing of information is known as the joint-client, the joint-defense, or the common-interest doctrine. There is some uncertainty in this law as it affects the receipt and use of information, particularly with regard to whether one client may or all clients must agree to waive the attorney-client privilege or the work-product doctrine as it applies to information belonging to one or more clients, and with regard to how these rules apply in litigation and non-litigation matters. The Company has agreed to permit a joint representation only so long as its decisions govern the disclosure or use of all information that we obtain in the representation. [Alternative: The present joint representation is proposed to be conducted, and an agreement to be represented therein would include, an agreement that, regardless of whether litigation or non-litigation matters are involved, the protection of information provided by one or more clients would be subject to waiver by that client or clients, and the protection of information otherwise created or obtained would be subject to waiver only by all clients involved in the representation at the time of the waiver.]

We advise the Company and the Directors that, as facilitated by the joint-client, joint-defense or common-interest doctrine, there may be unrestricted disclosure and common use of any information learned in the course of the representation from the Company, a Director, or other persons, to the other clients who are part of the proposed multiple representation. This circumstance raises the possibility that one client might not be as complete or candid with us as he or she would have been if separately represented, although we do not regard this as likely based upon our understanding of the existing facts and the facts that are likely to appear. If you believe that the proposed multiple representation would impair your willingness to provide or our ability to obtain significant information from any source, you should advise us of that belief now, in which case we would not be in a position to represent you. If you should come to such a belief in the future, we request that you so advise us promptly, withholding any further information relating to the representation until we have assessed whether we should receive such information from you. We would expect to withdraw from the representation of any Director who held that view, and would continue to represent the Company and any Director who did not hold that view. Obviously such concerns sometimes arise from
miscommunications or misunderstandings, and it would be in your interest, and indeed in the interest of all concerned, to make sure that such a belief was both reasonable and warranted before any such action were taken.

Finally, we advise the Company and the Directors that despite the consents, waivers, and agreement proposed in this letter, a court might disqualify us from representing the Company or one or more Directors in the event of a conflict of interest involving another of the clients included in the proposed multiple representation. There is further the potential that unforeseeable conflicts of interest could be non-waivable, in which event the ethical standards or a court applying those standards might require our withdrawal from the representation from the Company or one or more of the other Directors.

Confidential Information and Request for Consent to Disclosure and Use of Information in the Event of Withdrawal

[KRPC, Model Rules.] The ethical standards that control an attorney’s handling of confidential or secret information received from one or more of multiple clients, or from other sources during the course of their representation, are set out in Rule 1.6 and 1.9(c) of the [name of jurisdiction] Rules of Professional Conduct. Rule 1.6 provides, in pertinent part, that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation,” and except in certain circumstances not now germane. Rule 1.9(c) further prohibits the use of a former client’s information for the benefit of a third person or to the detriment of the former client. This includes information that is “confidential” in the sense that it is subject to the attorney-client privilege, as well as other information that the attorney learns relating to the representation, regardless of its source.

[Ohio, Model Code.] The ethical standards that control an attorney’s handling of confidential or secret information received from one or more of multiple clients, or from other sources during the course of their representation, are set out in Disciplinary Rule [“DR”] 4-101 of the ABA Model [or name of jurisdiction] Code of Professional Responsibility. DR 4-101 provides, in summary (with certain other exceptions not now germane), that a lawyer shall not knowingly reveal or use a client’s confidence or secret to the client’s detriment or for his own or a third person’s advantage, but that the lawyer may reveal or use such information where the client consents after full disclosure. [Alternatively, DR 4-101 may be quoted in full or in pertinent part.] Information received that is “confidential” refers to information protected by the attorney-client privilege. Information received as a “secret” may or may not be secret as that term is commonly used, but refers to other information obtained or gained during the representation that the client has
requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.

The above ethical protections of client information are such that, where an attorney withdraws from representation of one of multiple clients because of a conflict of interest that appears after the representation has begun, the attorney’s possession or use of that now-former client’s confidential and secret information may require that the attorney withdraw from the other clients’ representation as well. Just as the Company has conditioned its advance of expenses on a waiver of future conflicts, so the Company has conditioned that advance on a waiver that would permit us to use your confidential and secret information in its continued representation.

[The potential significance of the disclosure or use of client confidences and secrets should be explained here as to existing or reasonably foreseeable conflicts that have been identified.]

As to conflicts that are not now reasonably foreseeable, we cannot now determine the potential significance of the later disclosure or use of information in our representation of the Company or another Director. It may be that the information would not be adverse to you, but it may be that the information would be adverse to you, such that its later use could be harmful to your interests. We will make every effort consistent with the proper representation of all clients in the multiple representation to anticipate such conflicts, to avoid receipt of confidences and secrets in an effort to manage conflict and withdrawal issues without prejudice to our clients. As stated above with regard to conflicts of interest, the Company has directed that we point out to the Directors the Company’s position that their fiduciary duties to the Company may well counsel, if not require, that the Directors provide waivers of conflicts to the extent that may be accomplished under the applicable ethical standards, and that it will request such a waiver to the extent that any now-unforeseeable conflict arises in the future.

As to existing or reasonably foreseeable conflicts of interest as described above, therefore, we request that you consider whether you will provide a waiver of the protections of KRPC 1.6 and 1.9(c) [ABA Model [or name of jurisdiction] Code, DR 4-101]. As to conflicts of interest that are not reasonably foreseeable at this time, we will attempt, where possible, to anticipate circumstances that may raise conflicts concerns as this matter moves forward, and to avoid obtaining from you confidential or secret information that bears on such matters. In the event that unforeseeable conflicts present themselves in the future, we will proceed to resolve those in a timely and appropriate manner.
Possibility of Additional Directors as Clients

At the present time, it has been determined that certain Directors will not be included in the initial group of the Company and Directors who will be part of the multiple representation. It may be determined, as our investigation continues, that it is appropriate to consider including them in the multiple representation. This is not because of any belief that any of those other Directors may have engaged in any wrongdoing or that any conflict exists or may arise, but simply is intended to permit a decision to be made about their joint representation based on more complete information than we have at the present time. [Modify as needed to describe circumstances accurately.]

The possible addition of other Directors to the group of clients proposed to be represented may affect the question of your consent to multiple representation and the waiver with respect to confidential information, as discussed above. We contemplate that any such addition would occur under substantially similar circumstances to those described in this letter for the present group of proposed clients. We do not know, and therefore cannot tell you, what the precise circumstances would be, nor can we tell you what the facts will be at that time, since those facts remain to be determined. We do ask, however, that you consider any possible effect of the later addition of other Directors to the group of clients upon your desire and willingness to be a part of the group. We further ask that if you wish to participate in the multiple representation, you advise us whether there are any Directors with whom you would not be willing to be represented, so that we may consider that fact at this time.

Independent Advice of Attorney

You may wish to obtain the independent advice of an attorney as to whether to enter into this multiple representation. The Company has indicated that it will/will not pay for such advice as part of its advance of expenses. Please keep in mind the exigencies of time in this matter, and advise us no later than [deadline] of your decision about whether you will join in the multiple representation as a client.

Conclusion

We believe, based upon our present information and the circumstances as described above, that since the interests of the Company and the above Directors appear not to be in conflict, there are substantial benefits to be gained from a multiple representation under the terms described above. Representation of non-conflicting interests by a single law firm should result in the more effective and efficient conduct of an internal investigation and litigation, than would be the case if each Director were to obtain separate attorneys. We ask, however, that you carefully consider the matters discussed in this letter in deciding whether it is in
your best interest to agree to the multiple representation offered by the Company in this matter. We are available to discuss this matter with you as you may wish, to answer any questions that you may have, and to provide you with any additional information you feel would be helpful in order for you to make a fully informed decision. Of course, should you decide it is in your best interest to obtain separate counsel, we will cooperate with and assist your new counsel to the fullest extent possible.

[Closing paragraph and signature line.]

Company Consent to Multiple Representation

The Company, by its duly authorized officer, has reviewed and considered the foregoing letter, and have had the opportunity to obtain all information and advice that it believes is necessary to permit me to make an informed decision about the joint representation proposed in the letter. The Company hereby consents to the joint representation and the conflicts of interest, and the disclosure and use of confidential information, all as described more fully in the letter.

Dated this ___ day of _____________________, 20__.
[Signature Lines for the Company]

Director Consent to Multiple Representation, Disclosure and Use of Information, and Continued Representation

I have reviewed and considered the foregoing letter, and have had the opportunity to obtain all information and advice that I believe is necessary to permit me to make an informed decision about the multiple representation proposed in the letter. I hereby request that the Company provide me with joint representation according to the terms proposed, consent to the conflicts of interest, the disclosure and use of confidential information, and the continued representation of the Company and other Directors, all as described more fully in the letter.

Dated this ___ day of _____________________, 20__.
[Signature Lines for Directors]

2. Initial Conflicts Letter Waiving Conflicts of Interest (Directors Only)441

This letter pertains to our potential representation of one or more of the

441. This exemplar assumes that the outside attorneys are not yet representing any Director as a client.
Directors to whom the letter is addressed, and possibly additional Directors, in connection with [describe matter]. We will provide the disclosure that is necessary and desirable for your evaluation of the proposed representation, and if appropriate, your consent thereto. We also will address the question of possible termination of the representation of one or more Directors as clients based upon future contingencies, for which we also will request your consent. We do not now anticipate the need for any such termination, but the Company (in connection with its advance of expenses and indemnity agreement in this matter) has directed that we provide for that possibility at the outset.

As you know, we have not represented any of the Directors of the Company in any matter [or, describe nature, scope and duration of any representation]. Among new clients, it nevertheless is possible for conflicts of interest to arise among multiple clients of the same attorney or law firm, whatever the nature of the matter, and internal investigations and corporate or securities litigation are not exceptions. We advise you that we are not presently aware of any facts that would raise actual conflicts of interest, either now existing or reasonably foreseeable, which would interfere with our ability to effectively represent each of you [modify to the extent that potential conflicts are apparent, and explain in body of letter]. The purpose of this letter is to ensure that you are fully informed of all conflict situations that might arise in this representation, and further to advise you of the ethical standards protecting confidential and secret information that are inherent in this proposed representation. Upon that basis, you may then decide whether it is in your best interest for us to represent your interests along with those of the other Directors.

The scope of the matter in which this multiple representation is proposed, and the facts to which we apply the above standards in this matter may be summarized as follows. [State scope of matter and known facts, identify unknown facts that may raise conflict concerns, and explain potential conflicts arising from either. In Kentucky and other Model Rules jurisdictions it is required, and in other jurisdictions it is recommended, that this discussion include the implications, advantages, and risks of the common representation.]

**Multiple Representation**

[Kentucky, Model Rules.] The ethical guidelines that control a law firm’s representation of multiple clients are set out in Rule 1.7 of the Kentucky Rules of Professional Conduct (“Rule” in “KRCP”). Rule 1.7 provides that an attorney may not represent a client if that representation is directly adverse to that of another client, or if the representation will be materially limited by the lawyer’s responsibilities to another client, a third person, or the lawyer’s own interests. The client’s consent to a multiple representation may be sought if “the lawyer reasonably believes the representation will not be adversely affected,” and if the
client consents after a consultation that includes an “explanation of the implications of the common representation and the advantages and risks involved.” It is our practice also to include consultation on the effect on the attorney-client privilege of the proposed joint representation, which is under a separate heading in this letter.

[Ohio, Model Code.] The ethical guidelines that control a law firm’s representation of multiple clients are set out in Disciplinary Rule (“DR”) 5-105 of the Ohio Code of Professional Responsibility. Those standards provide, in summary, that an attorney shall decline or withdraw from representation of a client “if the exercise of his independent professional judgment is behalf of a client will be or is likely to be adversely affected by his representation of another client.” If the multiple representation may result in an adverse effect on the attorney’s judgment, the attorney may represent the multiple clients “if it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effect of such representation on the exercise of his [the lawyer’s] independent professional judgment on behalf of each. [Alternatively, DR 5-105 may be quoted in full or in pertinent part.]”

The scope of the matter in which this multiple representation is proposed, and the facts to which we apply the above standards in this matter may be summarized as follows. [State scope of matter and known facts, identify unknown facts that may raise conflict concerns, and explain potential conflicts arising from either. In Kentucky and Model Rules jurisdictions it is required, and in Ohio and other jurisdictions it is recommended, that this discussion include the implications, advantages, and risks of the common representation.]

Non-Existence [Existence] of Present Conflict of Interest

Based upon the above information, we have no information suggesting that a conflict of interest exists or is likely to arise in our representation both of you and of the other Directors. [Alternatively, explain existing and reasonably foreseeable conflicts of interest, and state and explain the conclusion that it is “reasonable” to conclude (Kentucky, Model Rules) or “obvious” (Ohio, Model Code) or that the attorney can represent the interests of all clients.] It is possible, of course, that in the course of an internal investigation or litigation, new facts could come to light that would create an actual conflict or increase the potential for conflicts to arise still later. If an actual conflict were to arise between the interests of one or more Directors, under the above standards we might potentially have to withdraw from representing all clients in this matter.

The Company has determined, in the exercise of the Board of Directors’ business judgment, that it is willing to advance expenses to the Directors in this matter, conditioned upon the representation being conducted in the most efficient
manner possible given the ethical standards applicable to conflicts of interest. [If advance of expenses is mandatory but there are legal standards or guidelines for the advance, those should be stated as the ground for any proposed or continued-representation provisions.] The Company accordingly has determined that it will advance expenses conditioned upon the Directors’ waiver of existing and reasonably foreseeable conflicts of interest as described in this letter, and is further conditioned upon the Directors’ understanding and agreement that, in the event of a future conflict that has not been or cannot be waived (the question of an advance of expenses to be determined at that time), the Company’s position will be that we would continue to represent those Directors as to whom no conflict exists. As to conflicts that are not now reasonably foreseeable, the Company has directed that we point out to the Directors the Company’s position that their fiduciary duties to the Company may well counsel, if not require, that the Directors provide waivers of conflicts to the extent that may be accomplished under the applicable ethical standards, and that it will request such a waiver to the extent that any now-unforeseeable conflict arises in the future.

It is possible that other internal investigations, other civil litigation, administrative proceedings, or even (although we regard this as unlikely) criminal investigations and proceedings could arise in the future in connection with this matter. Similarly, it is possible that conflicts of interest involving one or more Directors may arise out of those new circumstances. The existence of conflicts of interest must be addressed at all stages of a matter, and we will do so if and as the need arises. The Company has directed that we make clear, however, that if a non-waivable or unwaived conflict developed as to one or more Directors, we would withdraw from the representation of any such client and continue to represent the remaining Directors. The proposed consent to our continued representation of the non-conflicted Directors includes such scenarios as well as continued representation in the present internal investigation and litigation.

One feature of a multiple representation, which arises from the law governing a broader set of circumstances, is that information may be shared among the multiple clients for purposes of facilitating the representation. The law applicable to the sharing of information is known as the joint-defense or the common-interest doctrine. There is some uncertainty in this law as it affects the receipt and use of information, particularly with regard to whether one client may or all clients must agree to waive the attorney-client privilege or the work-product doctrine as it applies to information belonging to one or more clients, and with regard to how these rules apply in litigation and non-litigation settings. The Company has agreed to permit a joint representation only so long as its decisions govern the disclosure or use of all information that we obtain in the representation. [Alternative: The present joint representation is proposed to be conducted, and an agreement to be
represented therein would include, an agreement that, regardless of whether litigation or non-litigation matters are involved, the protection of information provided by one or more clients would be subject to waiver by that client or clients, and the protection of information otherwise created or obtained would be subject to waiver only by all clients involved in the representation at the time of the waiver.]

We advise you that, as facilitated by the joint-defense or common-interest doctrine, there may be unrestricted disclosure or common use of any information learned in the course of the representation from a Director, or other persons, including the Company, to the other clients who are part of the proposed multiple representation. This circumstance raises the possibility that one client might not be as complete or candid with us as he or she would have been if separately represented, although we do not regard this as likely based upon our understanding of the existing facts and the facts that are likely to appear. If you believe that the proposed multiple representation would impair your willingness to provide or our ability to obtain significant information from any source, you should advise us of that belief now, in which case we would not be in a position to represent you. If you should come to such a belief in the future, we request that you so advise us promptly, withholding confidential and secret information until we have assessed whether we should receive such information from you. We would expect to withdraw from the representation of any Director who held that view, and would continue to represent any Director who did not hold that view. Obviously such concerns sometimes arise from miscommunications or misunderstandings, and it would be in your interest, and indeed in the interest of all concerned, to make sure that such a belief was both reasonable and warranted before any such action were taken.

Finally, we advise you that despite the consents, waivers, and agreement proposed in this letter, a court might disqualify us from representing one or more Directors in the event of a conflict of interest involving another of the clients included in the proposed multiple representation. There is further the potential that unforeseeable conflicts of interest could be non-waivable, in which event the ethical standards or a court applying those standards might require our withdrawal from the representation from one or more of the other Directors.

Confidential Information and Request for Consent to Disclosure and Use of Information in the Event of Withdrawal

[KRPC, Model Rules.] The ethical standards that control an attorney's handling of confidential or secret information received from one or more of multiple clients, or from other sources during the course of their representation, are set out in Rule
1.6 and 1.9(c) of the Kentucky Rules of Professional Conduct ("Rule" or "KRPC"). Rule 1.6 provides, in pertinent part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," and except in certain circumstances not now germane. Rule 1.9(c) prohibits the use of a former client's information for the benefit of a third person or to the detriment of the former client. This includes information that is "confidential" in the sense that it is subject to the attorney-client privilege, as well as other information that the attorney learns relating to the representation, regardless of its source.

[Ohio, Model Code.] The ethical standards that control an attorney's handling of confidential or secret information received from one or more of multiple clients, or from other sources during the course of their representation, are set out in Disciplinary Rule ["DR"] 4-101 of the ABA Model [or name of jurisdiction] Code of Professional Responsibility. DR 4-101 provides, in summary (with certain other exceptions not now germane), that a lawyer shall not knowingly use a client's confidence or secret to the client's detriment or for his own or a third person's advantage, but that the lawyer may reveal or use such information where the client consents after full disclosure. [Alternatively, DR 4-101 may be quoted in full or in pertinent part.] Information received that is "confidential" refers to information protected by the attorney-client privilege. Information received as a "secret" may or may not be secret as that term is commonly used, but refers to other information obtained or gained during the representation that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.

The above ethical protections of client information are such that, where an attorney withdraws from representation of one of multiple clients because of a conflict of interest that appears after the representation has begun, the attorney's possession or use of that then-former client's confidential and secret information may require that the attorney withdraw from the other clients' representation as well. Just as the Company has conditioned its advance of expenses on a waiver of future conflicts, so the Company has conditioned that advance on a waiver that would permit us to disclose and use your confidential and secret information in its continued representation.

[The potential significance of the disclosure or use of client confidences and secrets should be explained here as to existing or reasonably foreseeable conflicts that have been identified.]

As to conflicts that are not now reasonably foreseeable, we cannot now determine the potential significance of the later disclosure or use of information in our representation of another Director. It may be that the information would not be
adverse to you, but it may be that the information would be adverse to you, such that its later use could be harmful to your interests. We will make every effort consistent with the proper representation of all clients in the multiple representation to anticipate such conflicts, to avoid receipt of confidences and secrets in an effort to manage conflict and withdrawal issues without prejudice to our clients. As stated above with regard to conflicts of interest, the Company has directed that we point out to the Directors the Company’s position that their fiduciary duties to the Company may well counsel, if not require, that the Directors provide waivers of conflicts to the extent that may be accomplished under the applicable ethical standards, and that it will request such a waiver to the extent that any now-unforeseeable conflict arises in the future.

As to existing or reasonably foreseeable conflicts of interest as described above, therefore, we request that you consider whether you will provide a waiver of the protections of KRPC 1.6 and 1.9(c) [ABA Model [or name of jurisdiction] Code DR 4-101]. As to conflicts of interest that are not reasonably foreseeable at this time, we will attempt, where possible, to anticipate circumstances that may raise conflicts concerns as this matter moves forward, and to avoid obtaining from you confidential or secret information that bears on such matters. In the event that unforeseeable conflicts present themselves in the future, we will proceed to resolve those in a timely and appropriate manner.

Possibility of Additional Directors as Clients

At the present time, it has been determined that certain Directors will not be included in the initial group of Directors who will be part of the multiple representation. It may be determined, as our investigation continues, that it is appropriate to consider including them in the multiple representation. This is not because of any belief that any of those other Directors may have engaged in any wrongdoing or that any conflict exists or may arise, but simply is intended to permit a decision to be made about their joint representation based on more complete information than we have at the present time. [Modify as needed to describe circumstances accurately.]

The possible addition of other Directors to the group of clients proposed to be represented may affect the question of your consent to multiple representation and the waiver with respect to confidential information, as discussed above. We contemplate that any such addition would occur under substantially similar circumstances to those described in this letter for the present group of proposed clients. We do not know, and therefore cannot tell you, what the precise circumstances would be, nor can we tell you what the facts will be at that time, since those facts remain to be determined. We do ask, however, that you consider
any possible effect of the later addition of other Directors to the group of clients upon your desire and willingness to be a part of the group. We further ask that if you wish to participate in the multiple representation, you advise us whether there are any Directors with whom you would not be willing to be represented, so that we may consider that fact at this time.

Independent Advice of Attorney
You may wish to obtain the independent advice of an attorney as to whether to enter into this multiple representation. The Company has indicated that it will/will not pay for such advice as part of its advance of expenses. Please keep in mind the exigencies of time in this matter, and advise us no later than [deadline] of your decision about whether you will join in the multiple representation as a client.

Conclusion
We believe, based upon our present information and the circumstances as described above, that since the interests of the above Directors appear not to be in conflict, there are substantial benefits to be gained from a joint representation under the terms described above. Representation of non-conflicting interests by a single law firm should result in the more effective and efficient conduct of an internal investigation and litigation, than would be the case if each Director were to obtain separate attorneys. We ask, however, that you carefully consider the matters discussed in this letter in deciding whether it is in your best interest to agree to the joint representation offered by the Company in this matter. We are available to discuss this matter with you as you may wish, to answer any questions that you may have, and to provide you with any additional information you feel would be helpful in order for you to make a fully informed decision. Of course, should you decide it is in your best interest to obtain separate counsel, we will cooperate with and assist your new counsel to the fullest extent possible.

[Closing paragraph and signature line.]

Director Consent to Multiple Representation, Disclosure and Use of Information, and Continued Representation
I have reviewed and considered the foregoing letter, and have had the opportunity to obtain all information and advice that I believe is necessary to permit me to make an informed decision about the multiple representation proposed in the letter. I hereby request that I be included as a client in the joint representation according to the terms proposed, consent to the conflicts of interest, the disclosure and use of confidential information, and the continued representation of other Directors, all as described more fully in the letter.

Dated this _____ day of ____________________, 20__.
3. **Conflicts Letter Waiving Conflicts as to New Director Client**

This letter pertains to our continued representation of [the Company and] the above Directors in connection with [describe matter]. In particular, this letter pertains to the proposed addition of [names of new client Directors] as clients in the multiple representation in which [the Company and] you are our existing clients.

In addition to the facts stated in our letter of [earlier date], we have learned the following additional facts [or, the facts stated in the attached letter to the proposed new clients].

Based on the facts stated in our earlier letters and in this [or, the attached] letter, we have no information suggesting that a conflict of interest exists or is likely to arise in our continued representation of [the Company and] you or in our proposed representation of the additional Directors as new clients. That being the case, and for the reasons stated more fully in our earlier letters, to which we respectfully direct your attention, we believe that it is appropriate and desirable that those Directors be clients in the present multiple representation.

The proposed addition of these Directors as new clients is subject to the same terms and conditions stated in our earlier letter. If you do not have a copy of those letters for ready reference, please let us know and we will provide you with copies. [Or, attach copies of the letters.]

If it is agreeable to you that we represent the above individuals along with [the Company and] you in this matter, we would appreciate your so indicating by executing the attached signature page on the copy of this letter and returning the same to us by mail [overnight, fax].

[Closing paragraph and signature line.]

**Director Consent to Multiple Representation, Use of Information, and Continued Representation.**

I have reviewed and considered the foregoing letter and the letters dated [date of earlier conflicts and other letters], and have had the opportunity to obtain all information and advice that I believe is necessary to permit me to make an informed decision about the multiple representation of additional Directors as proposed in the

---

442. This is a short-form followup letter to existing clients for use when a Director is added to the multiple representation. New disclosure of conflicts and confidentiality information can be made in this letter, or by attaching and referring to the letter to the proposed new client.
foregoing letter. I hereby consent to my continued representation and the representation of those additional Directors as clients in the multiple representation according to the terms proposed, consent to the conflicts of interest, the disclosure and use of confidential information, and the continued representation of other Directors, all as described more fully in all letters referred to above.

Dated this ____ day of __________________, 20__.

[Signature Lines for Directors]

F. Provisions Regarding Payment of Fees for Retainer Letters

1. Letter to Company

This letter is to confirm that we will be retained to provide legal representation to [names of Directors] (the “Directors”) in connection with [describe matter], and to confirm the terms of that representation. We write to you in this matter because of our understanding that [name of Company] (the “Company”) has agreed to advance all reasonable attorneys’ and experts’ fees, costs and expenses incurred by the Directors in connection with this matter, and to indemnify the Directors for those matters, if indemnification is deemed to be appropriate.

[Describe statutory or documentary basis for the Company’s obligation to make or the Directors’ right to expect advancement of fees, costs and expenses, including any provision referencing directors’ advance consent to representation by Company counsel. If the Director is to be secondarily responsible for fees, costs and expenses, or if the Company’s liability is only contingent, that should be explained in this letter.]

[Kentucky, Model Rules.] The obligations we are undertaking to the Directors require us to advise you of three specific ethical requirements for an attorney’s representation of a client where payment of fees is made by a third party such as the Company. First, Rule 1.8(f) of the Kentucky Rules of Professional Conduct (“Rule” or “KRPC”) provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) Such compensation is in accordance with an agreement between the client and the third party or the client consents after consultation; (2) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) Information relating to the representation of a client is protected as required by Rule 1.6.” Second, KRPC 5.4(c) provides that “[a] lawyer shall not permit a person

443. Addressed to corporate officer other than the director[s] being represented. Ky. S. Ct. R. 3.130, KRPC 1.13(e). CC to Directors.
who recommends, employs, or pays the lawyer to render legal services for another
to direct or regulate the lawyer’s professional judgment in rendering such legal
services.” We are communicating with the Directors about their consent to the
terms of our engagement, including compensation. We will include them in all
communications with the Company regarding our terms of engagement, and ask
that the Company do the same. We are confident that no problems of the nature
described in KRPC 1.8(f)(2) or 5.4(c) will arise during the Directors’
representation, but it is both necessary and desirable that all concerned remain
aware of our obligations in that regard.

Third, KRPC 1.8(f)(3) provides that “[a] lawyer shall not accept compensation
for representing a client from one other than the client unless: . . . (3) Information
relating to the representation of a client is protected as required by Rule 1.6.” We
discuss the implications for ethically protected information in our representation of
both the Company’s and the Directors’ interests in the letter on conflicts of interest.
[Directors-only counsel should delete the preceding sentence, and may want to add
assurances that ethically protected information will not be compromised, but that
the question of the Director’s consent to disclosure may well arise. If a common-
interest representation is formed with the Company’s lawyers, the terms of that
agreement should be explained. If the Company has stated a position on the
Directors’ fiduciary obligation to disclose information to the Company’s attorneys
that may affect the representation of the Directors, that should be mentioned or
responded to here.]

[Ohio, Model Code.] The obligations we are undertaking to the Directors
require us to advise you of three specific ethical requirements for an attorney’s
representation of a client where payment of fees is made by a third party such as the
Company. First, Disciplinary Rule (“DR”) 5-107(a) of the Ohio Code of
Professional Responsibility provides that “[e]xcept with the consent of his client
after full disclosure, a lawyer shall not: (1) Accept compensation for his legal
services from one other than his client. (2) Accept from one other than his client
any thing of value related to his representation of or his employment by his client.”
Second, Ohio DR 5-107(B) provides that “[a] lawyer shall not permit a person who
recommends, employs, or pays him to render legal services for another to direct or
regulate his professional judgment in rendering such legal services.” We are
communicating with the Directors about their consent to the terms of our
engagement, including compensation. We will include them in all communications
with the Company regarding our terms of engagement, and ask that the Company
do the same. We are confident that no problems of the nature described in Ohio DR
5-107(A) or (B) will arise during the Directors’ representation, but it is both
necessary and desirable that all concerned remain aware of our obligations in that
Third, Ohio DR 4-101 requires that we maintain the confidences and secrets of the Directors as our clients and not disclose them to others, which in this case includes the Company, without the Directors' consent. We discuss the implications for ethically protected information of our representation of both your and the Company's [the other Directors'] interests in the letter on conflicts of interest. [Directors-only counsel should delete the preceding sentence, and may want to add assurances that ethically protected information will not be compromised, but that the question of the Director's consent to disclosure may well arise. If a common-interest representation is formed with the Company's lawyers, the terms of that agreement should be explained. If the Company has stated a position on the Directors' fiduciary obligation to disclose information to the Company's attorneys that may affect the representation of the Directors, that should be mentioned or responded to here.]

[Describe terms of engagement according to standard retainer letter provisions, including definition of scope of representation. If the Director is to be secondarily responsible for the payment of fees, costs and expenses, that should be mentioned in this letter.]

2. Letter to Directors

This letter pertains to our proposed representation of your interests in connection with [describe matter]. Since we understand that [name of Company] (the "Company") will pay your attorneys' fees, costs and expenses in this matter, we have addressed a letter to the Company about the terms of the representation, a copy of which is enclosed for your review.

[Describe statutory or documentary basis for the Company's obligation to make or the Directors' right to expect payment of fees, costs and expenses, including any provision referencing directors' advance consent to representation by Company counsel. If the Director is to be secondarily responsible for fees, costs and expenses, or if the Company's liability is only contingent, that should be explained in this letter.]

[Describe scope of representation in same terms as those used in the letter to the Company, or as appropriately for Directors-only counsel.]

[Kentucky, Model Rules.] There are three ethical standards applicable to the Company's payment of compensation to us as your attorneys. First, Rule 1.8(f)(1) of the Kentucky Rules of Professional Conduct ("Rule" or "KRPC") provides that

---

444. Include copy of retainer letter to the Company.
“[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) Such compensation is in accordance with an agreement between the client and the third party or the client consents after consultation . . . .” The purposes of this ethical standard are to require full disclosure of such arrangements to the client, and to ensure that a lawyer’s exercise of independent professional judgment on the client’s behalf is not called into question or compromised by another person’s or entity’s payment of the attorney’s fees and expenses. Our request for your affirmative consent to the present arrangements for your representation follow a discussion of the remaining provisions of Rule 1.8(f). [Any agreement between you and the Company for payment of legal fees and expenses may need to be explained here.]

Second, KRPC 1.8(f)(2) provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship . . . .” Also, KRPC 5.4(c) provides that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” The purposes of these ethical standards are to ensure that the attorney exercises independent professional judgment on behalf of the client, and that the attorney is directed by his client, not another person or entity, in the course of the representation. We are confident that no such problems will arise during our representation of your interests, and we ask that you let us know if, at any point, you have any concerns whatsoever in that regard.

Third, KRPC 1.8(f)(3) provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (3) Information relating to the representation of a client is protected as required by Rule 1.6.” We discuss the implications for ethically protected information in our representation of both your and the Company’s [the other Directors’] interests in the letter on conflicts of interest. [Directors-only counsel should delete the preceding sentence, and may want to add assurances that ethically protected information will not be compromised, but that the question of the Director’s consent to disclosure may well arise. If a common-interest representation is formed with the Company’s lawyers, the terms of that agreement should be explained. If the Company has stated a position on the Directors’ fiduciary obligation to disclose information to the Company’s attorneys that may affect the representation of the Directors, that should be mentioned or responded to here.]

[Ohio, Model Code.] The obligations we are undertaking to the Directors require us to advise you of three specific ethical requirements for an attorney’s representation of a client where payment of fees is made by a third party such as the
Company. First, Disciplinary Rule ("DR") 5-107(a) of the Ohio Code of Professional Responsibility provides that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not: (1) Accept compensation for his legal services from one other than his client. (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.”

Second, Ohio DR 5-107(B) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.” The purposes of this ethical standard are to require full disclose of such arrangements to the client, and to ensure that a lawyer’s exercise of independent professional judgment on the client’s behalf is not called into question or compromised by another person’s or entity’s payment of the attorney’s fees and expenses. Our request for your affirmative consent to the present arrangements for your representation follow a discussion of the remaining provisions of Rule 1.8(f). [Any agreement between you and the Company for payment of legal fees and expenses may need to be explained here.]

Third, Ohio DR 4-101 requires that we maintain the confidences and secrets of the Directors as our clients and not disclose them to others, which in this case includes the Company, without the Directors’ consent. We discuss the implications for ethically protected information of our representation of both your and the Company’s [the other Directors’] interests in the letter on conflicts of interest. [Directors-only counsel should delete the preceding sentence, and may want to add assurances that ethically protected information will not be compromised, but that the question of the Director’s consent to disclosure may well arise. If a common-interest representation is formed with the Company’s lawyers, the terms of that agreement should be explained. If the Company has stated a position on the Directors’ fiduciary obligation to disclose information to the Company’s attorneys that may affect the representation of the Directors, that should be mentioned or responded to here.]

[If applicable.] We have addressed in a separate letter the question of conflicts of interest in our representation of both your and the Company’s [the other Directors’] interests. The essential difference between these two sets of ethical standards is that we are required to exercise independent professional judgment on behalf of each of our clients at all times during the representation, whereas the actual or potential existence of a conflict of interest requires that the terms of the representation, and the risks and compromises that may be required to form or continue the representation, be addressed initially and from time to time, to ensure either that you have had an opportunity to consider and either waive the conflict or terminate the representation, all as stated more fully in that letter. We will be happy to discuss these issues with you further.
We ask that you review the enclosed letter to the Company and, if those terms of engagement meet with your approval, including those relating to the Company's payment of compensation to us as your attorneys, indicate your consent in the space provided below and returning an executed copy of this letter. We will include you in all communications with the Company regarding our terms of engagement, and have asked that the Company do the same.

[Closing paragraph and signature line.]

**Agreement for Representation and Consent to Compensation by the Company**

I have reviewed the above letter and agree to the representation described therein. I have reviewed also the attached letter to the Company, and consent to the terms of representation described therein, including the Company's payment of compensation to my attorneys.

Dated this ____ day of ______________, 20__.

[Client's signature line.]
THROUGH THE LOOKING GLASS: A BRIEF COMMENT ON THE SHORT LIFE AND UNHAPPY DEMISE OF THE SINGLETON RULE

by Chad Baruch

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."²

It ain't legal
And worse than that
By God, it ain't right.³

It is commonly estimated that ninety percent of criminal convictions in the United States are by pleas of guilty.⁴ The vast majority of these guilty pleas are arrived at through plea bargains.⁵ Plea bargaining is the routine method for disposition of criminal charges in the United States.⁶ Consequently, any rule concerning the propriety of testimony obtained by virtue of plea bargaining is likely to affect the overwhelming majority of criminal defendants in the United States.

As criminal defendants and their attorneys are discovering, this is particularly true in the present era of large-scale narcotics prosecutions.⁷ The government commonly pursues narcotics defendants by virtue of overblown indictments, charging anyone and everyone who has come into contact with the alleged narcotics

---

1. Chad Baruch is an attorney in Dallas, Texas. He is the former Vice-President for Legal Affairs of the ACLU's Dallas chapter. B.A., Political Science, University of Minnesota; J.D., University of Minnesota Law School.
2. Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass 164 (Whitman 1970).
4. See G. Nicholas Herman, Plea Bargaining 1 (1997) (citing Brady v. United States, 397 U.S. 742, 752 n.10 (1970)). Some contend this ninety percent figure has acquired validity primarily through force of repetition, but even these critics concede that "[w]hatever the precise percentage of cases disposed via guilty plea, it is admittedly high." James E. Bond, Plea Bargaining and Guilty Pleas 1-3 (2d ed. 1983).
7. See, e.g., United States v. Traylor, No. 97-11067 (5th Cir. Jun. 15, 1999). This case involved a twenty-four person indictment resulting in trial of five defendants, based in part on former co-defendant testimony. Id.
enterprise. The government then enters into favorable plea agreements with most of the defendants, and uses their resulting testimony against the few remaining defendants who were actually targets of the operation.

This brief essay argues that the government’s conduct in obtaining testimony by plea bargain violates federal bribery law as it is presently written. It further argues that the Supreme Court’s refusal to hear and decide the issue is inconsistent with previously established rules governing application of federal legislation to the government and sends the disturbing message that the judiciary is willing, on its own initiative, to exempt the government from compliance with statutes of general application.

The clear and unambiguous language of 18 U.S.C. § 201(c)(2) makes it a crime for any person or entity to give, offer, or promise anything of value to a fact witness in exchange for testimony:

(c) Whoever - . . .

2) directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom; . . .

shall be fined under this title or imprisoned for not more than two years or both.

Notwithstanding the clear implication of this provision of federal law, "the Department of Justice has a well-established practice of paying prosecution witnesses for their testimony, either in cash or by favorable plea bargains, or both." While the precise historical origins and frequency of plea bargaining are unclear, there is little doubt the practice became entrenched in the early part of this century. The United States Supreme Court made clear its belief in the permissibility and positive effects of plea bargaining through a trilogy of cases

8. Id.
9. Id.
decided in the 1970s. In *Brady v. United States*, the Court upheld plea bargaining as providing practical benefits to the justice system. The following year, the Court pointed to the efficiency of plea bargaining as a benefit, terming the practice "a highly desirable part" of the justice system, in *Santobello v. New York*. Finally, in 1978, the Court rejected a due process challenge to plea bargaining and again upheld the practice in *Bordenkircher v. Hayes*. Taken together, these three cases established the permissibility of plea bargaining in the eyes of the United States Supreme Court, and that permissibility remained unaltered by the federal judiciary until 1998.

In 1998, Sonya Singleton appealed her narcotics conviction to the Tenth Circuit Court of Appeals. Ms. Singleton argued that the government had obtained crucial testimony against her by virtue of prosecution and sentencing concessions, and that this conduct violated the federal bribery statute codified at 18 U.S.C. §201(c)(2), as well as the professional conduct rules governing attorneys. In July of 1998, a panel of the Tenth Circuit agreed with Ms. Singleton and ordered that she be retried. The Tenth Circuit, acting on its own motion, vacated the panel's ruling and ordered rehearing *en banc*. On January 8, 1999, the Tenth Circuit, in a 9-3 decision, held that the federal bribery statute "does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office."

The *Singleton* decisions have engendered significant strife and controversy among federal judges. Most federal courts asked to address the issue have rejected *Singleton I*. At the same time, other federal district courts have adopted the

---

14. *Id.* at 753.
17. United States v. Singleton, 144 F.3d 1343, 1361 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999) (initial decision hereinafter referenced as "Singleton I").
18. *Id.* at 1343-44 (citing 18 U.S.C. §201(c)(2) (1994)).
19. *Id.* at 1361.
20. *Id.*
21. United States v. Singleton, 165 F.3d 1297, 1298 (10th Cir. 1999) (hereinafter referenced as "Singleton II").
Singleton I approach. It is not only in the results that controversy has arisen. The shrill rhetoric of several of the opinions makes clear the divergence among federal judges on the issue. In rejecting Singleton I, one federal judge has written that "[t]he chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are, in this Court's judgment, about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns." In contrast, the three dissenting judges in Singleton II, along with other federal judges, have made clear their strong beliefs that the reasoning of Singleton I remains credible. Despite this disagreement, and the impact the issue has on the nation's criminal justice system, the Supreme Court has refused to hear the issue.

The central rationale for rejection of Singleton I, aside from practical concerns, appears to be the notion that "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." Assuming, arguendo, that this statement constitutes a legitimate basis for upholding the practice of plea bargaining, its accuracy is open to serious debate. The precise origins of plea bargaining in the American justice system cannot be conclusively established, and it is not until the latter portion of the nineteenth century that such cases begin to appear regularly in appellate reports.

More important, the notion that an "entrenched" practice is inherently justified has been rejected repeatedly by the Supreme Court in a wide variety of contexts,


27. Id. at 366 (quoting United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988)).

28. See, e.g., State v. Richardson, 12 S.W. 245 (Mo. 1889); State v. Kring, 8 Mo. App. 597 (1880).
including: 1) improperly obtained criminal evidence; 2) the privilege against self-incrimination; 3) religious freedom and compulsory flag salute; and 4) race discrimination. In fact, a compelling argument could be made that the prestige of the Court has been at its lowest point when giving undue deference to historical practice, and at its peak when elevating concerns of constitutional efficacy and fundamental fairness above historical “entrenchment.”

Section 201(c)(2) of the Bribery and Graft Act is exceptionally clear: it uses the term “whoever” to define the class of persons encompassed by its terms. “The starting point in statutory interpretation is ‘the language [of the statute] itself.’” The strong presumption that the plain language of a statute expresses congressional intent is rebutted only in those rare and exceptional circumstances where a contrary legislative intent is clearly expressed. In the absence of such evidence, the federal courts are bound to take Congress “at its word.”

Despite the clear language of the statute, most federal courts have concluded that the word “whoever” as used in the statute does not include the government, and the Supreme Court has, to date, permitted these opinions to stand. The end result of this approach is to permit the federal judiciary to remove crucial words from statutes, when not to do so would be inconvenient. If this is the law, the notion of uniform justice in the federal criminal justice system shall quickly become a distant memory. The Fifth Circuit, for example, washes away all this analysis with the following statement:

[I]t is evident to this Court that Congress did not intend for section 201(c)(2) to be used when prosecutors offer leniency for a witness' truthful testimony. To interpret section 201(c)(2) in any other way would apply shackles to the government in its

pursuit to enforce the law.  

In other words, to protect an established law enforcement practice, the Fifth Circuit and other courts have contorted the plain language of an unambiguous federal statute. In classic "Humpty Dumpty" fashion, the federal courts take the position that the word means "what they say it means," even if their "definition" flouts common sense and judicial precedent. This contortion violates established principles of statutory construction:

[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy - even assuming that it is possible to identify that evil from something other than the text of the statute itself.  

Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.  

The simple fact is that section 201(c)(2) is a statute of general application that does not, by its terms, exempt the government from adherence. In the absence of such express exemption, the government is compelled to follow its own laws. This notion has existed since before the time of Christ. It was reaffirmed by the Magna Carta in A.D. 1215. Justice Brandeis pointed out the potential for disaster inherent in any other approach:

40. Haese, 162 F.3d at 367.
42. Id. at 408. Of course, there are additional problems with this reasoning. For the government to purchase testimony permissibly, someone must be permitted to sell it. Id. Section 201(c)(3) of the bribery statute makes it a crime for anyone "directly or indirectly" to demand, seek, receive, accept, or agree to receive or accept anything of value for or because of testimony under oath at a hearing or trial. 18 U.S.C. § 201(c)(3) (1994). This language leaves no doubt that Congress intended to make certain that exchanges of value in any form would not affect witness testimony. Id. Congress accomplished this by prohibiting anyone from accepting such an offer of value in connection with testimony. Id. Thus, to permit the government to obtain testimony by offer of concessions requires additional distortion of the word "whoever." Id.
44. See 13 Romans 1 ("Everyone must submit himself to the governing authorities, for there is no authority established except that which God has established."). The underlying principle, that all persons are obligated to follow the "laws of the land" is part of the Jewish Talmud. See Babylonian Talmud (Isidore Epstein ed., 1960).
45. See JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 1003 (3d ed. 1986).
Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.\textsuperscript{46}

This principle will not give way absent to the expediency of the government’s practices without legislative authorization.\textsuperscript{47}

The Supreme Court has recognized a canon of construction providing that statutes do not apply to the government unless the text expressly includes the government, but that canon is exceptionally limited in its scope.\textsuperscript{48} The Court delineated the scope of this canon of statutory construction in \textit{Nardone v. United States}.\textsuperscript{49} At issue in \textit{Nardone} was “whether, in view of the provisions of § 605 of the Communications Act of 1934, evidence procured by a federal officer's tapping telephone wires and intercepting messages [was] admissible in a criminal trial…”\textsuperscript{50} The Communications Act of 1934 provided that “no person” who, as an employee, dealt with the sending or receiving of any interstate communication could divulge or publish its substance to anyone other than the addressee.\textsuperscript{51} This Court held the plain language of the statute made clear its application to the government: “Taken at face value the phrase ‘no person’ comprehends federal agents, and the ban on communication to ‘any person’ bars testimony to the content of an intercepted message.”\textsuperscript{52}

Interestingly, one of the government’s chief arguments in \textit{Nardone} was its central argument on the \textit{Singleton} issue: “[I]t is improbable Congress intended to hamper and impede the activities of the government in the detection and

\begin{itemize}
\item[46.] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
\item[48.] \textit{Nardone v. United States}, 302 U.S. 379 (1937).
\item[49.] \textit{Id.} at 383-84.
\item[50.] \textit{Id.} at 380.
\item[51.] \textit{Id.} at 380-81.
\item[52.] \textit{Id.} at 381.
punishment of crime." In *Nardone*, however, the Supreme Court made short work of that contention, in language that could easily have been written for *Singleton*:

The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty.

The canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest. A classical instance is the exemption of the state from the operation of general statutes of limitation. The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.

The second class -- that where public officers are impliedly excluded from language embracing all persons -- is where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.

The Court concluded that federal agents were covered by the term "anyone" and thus subject to the statute's prohibition.

It is impossible to reconcile rejection of *Singleton I* with *Nardone*. Like the statute at issue in *Singleton*, the statute under review in *Nardone* concerned a term of general applicability ("no person") to enumerate the class of persons subject to it. *Nardone* rightfully and aptly identifies only two classes of statutes in which such terms of general applicability do not apply to the government. The decision that "whoever" somehow does not include the government effectively overrules the *Nardone* test.

53. Id. at 383.
54. Id. (citations omitted).
55. Id.
56. Id. at 384 (citations omitted).
57. Id.
59. Id. at 383-84.
Initially, general statutes do not apply to the government where application would deprive the sovereign of a recognized or established prerogative title or interest.60 This exemption is inapplicable in analysis of Singleton. The government has a longstanding practice of obtaining testimony by granting plea and sentence concessions does not give rise to a "prerogative title or interest."61 The government cannot by mere repetition make valid that which is otherwise legally impermissible.62 Moreover, this rule of exclusion is less stringently applied where the operation of the law is upon the agents of the government, rather than the government itself.63 To treat United States Attorneys as the government's "alter ego" would be to render this rule without any effect, and reduce it to mere surplusage.64

The second instance of non-application is where application would work an obvious absurdity.65 It is apparently the contention of the government, adopted by most federal courts to consider the issue, that holding plea bargains violative of the bribery statute would work such an absurdity by hindering law enforcement.66 It is difficult to conceive how such a holding would be any more absurd or constitute any greater hindrance than forcing police to "Mirandize" suspects,67 requiring counsel for those accused of crime,68 or excluding evidence obtained in violation of constitutional provisions.69

There is nothing absurd about holding the government subject to a law of general application. In fact, a reasonable argument could be maintained that forcing the government to abandon its present approach to plea bargaining would actually improve the administration of criminal justice. The process of plea bargaining is not generally considered an ornament to our system of justice. A host of articles criticize the practice as inconsistent with established notions of justice.70 The very

60. Id. at 383.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 384.
66. Id.
70. See, e.g., Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979 (1992);
nature of plea bargaining makes a substantial part of an offender's sentence depend not on the offense but upon strategic decisions outside the proper scope of criminal proceedings.\textsuperscript{71} It undermines the constitutional requirement of proof beyond a reasonable doubt by subordinating it to a "split-the-difference" system of guilt.\textsuperscript{72}

Plea bargaining, at least in its present form, devalues human liberty by viewing it as a commodity to be traded for economic and time saving purposes. and in doing so, it undermines the sanctity of the judicial process.

Of course, the various pressures operating on both prosecution and defense attorneys make plea bargaining unlikely to result in justice in most cases. The prosecution's interest in economizing resources and resolving cases without trial often results in lenient sentence offers.\textsuperscript{73} Most defense attorneys have a personal or professional interest in settlement even where trial might well be to the client's advantage.\textsuperscript{74} Defense attorneys are often court-appointed or working on a "flat fee" basis, and many serve without any compensation.\textsuperscript{75} Under these circumstances, a defense attorney who proceeds to trial takes the risk of earning as little as one or two dollars per hour.\textsuperscript{76} As a result, in many cases, it is only the foolhardy defense


\textsuperscript{72} See generally id.


\textsuperscript{74} See generally Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179 (1975)

\textsuperscript{75} Id.

\textsuperscript{76} See, e.g., Huskey v. State, 688 S.W.2d 417, 419 (Tenn. 1985) (affirming fee of $500 for 181 hours of work on felony-murder trial); MacKenzie v. Hillsborough County, 288 So. 2d 200 (Fla. 1973)
attorney who proceeds to trial. Constitutional objections aside, plea bargaining seriously impairs the public interest in effective punishment of crime and accurate separation of the guilty from the innocent.77

Plea bargaining also transforms judges from respected arbiters of justice to mere paper-pushing figureheads who "bless" transactions already negotiated among counsel. The job of adjudication is ceded to less experienced and judicious persons not elected or appointed to fulfill this crucial function. In addition to undermining the status of judges, the present plea bargaining system independently corrupts the process by permitting guilty defendants to feel they have "defeated the system," leaving them free to commit future crime. At the very least, plea bargaining exists in a state of constant tension with established notions of justice and threatens to render illusory a variety of constitutional doctrines, including: the prohibition against unreasonable searches and seizures; the right to confront witnesses;78 the right of the public to observe justice;79 and the right of the accused to a fair trial.80

Why, then is plea bargaining acceptable? All the various explanations can be reduced to their simplest form - expediency:

The present state of affairs was brought about by willingness to reduce standards of justice to conform to the resources made available for its administration. I suggest the time has come for the judiciary to start moving in the other direction, and to insist on a return to first principles as quickly as possible.81

Many scholars and judges now contend that plea bargaining is inevitable, that "to speak of a plea bargaining-free criminal justice system is to operate in a land of

(affirming $750 fee for more than 500 hours spent working on capital case).
80. J. Richard Johnston, Paying the Witness: Why Is It OK for the Prosecution, But Not the Defense?, CRIM. J., Winter 1997, at 21, 24 ("Regardless of the difference in the duties of a prosecutor and defense counsel, compensating a witness for testifying involves an identical threat to the integrity of the judicial system whether the witness testifies for the prosecution or the defense.").
There seems to be a prevailing sentiment that such a decision would cause a collapse of the court system. But many commentators believe that the inevitable court reform that would follow such a decision would address these problems:

Those who predict disaster for our criminal courts system if we cease plea bargaining are really saying that the courts cannot provide a jury trial for all those who have a right to trial. If this assessment were true, then the courts should declare themselves bankrupt . . . . But I do not believe the court system will collapse under the weight of too many trials if we abandon plea bargaining.

The more fundamental point is that "economy is not an objective of the system." The Supreme Court has made it clear that "administrative convenience alone is insufficient to make valid that what otherwise is a violation of due process of law." It is a bedrock principle of our justice system that the government is not above the law - that very principle lies at the core of the Bill of Rights and distinguishes the United States as a cradle of liberty. If what is necessary to protect our justice system is the dismantling of that which justifies its existence, there is little to recommend the effort. The objections of federal prosecutors and district court judges notwithstanding, the Supreme Court should adopt the plain meaning of section 201(c)(2) of the Bribery and Graft Act and apply it to the government. In so doing, it would teach a critical lesson to both the citizenry and the appellate courts - words mean "what they mean," even where the government is concerned.

---

83. Id.
84. Arthur Alarcon, Court Reform Would Solve the Problem, L.A. TIMES, Nov. 9, 1975, § 8, at 5. This argument also ignores the practical side of the plea bargaining system, in which defense lawyers flood the court with groundless motions in an effort to secure a better plea, and prosecutors inflate and multiply criminal charges, making those few trials that do result lengthy and needlessly complex.
SUTTON v. UNITED AIR LINES, INC: TEXTUALISM,
INTENTIONALISM, THE CHEVRON DOCTRINE AND JUDICIAL
POLICY-MAKING

by H. Drewry Gores

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or
the dictates of our passions, they cannot alter the state of facts and evidence."

John Adams, Argument in the Defense of the
[British] Soldiers in the Boston Massacre Trials
[December 1770]1

"Great cases, like hard cases, make bad law. For great cases are called great, not by
reason of their real importance in shaping the law of the future, but because of
some accident of immediate overwhelming interest which appeals to the feelings
and distorts the judgment. These immediate interests exercise a kind of hydraulic
pressure which makes what previously was clear seem doubtful, and before which
even well settled principles of law will bend."

Oliver Wendell Holmes, Northern Securities Co.
v. United States2

I. INTRODUCTION

Facts are indeed "stubborn things." The canons of law jealously protect the
integrity of the facts against the dictates of wishes and passions. The courts
predicate decisions on objective viewing of facts and neutral application of the law.
But, a court is made up of men and women who are formed by “inclinations,”
“wishes” and “the dictates of [their] passions.” At times, the facts of a case will
influence those men and women of the Supreme Court to decide a case as much on
policy (and perhaps more) as on objective analysis of law or facts. Sutton v. United
Air Lines, Inc.,3 the focus of this note,4 is such a case.

2. 193 U.S. 197, 400-01 (1904).
4. There were two issues that the Court examined in Sutton. The first involved whether the
petitioners were “substantially limited” in a major life activity due to their impairment and were thus
disabled under the ADA. The second issue was whether respondent airline “regarded them” as
addresses how the Court and the dissent decided the first issue. The second issue is mentioned only
Whether or not the Supreme Court viewed *Sutton* as a "great case" or a "hard case," it ignored the true importance of the Americans with Disabilities Act ("ADA"), as a broad encompassing, remedial statute. It did not justify the majority opinion on the "stubborn facts" of *Sutton* or on the law undergirding the ADA. Instead, it allowed the "hydraulic pressure" of an "immediate overwhelming interest," of the merest possibility of thousands of lawsuits clogging the courts, to make the "principles of the settled law"- of administrative law, generally, and the ADA, in particular - bend to its policy needs.

In *Sutton*, there were two female petitioners who were commercial pilots for non-global airlines. Petitioners claimed disability under the ADA, based on respondent's - global airline United Air Lines - refusal to hire them. United Air Lines had an internal policy of hiring no one with uncorrected vision of 20/100 or worse for a pilot's position. Petitioners had uncorrected myopia of 20/200 or worse, which was correctable to 20/20.

Petitioners did not meet the ADA's general description of the disabled. The ADA, in an introductory passage, states:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Petitioners were not examples of "political powerlessness" unable to "participate in, and contribute to, society." Certainly, competent airline pilots fail to fit easily into a layman's idea of disabled. They are not the most sympathetic of petitioners, whether viewed by a layman or the Court.

Most importantly, the Court was strongly influenced by the respondent's argument that, while the text of the ADA identifies the disabled American in summary of the decisions by the Supreme Court and the lower courts.


7. *Id.*

8. *See id.*

population at some 43,000,000, over 100,000,000 people in America suffer from vision impairment. The respondent argued that if the Court allowed these petitioners to survive summary judgment, the courts would be flooded with cases, based on facts no more appealing than those in Sutton. The Court decided in favor of the respondent. The dissent described the majority opinion as the "court's crabbed vision of the territory covered by this important statute." "[T]he Court has been cowed by respondent's persistent argument that [ruling for petitioners] will lead to a tidal wave of lawsuits." Strong interests, pushing for judicial efficiency were at work. Policy at its purest won, championing over the legislative intent of Congress when it wrote the ADA.

Part II of this note discusses the history of the ADA and examines the lower courts' decisions that led to the Supreme Court's grant of certiorari in Sutton. Parts III and IV examine the Court's justification for its opinion in this "great case" or "hard case" that made "bad law." Part IV explains that the rise of textualism, a theory of interpretation applied increasingly to statutes, has allowed the Court to make decisions, driven by policy determinations such as seen in Sutton, all the easier.

II. BACKGROUND

A. Legislative History of the ADA

Congress enacted the ADA in 1990 to protect broadly individuals with disabilities from discrimination. Earlier, in 1973, Congress had passed the Federal Rehabilitation Act. The Rehabilitation Act was an important piece of civil rights legislation, prohibiting discrimination against people with handicaps,

14. Id. at 2161 (Stevens, J., dissenting).
15. Id. at 2158-59.
16. See 42 U.S.C. § 12101(a)(1) (1994) (stating in the introductory, general provisions of the ADA, that Congress found that "some" 43,000,000 Americans had disabilities, with the number increasing as the population aged).
but was limited to the federal sector only. While including most of the substantive provisions of the Rehabilitation Act in the ADA, Congress expanded the scope of coverage for people with disabilities by applying the provisions of the Rehabilitation Act to state and local governments and to the private sector. Private employers were specifically targeted in Title I of the ADA.

The ADA provides that no employer, that falls under the Act, "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." A "qualified individual with a disability" is defined as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Furthermore, the ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." The ADA does not define "physical or mental impairment," "substantially limits" or "major life activities."

---

18. See id.
19. See Timothy Stewart Bland, The Determination of Disability under the ADA: Should Mitigating Factors Such as Medications be Considered?, 35 IDAHO L. REV. 265, 273-74 (1999). Bland writes: [The] Rehabilitation Act is considered the forerunner of the ADA. Many provisions of the two acts are virtually identical.... Indeed, the ADA expressly requires that its provisions be interpreted in a manner that 'prevents imposition of inconsistent or conflicting standards for the same requirements' under the ADA and the Rehabilitation Act.
20. See 42 U.S.C § 12111(5) (1994) (defining "employer," generally, as an employer in the private sector with over fifteen employees and specifically excluding the United States). Title I of the ADA regulates employment, as codified at 42 U.S.C. §§ 12111-17 (1994); Title II applies to public services, including those provided by state and local government and to public transportation, as codified at §§ 12131-65; Title III applies to public accommodations and services operated by private entities, as codified at §§ 12181-89; Title IV covers telecommunications and is codified at 47 U.S.C. § 225(c) (1994); and Title V codifies miscellaneous provisions at 42 U.S.C. §§ 12201-13 (1994).
22. Id. § 12111(8).
23. Id. § 12102(2).
24. See generally id.
Following Congress' ratification of the ADA, The Equal Employment Opportunity Commission ("EEOC") promulgated regulations to carry out Title I, the employment section of the ADA.\(^\text{25}\) After adopting the ADA's definition of "disability," the EEOC regulations defined "physical impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine."\(^\text{26}\) "Substantially limits" is defined as "[u]nable to perform a major life activity that the average person in the general population can perform,"\(^\text{27}\) or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity."\(^\text{28}\) The EEOC regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\(^\text{29}\)

At the same time that the EEOC promulgated the regulations, it published Interpretive Guidelines to provide further assistance in implementing the ADA.\(^\text{30}\) The guidelines state that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures, such as medicines, or assistive or prosthetic devices."\(^\text{31}\) Similar guidelines were issued by the Department of Justice, while

\(^{25}\) See Sutton, 119 S. Ct. at 2145.


\(^{27}\) Id. § 1630.2(j)(1)(i).

\(^{28}\) Id. § 1630.2(j)(1)(ii).

\(^{29}\) Id. § 1630.2(i).

\(^{30}\) See generally 29 C.F.R. app. § 1630 (1998).

\(^{31}\) 29 C.F.R. app. § 1630.2(j) (1998); see also, 29 C.F.R. app. § 1630.2(h). Section 1630.2(h) states:

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.
implementing Title II, Subtitle A\textsuperscript{32} of the ADA. The Department of Transportation issued regulations containing the same definition of “disability” as the EEOC, while implementing the transportation sections of Title II, Subtitle B and Title III.\textsuperscript{33}

The ADA’s language seeks to expand the scope of protection against discrimination to all Americans with disabilities. “It is the purpose of this Act ... to provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.”\textsuperscript{34} Broadly written, the Act has caused much confusion in the courts.\textsuperscript{35} There is concern that litigation over the ambiguities inherent in this broadly written statute has caused the Act to lose its power as a remedial act to provide qualified individuals equal access and opportunity.\textsuperscript{36}

The federal courts’ struggle with the “no mitigating measures” language in the EEOC Interpretive Guidelines of the ADA is a stark example of the struggle over the ambiguous language in the ADA. The courts have differed as to whether to adopt or reject the Interpretive Guidelines when determining whether a person has a disability under the ADA. Prior to the Supreme Court’s decision in Sutton, many of the Circuit Courts had adopted the Interpretive Guidelines and determined the definition of a disability without regard to mitigating measures.\textsuperscript{37}

\textit{Id.} 32. \textit{See} 29 C.F.R. pt. 35, app. A, §35.104 (1998) (“The question whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”).

33. \textit{See} Transportation Services for Individuals with Disabilities (ADA), 49 C.F.R. pt. 37.3 (1998). No language concerning mitigating measures is found in this section which is entitled “Definitions.” \textit{See generally id.}


35. \textit{See} Isaac S. Greaney, Note, \textit{The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990}, 25 FORDHAM URB. L.J. 1267, 1267-68 (1999) (stating that almost all of the sections of the ADA have been the subject of contradictory court opinions).


37. \textit{Compare} Sutton, 119 S. Ct. at 2144 (citing to five Courts of Appeals cases that have decided, when determining a disability, that an impairment, to be substantially limiting, should be judged in its uncorrected or unmitigated state: Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir.}
In November 1997, The Tenth Circuit decided *Sutton v. United Air Lines, Inc.* 38 Contrary to other Circuit decisions determining the definition of “disability” in the ADA, the Tenth Circuit refused to accord the EEOC Interpretive Guidelines deference when determining whether an impairment substantially limits a major life activity. 39 The court viewed petitioners in their mitigated state, with corrected vision, and ruled for the defendant, United Air Lines. 40 The plaintiffs appealed and the Supreme Court granted certiorari. 41

The Supreme Court has not forged a clear path through the maze of the ADA. Slightly less than a year before the *Sutton* decision, the Court decided a controversial case under the ADA involving a female respondent with asymptomatic HIV, entitled *Bragdon v. Abbott.* 42 In *Bragdon*, the Court read the ADA expansively in defining the act of reproduction as a “major life activity.” 43 Reproduction is not listed in the Act as a major life activity, nor is it listed in the regulations or the agency interpretive guidelines as such. 44 The Court made a

---

1998); Bartlett v. New York State Bd. of Law Exam’rs., 156 F.3d 321 (2d Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 854 (3d Cir. 1997); Washington v. HCA Health Servs. of Texas, 152 F.3d 464 (5th Cir. 1998); Baert v. Euclid Beverage Ltd., 149 F.3d 626 (7th Cir. 1998)) with *Sutton*, 119 S. Ct. at 2153 (the minority opinion lists the five cases cited by the majority and adds three more circuits: Doane v. Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)).

38. 130 F.3d 893 (10th Cir. 1997).
39. *Id.* at 902.
40. *Id.*
42. 118 S. Ct. 2196 (1998). Justice Kennedy delivered the opinion of the Court. The original plaintiff, now respondent, was infected with asymptomatic HIV. She was denied dental treatment by defendant/petitioner dentist in his office. Defendant was worried about possible infection and stated he would treat the plaintiff in a hospital only. Plaintiff brought an action under Title III of the ADA. The Court, affirming the lower court decision, found that asymptomatic HIV was an impairment, that reproduction was a major life activity and that HIV could substantially limit that major life activity in its asymptomatic stage. *Id.*; see also Greaney, *supra* note 35, at 1287.
43. *Bragdon*, 118 S. Ct. at 2205.
44. See *Bragdon*, 118 S. Ct. at 2205 (stating that the ADA must be construed to be consistent with the regulations implementing the Rehabilitation Act, a civil rights act enacted in 1973; and stating further that: Rather than enunciating a general principle for determining what is and is not a major life
second broad statement when it found, without making an individualized inquiry of the impact of HIV on the respondent’s life, that HIV was a disability in its asymptomatic stage.\textsuperscript{45}

The Court relied on the \textit{Chevron} doctrine,\textsuperscript{46} articulated by the Court in a 1984 decision, to reach its decision in \textit{Bragdon}.\textsuperscript{47} The \textit{Chevron} doctrine was developed to deal with decisions involving administrative agencies and involves a two step process to determine whether deference to the agency interpretations of a regulation or statute is permitted.\textsuperscript{48} In that process, traditional tools of statutory construction are used to determine legislative intent.\textsuperscript{49} Traditional tools of statutory construction have been identified as: analysis of text, legislative history and application of various canons of construction.\textsuperscript{50} The use of legislative history by the courts to find legislative intent is known as "intentionalism."\textsuperscript{51} The \textit{Chevron} doctrine is examined more thoroughly in Part IV of this note. In \textit{Bragdon}, the Court used the \textit{Chevron} doctrine and examined legislative history to determine the legislative intent of Congress on the issue of whether HIV constituted a disability under the ADA. The Court determined that deference was due the agency’s interpretive guidelines.\textsuperscript{52}

activity, the Rehabilitation Act regulations instead provide a representative list, defining term to include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, breathing, learning and working.” (citation omitted) As the use of the term “such as” confirms, the list is illustrative, not exhaustive.)

\textit{Id.} \textit{See also} Greaney, \textit{supra} note 35 at 1288-89.

\textsuperscript{45} See \textit{Bragdon}, 118 S. Ct. at 2206-07.


\textsuperscript{47} \textit{Bragdon}, 118 S. Ct. at 2207.

\textsuperscript{48} See \textit{Chevron}, 467 U.S. at 842-43 (developing the two step process).

\textsuperscript{49} See \textit{id.} at 843 n.9.

\textsuperscript{50} See, \textit{e.g.}, Thomas W. Merrill, \textit{Judicial Deference to Executive Precedent}, 101 \textit{YALE L.J.} 969, 971 (1992) (identifying the traditional tools of statutory construction in the pre-\textit{Chevron} era as: analysis of the text, legislative history and various canons of construction).

\textsuperscript{51} See Richard J. Pierce, \textit{The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State}, 95 \textit{COLUM. L. REV.} 749, 750 (1995) (“Intentionalism refers to the use of a variety of tools, including legislative purpose and legislative history, in an effort to determine the intent of the legislature when it included a particular word or phrase in a statute.”).

\textsuperscript{52} See \textit{Bragdon}, 118 S. Ct. at 2007. The Court stated:

Our holding is confirmed by a consistent course of agency interpretations before and after enactment of the ADA.... It is enough to observe that the well-reasoned views of the
It is against this background that Sutton was decided. The broad reading of Bragdon led some to believe that the primary issue in Sutton, whether a person with an impairment is to be viewed in her unmitigated state when determining if that impairment is substantially limiting and thus a disability under the ADA, would be decided in the affirmative. But as Part III and IV of this note discuss, the Court in Sutton refused to give the ADA the expansive reading it had one year earlier in Bragdon.

The Court ignored the 'traditional' Chevron doctrine and refused to look at legislative history for legislative intent. Instead in Sutton, the Court followed a theory of more recent creation - the theory of textualism - to formulate its decision. This textualist reading creates a bright line test when using mitigating factors to determine disabilities. Part IV of this note discusses this bright line test. It examines how the textualist theory allows the judiciary to decide policy ab initio, at the beginning, precluding any need to employ the Chevron doctrine and, more importantly, precluding any need to look at legislative history for legislative intent.


Petitioners were severely myopic twin sisters who applied to respondent United Air Lines ("United") for jobs as commercial pilots. Petitioners' eyes, with agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

*Id.*


55. Id.

56. See Sutton, 119 S. Ct. at 2143. Each sister's uncorrected vision in her right eye was 20/200 or worse and 20/400 or worse in her left eye. "[W]ithout corrective lenses, each 'effectively cannot see
corrective lenses, were correctable to 20/20 vision or better.\textsuperscript{57} Having met the basic requirements of age, education, experience and FAA certification, petitioners received invitations from respondent to interview.\textsuperscript{58} At separate interviews, though, each sister was told that her application was being rejected because she did not meet United's minimum vision requirement of 20/100 or better with uncorrected vision.\textsuperscript{59}

The sisters filed suit in the district court for the District of Colorado, alleging that United's refusal to hire them, because of their visual impairments, was a violation of the ADA.\textsuperscript{60} Specifically, they alleged that the airline had discriminated against them "on the basis of a disability or because United regards them as having a disability."\textsuperscript{61} United filed a motion to dismiss for failure to state claim upon which relief could be granted.\textsuperscript{62} The court dismissed the plaintiffs' claims. The court agreed with United that plaintiffs were not disabled under the meaning of the ADA because their vision in its corrected form\textsuperscript{63} did not limit a major life activity.\textsuperscript{64} With respect to the claim that United "regarded" them as disabled, the court found no support for the allegation; United did not regard the plaintiffs as substantially impaired in the major life activity of seeing based on stereotype, myth or unsubstantiated fear.\textsuperscript{65} Nor were the plaintiffs regarded as substantially impaired in the major life activity of working because plaintiffs were not regarded by United as being handicapped by their impairments in their ability to find, generally, the type of employment involved.\textsuperscript{66} Plaintiffs, merely, were unable to satisfy the requirements of the particular job at United.\textsuperscript{67} The Court of Appeals for the Tenth

\begin{itemize}
\item to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores."\textsuperscript{3} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} See \textit{id.}
\item \textsuperscript{63} Uncorrected and corrected are to be read as synonymous with unmitigated and mitigated.
\item \textsuperscript{64} Sutton, 1996 WL 588914, at *5.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.}
\end{itemize}
III. THE SUPREME COURT’S REASONING

Justice O’Connor wrote the opinion for the Court. The Court affirmed the lower court’s dismissal of petitioners’ first claim that they had a disability that substantially limits a major life activity. The Court found that the “approach adopted by the agency guidelines - that persons are to be evaluated in their hypothetical uncorrected state - is an impermissible interpretation of the ADA.” Both positive and negative effects of the corrective measures must be evaluated when deciding if an impairment substantially limits a major life activity. Furthermore, since the Court decided that the ADA, “by its terms,” could not be read to permit evaluating persons in their uncorrected state, there was no need to consider the legislative history of the ADA. By couching the decision this way, the Court also avoided having to decide what deference was due agency interpretive guidelines.

The Court based its decision on reading three separate provisions of the ADA “in concert.” First, since the ADA defines a “disability” as “a physical or mental impairment” that “substantially limits” one or more of the major life activities of the person, the Court determined that “substantially limits” had to be read in the “present indicative” form; the impairment must presently, not hypothetically, impair a major life activity. Any impairment that is corrected by medication or other measures is not an impairment from which the person suffers presently.

70. See id. at 2144.
71. Id. at 2146. It is to be inferred from the text of the opinion that the Court was referring to the EEOC and Department of Justice interpretive guidelines in this part of the opinion. See id.
72. Id.
73. Id.
74. Id.
75. See id. at 2146 (“Although the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due.”).
76. Id.
77. Id.
78. Id. at 2146-47.
Secondly, the Court determined that whether or not a person has a disability is an individualized inquiry. Each individual is to be judged, not on the basis of the name or diagnosis of the impairment, but rather on the effect the impairment has on the life of that person. The agency guidelines, directing that a person is to be judged in an uncorrected state, defeat the individualized inquiry. Under the interpretive guidelines, employers and the courts would be forced to make a decision based on general information gathered about members of a group who suffered the impairment at issue, rather than focus on the actual effect of the impairment on a single particularized individual.

"Finally and critically," since Congress had adopted findings in the ADA that "some 43,000,000 Americans" suffered from a disability, the more than 100,000,000 people in the population who need corrective lenses could not be brought under its protection. Upon looking at the legislative history of the source of the 43,000,000 people that had disabilities under the ADA, the Court decided that only those individuals who had a "functional limitation on performing certain basic activities when using ... 'special aids' such as glasses or hearing aids" are among the 43,000,000.

Following its examination and application of the three identified provisions of the ADA "in concert," the Court summarized its position. The Court declared "because we decide that disability under the Act is to be determined with reference to corrective measures, we agree with the courts below that petitioners have not stated a claim that they are substantially limited in any major life activity."

---

79. Id. at 2147.
80. Id.
81. Id.
82. Id.
84. See Sutton, 119 S. Ct. at 2149 (finding, based on a National Advisory Eye Council report from 1998, that "more than 100 million people need corrective lenses to see properly").
85. See Sutton, 119 S. Ct. at 2147.
86. See id. at 2147-49 (having announced in the beginning of the majority opinion that the Court was not going to look at legislative history of the ADA, the Court did precisely that in analyzing this third prong); see also infra notes 205, 207-12 and accompanying text.
88. Sutton, 119 S. Ct. at 2149.
89. Id.
Justice O’Connor completed the majority opinion by assessing the petitioners’ second claim that United Airlines “regarded” the petitioners as disabled.\(^9\)

Following reasoning similar to the lower court’s, the Court found for respondent on this second claim and affirmed the Tenth Circuit.\(^1\)

Justice Ginsburg wrote a short concurring opinion.\(^2\) She focused on the third provision alone: the 43,000,000 identified as disabled by the language of the ADA provisions.\(^3\) While quoting the general introductory language of the ADA provisions, Ginsburg stated that, because the ADA describes the disabled as “a discrete and insular minority,”\(^4\) historically subjected to “purposeful unequal treatment and relegated to a position of powerlessness,”\(^5\) the petitioners’ “enormously embracing” definition of disability was incorrect.\(^6\) People who rely on glasses for good eyesight or take daily medication for their health are found in all socio-economic classes. They are not found solely among those who are politically powerless or are subject to discrimination.\(^7\)

Justice Stevens wrote a stinging dissent, joined by Justice Breyer.\(^8\) Stevens applied what he termed the “customary tools of statutory construction”\(^9\) with an eye to the remedial purpose of the ADA to decide that the question of whether an individual is “disabled” under the Act is determined by viewing the individual without regard to mitigation.\(^10\)

Justice Stevens divided his analysis of the statutory construction of the ADA into two parts.\(^11\) The first question he posed was whether those persons that Congress did intend to cover under the Act should be viewed in their mitigated or unmitigated state when determining disability status.\(^12\) The second question, once it was found that the first question is answered by determining that an individual is

\(^{90}\) See id.

\(^{91}\) See id. at 2149-52.

\(^{92}\) Id. at 2152.

\(^{93}\) Id.


\(^{95}\) Id.

\(^{96}\) Sutton, 119 S. Ct. at 2152.

\(^{97}\) Id.

\(^{98}\) See Sutton, 119 S. Ct. at 2152-61 (Stevens, J., dissenting).

\(^{99}\) Id. at 2152.

\(^{100}\) Id.

\(^{101}\) See Sutton, 119 S. Ct. at 2153 (Stevens, J., dissenting).

\(^{102}\) Id.
potentially disabled in the unmitigated state, was whether to apply the "disability" term to "minor, trivial impairment[s]." 103

Applying those "customary tools of statutory construction," Justice Stevens looked first to the text of the statute to interpret Congress' intent. 104 He focused on the three-part definition of "disability" 105 in the ADA. He determined that the three parts of the definition are not mutually exclusive. The three parts overlap to guarantee that an individual, who now has or ever has had a substantially limiting impairment, is covered by the ADA. 106 The majority's insistence that the disability exists only where an individual's "present or actual" condition is substantially limited, means that those persons who were once disabled but are now fully recovered, are not among those protected by the Act. 107 Under the majority opinion, a man with a prosthetic leg who is not limited in his ability to walk would no longer be protected by the ADA. 108 If a man could walk, but with some limitations with the use of the prosthetic limb, he would be covered by the Act. 109 This leads to the counter-intuitive result that those individuals who completely overcome their disability, to make themselves more employable, fall outside the protection of the Act. 110

Continuing his application of statutory construction, Justice Stevens examined the legislative history of the ADA. 111 Because the ADA originated in the Senate, Stevens began his examination by looking at that report. 112 The Senate Report 113 and the two subsequently issued House reports, stated that whether a person has a disability should be determined by looking at that person in his unmitigated state. 114 Justice Stevens also examined the EEOC Interpretive Guidelines for the

103. Id.
104. Id.
105. See id.; see also supra text accompanying note 23 (quoting verbatim the definition of "disability" in the ADA).
106. Sutton, 119 S. Ct. at 2153.
107. Id. at 2154.
108. Id.
109. Id.
110. Id.
111. See id. ("To the extent there may be any doubt concerning the meaning of the statutory text, ambiguity is easily removed by looking at legislative history.").
112. Id.
113. Id.; see also S. REP. No. 101-116 at 23 (1989).
ADA,115 the Department of Justice interpretive guidelines116 and the Department of Transportation regulations117 for the ADA.118 The EEOC guidelines119 and the Department of Justice guidelines120 adopted the unmitigated assessment to determine the disability status of an individual. Summarizing his analysis of the first question, Justice Stevens stated:

[T]he Committee Reports and the uniform agency regulations merely confirm the message conveyed by the text of the Act – at least insofar as it applies to impairments such as the loss of a limb, the inability to hear, or any condition such as diabetes that is substantially limiting without medication.121

Justice Stevens then addressed the second question, whether the petitioners, with severe myopia of 20/200 or 20/400 or worse, had a “minor trivial impairment.”122 He stated that “[i]t has long been a ‘familiar canon of statutory

Committee on the Judiciary) (“The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-—than—substantial limitation.”); H.R. REP. No. 101-485, pt. II at 52 (1990) (House Committee on Education and Labor). The Report of the House Committee on Education and Labor states:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Id.

115. See supra note 31 and accompanying text.
116. See supra note 32.
117. See supra note 33 and accompanying text.
118. See Sutton, 119 S. Ct. at 2155 (Stevens, J., dissenting).
121. Sutton, 119 S. Ct. at 2156 (Stevens, J., dissenting).
122. See id. Justice Stevens states:

[T]he question, then, is whether the fact that Congress was specifically concerned about protecting a class that included persons characterized as a ‘discrete and insular minority’ and that it estimated that class to include ‘some 43,000,000 Americans’ means that we should construe the term ‘disability’ to exclude individuals with impairments that Congress
construction that remedial legislation should be construed broadly to effectuate its purposes.”

He elaborated on this analysis, by explaining that the Court had interpreted recent civil rights legislation (and outside the discrimination context, in applying the Racketeer Influenced and Corrupt Organization Act (RICO), as well) to include comparable “evils,” though those “evils” had not been expressly addressed in the legislation. Justice Stevens stated that visual impairments should be judged by the same standards as “hearing impairments or any other medically controllable condition.”

The Court does not disagree that the logic of the ADA requires petitioner’s visual impairment to be judged the same as other “correctable” conditions. Instead of including petitioners within the Act’s umbrella, however, the Court decides, in this opinion and its companion to expel all individuals who by using “measures [to] mitigate [their] impairment[s]”..., are able to overcome substantial limitations regarding major life activities.

Justice Stevens’ lengthy dissent concludes with his dismissal of the Court’s individualized inquiry analysis. “Viewing a person in her ‘unmitigated’ state simply requires examining that individual’s abilities in a different state, not the abilities of every person who shares a similar condition.”

probably did not have in mind.

Id.
123. Id. at 2157.
124. See id. (construing same sex sexual harassment in respect to Title VII in Oncale v. Sundownner Offshore Services, Inc., 523 U.S. 75 (1998)).
125. See id. (construing RICO to cover more than “organized crime” in H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)).
126. Sutton, 119 S. Ct. at 2157 (Stevens, J., dissenting).
127. Id. at 2158.
128. Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999). The Court ruled, citing Sutton, which had been decided by the Court that day, that an individual’s severe hypertension that was controllable with medicine did not substantially limit a major life activity. Id.
129. Sutton, 119 S. Ct. at 2158 (Stevens, J., dissenting).
130. Id. at 2159. Justice Stevens reiterates that all those who had fully controlled impairments would be lumped into one undifferentiated group – per the majority’s view of disability – that employers could refuse to hire, while a second undifferentiated group, with substantially limited impairments even with medication, could not be refused employment. This “perverse result” does not advance the ADA’s purpose to dismantle employment barriers. Id.
Stevens states that the majority's "narrow approach [on the history behind the 43,000,000 disabled Americans] may have the perverse effect of denying coverage for a sizeable portion of the core group of 43 million people" that the ADA was expressly intended to protect. He cited those individuals with diabetes and severe hypertension as examples.

The dissent concludes with a separate opinion delivered by Justice Breyer.

IV. ANALYSIS

The Sutton majority opinion is a study in textualism. The dissent is couched in traditional intentionalist language. A year before the Sutton decision, in Bragdon, in a closely decided opinion, the dissent argued for a position that was securely anchored in the theory of textualism. Did a majority of the justices in Sutton, a year later, simply find professionally competent, well employed petitioners, who were unable to fly globally because a common condition of nearsightedness grounded them, much less sympathetic than the HIV positive female in Bragdon, who had been denied simple dental treatment? Did "some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment," cause the shift in the Court? Or, on an evolutionary basis, was it time simply for that majority of the justices to leave the intentionalist camp for the textualist side? Are both possibilities true? Is it as likely that the "great case"/"hard case" presented by Sutton helped nudge three justices out of the intentionalist camp and

ADA's purpose to dismantle employment barriers. Id.

131. Id. at 2160.
132. Sutton, 119 S. Ct. at 2160. Justice Stevens did not address petitioners' second claim of being "regarded" as having a disability.
133. See Sutton, 119 S. Ct. at 2161-62 (Breyer, J., dissenting). Justice Breyer's dissent is not discussed in this note.
135. Chief Justice Rehnquist wrote the dissent. He cited to dictionary meanings to define "major life activity." See id. at 2215. He used grammatical usage to define "substantial limits." See id. at 2216. He dismissed the use of legislative history to find legislative intent. See id. at 2216-17. Nowhere in his dissent did the Chevron doctrine come up. See generally id. at 2214-17.
into the textualist? Part IV of this note examines these questions after discussing the *Chevron* doctrine and its questionable influence on administrative law.

**A. The Chevron Two Step Inquiry and the Rise of Textualism**

In 1984, the Supreme Court decided *Chevron, Inc. v. Natural Resource Defense Council*.136 *Chevron* is the most cited case of all time,137 a fact which qualifies *Chevron* as influential. But what is that influence, particularly in reference to how the Court decided *Sutton*?138

*Chevron* established a two-step framework to determine the scope of judicial review of agency interpretations of statutory provisions.139 In the first step, the court decides if “Congress has directly spoken to the precise question at issue.”140 If Congress has spoken directly, both the court and the agency must give effect to that unambiguous statement of Congress and thus the matter ends.141

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent (citations omitted). If a court, employing traditional tools of statutory construction, including legislative history, determines that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.142

This reading of the first step, emphasizing legislative history to find legislative

---

136. 467 U.S. 837 (1984). In *Chevron*, the Clean Water Act had required the EPA to limit pollution from a “stationary source.” The EPA had defined “stationary source” to allow an entire plant, under a “bubble concept,” to comply with emission controls, rather than have each individual emission producing piece of equipment within the plant comply. The Court of Appeals had disallowed this broad reading, as undermining the Congressional goal of speedy compliance with clean air standards. The Supreme Court reversed the lower court and deferred to the EPA’s interpretation of “stationary source” to resolve the ambiguity in its definition. In doing so, the Court articulated the two-step *Chevron* test. *Id.*


138. See *id.* ("[T]here are questions about the extent to which *Chevron* actually produced, is producing or will produce large-scale shifts in the law....").

139. See *Chevron*, 467 U.S. at 842-43.

140. *Id.*

141. *Id.* at 843.

142. *Id.* at 843 n.9.
intent, is referred to as intentionalism.\textsuperscript{143}

Secondly, if the court determines that Congress has not directly spoken on the issue or that the statute is ambiguous, the court is not to impose its own interpretation of the statute.\textsuperscript{144} Rather, it is to defer to the agency’s interpretation, as long as the latter’s interpretation is “based on a permissible construction of the statute.”\textsuperscript{145} “Permissible” is read to mean “reasonable.”\textsuperscript{146}

In the decade following \textit{Chevron}, scholars labeled the decision as “one of the few defining cases in the last twenty years of American public law;”\textsuperscript{147} “[a] watershed decision .... both evolutionary and revolutionary;”\textsuperscript{148} and “the case [that] has transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions.”\textsuperscript{149} In the Circuits, \textit{Chevron} has produced regular judicial deference to agency interpretations of the ambiguous language of agency administered statutes.\textsuperscript{150} So, why then did the Court in \textit{Sutton} never mention, even in passing, this “revolutionary,” “defining” decision? It is because the Court does not see \textit{Chevron} as the “universal test” when deciding when to defer to administrative agency interpretations of statutory issues.\textsuperscript{151} In fact, Thomas W. Merrill, Professor of Law at Northwestern University, has tracked the number of times the Court used \textit{Chevron}, in the decade following the decision, in these kinds of deference cases, and found that the Court used \textit{Chevron} in only about half the

\begin{thebibliography}{99}
\bibitem{chevron} \textit{Chevron}, 467 U.S. at 847.
\bibitem{id} Id.
\bibitem{starr_note} Starr, \textit{supra} note 146, at 283-84.
\bibitem{pierce_note} Pierce, \textit{supra} note 146, at 302.
\bibitem{pierce} See Pierce, \textit{supra} note 51, at 749-50 (“Appellate courts routinely accord deference to agency constructions of ambiguous language in agency-administered statutes.”).
\bibitem{merrill_note} See Merrill, \textit{supra} note 50, at 970; see also, Pierce \textit{supra} note 51 at 750 (“The Supreme Court has not applied the \textit{Chevron} test in a consistent manner. Its post-\textit{Chevron} jurisprudence is so confused that it is difficult to determine what remains of the original deferential test.”).
\end{thebibliography}
Furthermore, Merrill states that the rise of textualism has caused the Court to use *Chevron* less frequently. Of equal importance, textualism has changed the way in which *Chevron* is applied by the Court, when it is used.

Textualism, while associated with the traditional “plain meaning” rule, is a more complicated theory. Textualism uses tools such as “dictionary definitions, rules of grammar and canons of construction” to examine the context in which the words are used. Textualism employs an objective meaning of the words, based on the “ordinary reader’s” understanding of the words.

The application of both textualism and the *Chevron* doctrine, as applied in its traditional manner by a court, creates a fundamental inconsistency. *Chevron* was written in the pre-textualist era when legislative history was used regularly by the courts. Textualism rejects this traditional use of legislative history to find legislative purpose. In order to reconcile textualism and *Chevron*, the Court has

152. Merrill, *supra* note 50, at 970.
154. *See id.*
155. *See id.* at 351-52.
156. *See* Pierce, *supra* note 51, at 750.
157. *See Merrill, supra* note 143, at 352.
158. *See id.* at 357 (stating that Justice Stevens, who wrote the Court’s opinion in *Chevron*, is “the last true-blue holdout in favor of intentionalism and legislative history in statutory interpretation”).
159. *Id.* at 353.
160. *See id.* at 351-53 (stating that Justice Scalia is the leading proponent of the textualist theory). He is also a supporter of *Chevron*, albeit in a formulation that is quite different from that of Justice Stevens, who uses legislative history more traditionally. Both theories “are at least presented as doctrines of judicial restraint that limit judicial policy making.” *Id.* at 353. Justice Thomas shares similar views with Justice Scalia, and since his appointment, the Court is increasingly using textualism in statutory interpretation. *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUK J. 511 (1989). Justice Scalia has declared:

[T]o tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of
stripped the first step of *Chevron* of its legislative history component.\(^{161}\) The Court substitutes "plain meaning" language for the intention found in legislative history.\(^ {162}\) The Court goes even further. The Court no longer looks at the "precise question at issue"\(^ {163}\) in the first step of *Chevron*. It drops the "precise question at issue" analysis and it looks, instead, at the statute as a whole in order to find the preferred meaning of the statute.\(^ {164}\) The Court is allowed the "free substitution of judicial judgment for administrative judgment when the question involves the meaning of a statutory term."\(^ {165}\) The result of this shifting of the Court is that the judiciary, and not the agencies, becomes the "primary policy-makers."\(^ {166}\) The Court rarely reaches step two of *Chevron*; it resolves most policy issues in step one. Therefore, deference to the agencies is seldom seen.

The Court may go even further in this "marginalization" of the *Chevron* deference doctrine.\(^ {167}\) It may simply ignore the *Chevron* framework altogether.\(^ {168}\) The Court exercises its "independent judgment, find[s] that the statutory meaning is unambiguous and then drop[s] a footnote indicating that there is no need to

---

1. See Merrill, supra note 50, at 991.
2. See id. at 990.
4. See Merrill, supra note 50, at 991.
5. See Scalia, supra note 160 at 513. Justice Scalia has further stated:
   One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference.

Id. at 521.
6. See Merrill, supra note 50, at 1002 ("More problematically, if the reformulation results in a greatly enlarged judicial role at step one ... then it would have the paradoxical effect of elevating the courts rather than the agencies to the role of primary policymaker.").
7. See Merrill, supra note 143, at 362.
8. See Merrill, supra note 50, at 1000.
consider deference to agency views."\textsuperscript{169} Thomas W. Merrill sees an important symbolic difference between resolving an issue at step one of the *Chevron* doctrine and not reaching the *Chevron* inquiry at all.\textsuperscript{170} A court that decides the question under the framework of *Chevron's* step one acknowledges that a "major issue" in the case is which "institution" - either the court or the agency - has the right to interpret the statute.\textsuperscript{171} Every case is based on a separation of powers issue.\textsuperscript{172} When *Chevron* is not evoked, and the Court decides the issue using its independent judgment, it is relegating the deference doctrine to nothing more than another "pair of pliers in the statutory tool chest," similar to when a court applies a canon of construction to decide the issue.\textsuperscript{173}


It is within this judicial milieu, this *Chevron* doctrine versus textualism created tension, that the Supreme Court's decision in *Sutton v. United Air Lines, Inc.* must be viewed. Justice Stevens, author of the 1984 *Chevron* decision, embodies the traditional intentionalist.\textsuperscript{174} In his dissent in *Sutton*, Justice Stevens depends heavily upon legislative history to determine legislative intent.\textsuperscript{175} He applies the

\textsuperscript{169} Merrill, *supra* note 143, at 362.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id. But see Scalia *supra* note 160, at 515-16 (stating that he rejects the constitutional principle of separation of powers as a rationale for substituting agency interpretation for judicial interpretation in *Chevron*).

\textsuperscript{173} See Merrill, *supra* note 143, at 362-63. Merrill explains that both the textualists and the intentionalists believe that their own interpretation is the one that creates the most narrow interpretation of the issue. For the textualist, the range of meaning within the text is narrow and delving into legislative history creates too many unresolved ambiguities. For the intentionalist, the text is ambiguous and ambiguities are resolved by looking at legislative intent through legislative history. *Id.* at 367. Merrill goes on to say, "if we view the Court as currently divided into two camps engaged in a competitive struggle over the use of legislative history, it is plausible that Justices in both camps will strain to avoid deferring to agency interpretations as long as that struggle continues." *Id.* at 370.


\textsuperscript{175} See generally *Sutton*, 119 S. Ct. 2139, 2152-61 (1999) (Stevens, J., dissenting).
“customary tools of statutory construction” to the “threshold” question of whether the petitioners are disabled under the ADA.176 In doing so, he interprets the words of the statute “in light of the purpose Congress sought to serve.”177

First, Justice Stevens looks to the statutory text, reading the three prongs of the definition of disability ("substantially limits," "a record of," and "regarded as") together, and declares that petitioners should be viewed in their unmitigated state when determining if they have a disability under the ADA.178 Secondly, bolstering his argument further, Justice Stevens examines the legislative history of the Act extensively to expel any doubt that statutory ambiguity remains.179 He cites the Senate 180 and House Reports:181 "[a]ll of the Reports, indeed, are replete with references to the understanding that the Act’s protected class includes individuals with various medical conditions that ordinarily are perfectly ‘correctable’ with medication or treatment.”182 He cites the interpretive guidelines and regulations of the three Executive agencies – the Departments of Transportation and Justice and most particularly, the EEOC - charged with implementing the ADA.183

[Each of the three Executive Agencies charged with implementing the Act has consistently interpreted the Act as mandating that the presence of disability turns on an individual’s uncorrected state. We have traditionally accorded respect to such views when, as here, the agencies ‘played a pivotal role in setting [the statutory] machinery in motion.”184

Continuing his use of the “traditional tools of statutory construction,” Justice Stevens turns to the canons of statutory construction to resolve the apparent inconsistency between the 43,000,000 people cited in the Act as having a disability and the 100,000,000 people in America who have myopia.185 “It has long been a ‘familiar canon of statutory construction that remedial legislation should be

176. Id. at 2152.
177. Id. at 2153.
178. See id. at 2154.
179. Id.
180. See id. (citing S. REP. No. 101-116, at 23 (1989)).
182. Id.
183. See id. at 2156.
184. Sutton, 119 S. Ct. at 2155 (Stevens, J., dissenting).
185. Id. at 2156 (Stevens, J., dissenting).
construed to effectuate its purposes.”

For Justice Stevens, the remedial purpose of the ADA means that the statute should be construed broadly. All individuals who have a disability in the major life activity of seeing should be included, whatever that number might be.

Justice Stevens’ dissent in *Sutton* is a classic example of the intentionalist’s interpretation of an issue. He makes use of the traditionalist’s tools: he analyzes the text, he examines legislative history and he cites canons of construction. Yet, nowhere in that dissent is *Chevron* cited. The petitioners clearly felt that *Sutton* was a classic *Chevron* case. Petitioner’s Brief cites *Chevron* so often that “passim” is used in lieu of page citation. Perhaps Justice Stevens was influenced by the majority’s statement that, in promulgating the ADA, Congress gave no agency the power to issue regulations for the “generally applicable provisions” of the Act and most particularly for the word “disability.” The general provisions could then fall outside the province of *Chevron* deference to administrative

186. *See id.* at 2157 (Stevens, J., dissenting). Justice Stevens states:

   Congress sought, in enacting the ADA, to ‘provide a ... comprehensive national mandate for the discrimination against individuals with disabilities’ .... Even if an authorized agency could interpret this statutory structure so as to pick and choose certain correctable impairments that Congress meant to exclude from this mandate, Congress surely has not authorized us to do so.

   *Id.*

187. *Id.* at 2157 (Stevens, J., dissenting).

188. *See id.* at 2157-58 (Stevens, J., dissenting). Justice Stevens states:

   While not all eyesight that can be enhanced by glasses is substantially limiting, having 20/200 vision in one’s better eye is, without treatment, a significant hindrance. Only two percent of the population suffers from such myopia .... Uncorrected vision, therefore, can be “substantially limiting” in the same way that unmedicated epilepsy or diabetes can be. Because Congress obviously intended to include individuals with the latter impairments in the Act’s protected class, we should give petitioners the same protection.

   *Id.* at 2158.

189. *See supra* note 50 and accompanying text.


192. *Id.*

193. *See Sutton*, 119 S. Ct. at 2145 (stating that no agency has been given the authority under the ADA to issue regulations implementing the applicable provisions of the ADA and, more pointedly, no agency has been given the authority to interpret the term “disability”).
agencies. However, Justice Stevens was much more likely to be continuing his ongoing battle to convert justices to, or keep justices in, his intentionalist camp. He chose not to cloud the issue by arguing about deference due the agencies and/or constitutional separation of powers involved in application of the *Chevron* doctrine.\textsuperscript{194}

Justice O'Connor's majority opinion continues the trend toward marginalization of the *Chevron* doctrine.\textsuperscript{195} The Court also does not discuss *Chevron*.\textsuperscript{196} Instead, it exercises its independent judgment to find that the ADA's definition of disability is unambiguous and states (though not in a footnote) perfunctorily,\textsuperscript{197} "[a]lthough the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due."\textsuperscript{198} The Court's opinion is a textualist interpretation. It begins by looking at the ADA as a whole while reading three provisions of the Act "in concert"\textsuperscript{199} (and ignoring the "precise question at issue" of the *Chevron* doctrine). The Court finds that the agency guidelines that mandate viewing an individual in her unmitigated state, when determining whether a person has an impairment that substantially limits that person in a major life activity, is "an impermissible interpretation of the ADA."\textsuperscript{200}

First, the Court employs the textualist tool of grammar usage to determine that "substantially limits" in its "present indicative form" means that the individual is "presently, not potentially or hypothetically" impaired.\textsuperscript{201} A fully corrected impairment is not one that is "substantially limiting" currently, presently.\textsuperscript{202} The opinion does not make use of dictionary definitions. However, in analyzing the "plain meaning" of the words "individualized inquiry," the Court determines that by viewing a person in her unmitigated state the guidelines run "directly counter to the individualized inquiry mandated by the ADA."\textsuperscript{203} The guidelines erroneously treat a person as a member of a group, with like impairments, rather than as an

\textsuperscript{194} See supra note 173.

\textsuperscript{195} See supra note 151 and accompanying text.

\textsuperscript{196} See generally *Sutton*, 119 S. Ct. 2139-52.

\textsuperscript{197} See supra note 169 and accompanying text.

\textsuperscript{198} *Sutton*, 119 S. Ct. at 2146.

\textsuperscript{199} Id.

\textsuperscript{200} Id.

\textsuperscript{201} Id.

\textsuperscript{202} Id. at 2147.

\textsuperscript{203} Id.
"Finally, and critically," the Court focuses on that 43,000,000 number that the Act determines are disabled under the ADA.205 The Court delves extensively into the source of the 43,000,000 number.206 For example, the Court quotes directly from a report issued by the National Council on Disabilities in 1986.207 This report was used as a source for the 1988 bill introduced in Congress, which was the precursor of the ADA.208 The Court also references the report's 1988 update, which was a direct source for the 1990 Act that created the ADA.209

Justice Stevens describes the majority's analysis as "mining the depths of the history of the 43 million figure - surveying even agency reports that predated the drafting of any of this case's controlling legislation."210 He sees this final prong of the majority's analysis as an example of the use of legislative history, something that textualists shun.211 How can the majority's use of legislative history in this circumstance be justified? One commentator has declared that selective use of legislative history is a symptom of the abuse of textualism, or textualism run amuck.212

The extreme version of textualism ... allows judges to engage in disingenuous, result-oriented interpretation of statutes to at least the same extent as did the extreme version of intentionalism that the textualist Justices criticize. A hypertexualist judge can, in many cases, choose a result simply by choosing which dictionary, treatise, or judicial decision to use as the source of the "plain meaning" and by engaging in selective references to statutory and historical context. 213

Another interpretation may be found by looking carefully at what the majority does and does not cite as it determines who is included among the 43,000,000

204. Id.
205. Id.
206. See id. 2147-49.
207. See id. at 2147-48 (citing the NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE 10 (1986)).
208. Id. at 2147.
210. Id. at 2160 (Stevens, J., dissenting).
211. See generally id. at 2160-61.
212. See Pierce, supra note 51, at 778.
213. Id. at 778-79.
disabled. While it cites numerous surveys and reports, it never cites the committee reports coming from the House or Senate.\(^{214}\) It cites the U.S. Department of Commerce, Bureau of Census report,\(^ {215}\) the Mathematica Policy Research Inc. study\(^ {216}\) and the 1989 Statistical Abstract.\(^ {217}\) There is no citation to the Act’s House and Senate Committee Reports.\(^ {218}\) The Court is simply using the surveys and reports like a dictionary, to discover the “plain meaning” of the 43,000,000. The Act’s Committee Reports, used by the dissent to determine the legislative history and the intent of Congress, gain significance only in that their absence confirms that no viewing of legislative history is permitted.\(^ {219}\)

Whether the Court in *Sutton* was engaging in “hypertextualism” by picking and choosing what it would and would not accord weight in the legislative history of the ADA, or whether it simply manipulated the tools of textualism thoroughly to determine the definition of the three provisions of the Act it examined, the Court was fundamentally focused on the issue of those 100,000,000 clogging the federal courts. Justice Ginsburg’s concurrence exemplifies this focus in its purest form. Respondent clearly saw its argument as one predicated on the need to sharpen the Court’s focus on that 100,000,000. The first sentence of Respondent’s Brief states: “This case requires the Court to decide whether more than 100 million Americans who have nearsightedness that is correctable by ordinary glasses or contact lenses are covered by the Americans with Disabilities Act of 1990 (citations omitted).”\(^ {220}\) In the minority opinion, Justice Stevens argued in rebuttal.\(^ {221}\) He stated that a mere fraction of those with severe myopia similar to that of the petitioners would ever have, or attempt to get, a job where the myopia of the individual in its uncorrected

\(^{214}\) See *Sutton*, 119 S. Ct. at 2139-52.

\(^{215}\) See *id.* at 2148 (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, DISABILITY, FUNCTIONAL LIMITATION, AND HEALTH INSURANCE COVERAGE: 1984/85 2 (1986)).

\(^{216}\) See *id.* (citing MATHEMATICA POLICY RESEARCH INC., DIGEST OF DATA ON PERSON WITH DISABILITIES 25 (1984)).

\(^{217}\) See *id.* (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 106 (Tbl. 168) (1989)).

\(^{218}\) See generally *id.*

\(^{219}\) It may be that the Court is being disingenuous under this interpretation. In discovering a number of these documents, the easiest way to find them would have been through mention in one or the other of the House or Senate Reports.


\(^{221}\) See *Sutton*, 119 S. Ct. at 2152-61 (Stevens, J., dissenting).
state would determine that individual’s ability to do the job. This argument fell on deaf ears. No matter how persuasively Justice Stevens argued that the ADA is a remedial statute and broad enough to expand to allow those people like petitioners to make the threshold argument of disability in order to survive summary judgment, the Court was not convinced. The “plain meaning” of the provisions at issue, based on a textualist reading of the statute, permitted the Court to decide ab initio, that policy considerations, of the unimaginable increase in the number of lawsuits, would not permit such a broad reading of the statute.

V. CONCLUSION

Oliver Wendell Homes spoke wisely when he said, “[g]reat cases, like hard cases, make bad law.” Following its decision in Sutton, the Court is caught on the horns of a dilemma. The Court has avoided seeing the hordes of myopic individuals clog the courts. It has created a bright line test for determining whether an impairment that effects a major life activity is a disability under the ADA. Mitigating factors will be weighed and, if an impairment is fully corrected, there is no disability. If the impairment is fully correctable, but is not corrected, it is a disability.

However, any individual, who would prefer to live symptom-free rather than suffer the effects of the symptoms, is not permitted the protection of the ADA. On a practical basis, thousands of individuals with fully controlled diabetes, epilepsy, or mental illness will no longer be covered by the Act. An individual with a prosthetic leg may be so successful at adjusting to it that his ability to walk may no longer effected. He is no longer disabled under the ADA. As hearing aids improve further, those with hearing impairments, clearly intended to by covered by the Act, will no longer be covered. Justice Stevens is correct. The Court finds itself, through it’s “crabbed reading” of the ADA, denying coverage to those that the ADA was written to cover. Judicial policy-making has resulted in a judicial re-writing of the ADA to fit its policy needs.

Textualism is not solely at fault. It would be naive to state that policy has not driven the Court in other decisions. But, by applying textualism in determining its

---

222. See id. at 2152.
225. Id.
226. Id.
decisions, the Court is able to disregard the intent of the legislature no matter how clearly that legislative intent is stated in the history of the statute. The "mitigating measures" issue in *Sutton* is a striking example of the specificity with which Congress does state its intent, at least occasionally. The *Chevron* doctrine, never the persuasive doctrine with the Supreme Court that it has been with the lower courts, has little and perhaps no place in the textualist version of decision-making. Deference to the agencies, and certainly to the interpretive guidelines articulated by those agencies, holds no sway.

The majority in *Sutton* may have been reached through conversion of members to the textualist camp. More simply, though, the textualist camp may have won this battle only. The textualist interpretation, as applied to the particular set of facts of *Sutton*, may have allowed for an easy and coherent way to reach a policy decision that a majority of the justices wished, were inclined, were swayed by the dictates of passions, to reach: myopia is too common; the petitioners were too able bodied and professionally competent to need protection of the ADA; and/or as it is now, court dockets are bursting with unnecessary lawsuits. It is too earlier to say, though, that the textualists have won the war. Perhaps, when the Court next takes up an administrative law case, the Court may decide as it did in *Bragdon*; legislative history, as viewed through the intentionalist's prism, may well be the most effective weapon to win a majority.

Clearly, however, *Chevron*'s influence, such as it ever was, is waning ever further. With no canon or doctrine to incline the judges to defer to administrative judgment, judicial policy-making, whether couched in intentionalist terms or textualist terms, will continue to rise. The ADA will continue to be the basis of litigation. Those individuals, who once had the protection of the ADA, and now may or may not be protected because of the bright line "mitigating measures" test, may clog the courts as effectively as that hypothetical horde of myopic individuals was supposed to do. In the end, judicial efficiency has not triumphed. The costs are yet to be fully calculated.
INTRODUCTION

In the wake of public outcry against what are considered frivolous lawsuits, Ohio, like many other states, enacted tort reform laws. These reforms limit an individual's ability to recover damages for injuries sustained from a culpable defendant. Since the late 1980s, a battle has raged in Ohio between the General Assembly and the Ohio Supreme Court over the breadth of various tort reform laws. The Ohio Supreme Court took an activist role throughout the late 1980s and into the 1990s in striking down much of the legislature's attempts at tort reform on the basis of numerous state constitutional rights, including due process of law, equal protection, and the right to trial by jury.

In response to the court's negative rulings on the legislature's past attempts at tort reform, a comprehensive bill, known as Amended Substitute House Bill 350 (hereinafter "Tort Reform Act"), was signed into law on October 28, 1996. Even

2. Id.
4. Id. at 1156.
5. 1996 Ohio Laws 3867.
6. See Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1068 (Ohio 1999). The court provided a footnote illustrating just how extensive the Tort Reform Act is: Am.Sub.H.B. No. 350 amends, enacts, or repeals over one hundred sections of the Ohio Revised Code "relative to changes in the laws pertaining to tort and other civil actions." The changes addressed include interest on judgments, immunity and liability of political subdivisions, liability for the condition of premises open to the public for accessing growing agricultural produce, sales of securities and class action requirements therefor, joint and several liability, contributory and comparative fault, assumption of risk and apportionment.
before the Act was passed it was the subject of much controversy. As one scholar wrote, "[C]onstitutional challenges to key provisions of this new law will be brought as quickly as the Bar can find cases that present the opportunity."7 Undoubtedly, plaintiffs would appeal decisions in the normal course of law over issues such as the limited damages they could recover under the new law, and most likely many of the provisions of the Tort Reform Act would be ruled unconstitutional by the Ohio Supreme Court in a piecemeal fashion.8 However, that approach was made unnecessary by a 4-3 majority in the Ohio Supreme Court in the single landmark case of Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward in which the entire Tort Reform Act was found unconstitutional.9

Due to the breadth of topics covered in the opinion, this case is monumental for a number of reasons. The focus of this note is on the two issues of law that the majority used to invalidate the Tort Reform Act – the doctrine of separation of powers and the one-subject rule. Whether the relators had standing to sue and whether they were entitled to the remedies sought were the other two major issues in the case and points of controversy between the majority and the dissent.10

Id. at 1073 n.6 (citations omitted).

7. Werber, supra note 3, at 1156.

8. See generally Werber, supra note 3, at 1157 (predicting that attacks will be made on several provisions of the Tort Reform Act, including the release and repose amendments of the Wrongful Death Act; the standard for imposition of liability in toxic tort and hazardous substance litigation; the abrogation of the collateral source rule; the incomplete abolition of joint and several liability; various statutes of repose; and the ceilings on noneconomic and punitive damages awards).

9. 715 N.E.2d at 1111.

10. See id. at 1079-85, 1103-04, 1106-09. The respondents and the dissent argued that the relators did not have standing to sue since there was no personal injury to them. Id. at 1118. The majority
use of the doctrine of separation of powers and the one-subject rule is questioned in this note, for it appears that this holding is a manifestly gross example of political opportunism, allowing the majority to invalidate a disfavored law using a questionable approach.

HISTORICAL BACKGROUND

A. Separation of Powers

The establishment of the doctrine of separation of powers can be traced to the framing of the U.S. Constitution. The concept was incorporated into Ohio’s state government through its own constitution. “The principle of separation of powers is embedded in the constitutional framework of [Ohio’s] state government.” The Ohio Supreme Court has held that “[i]t is inherent in our theory of government ‘that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be conceded that there was no cause of action for a private claim but heard the case on the theory of the public right doctrine. Id. at 1084. In quoting Ohio ex rel. Newell v. Brown, 122 N.E.2d 105 (Ohio 1954), the majority wrote that “[w]here a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily adhered to by this court over the years.” Id. at 1083 (alteration in original). The majority decided that the public’s interest in this tort reform law was large enough to maintain a public right of action. Id. at 1084. The dissent argued that by dismissing the “long-established standards” governing the issuance of writs of mandamus or prohibition, the court can expect opponents of legislation to go directly to the court for a constitutional decision, a circumstance which is not part of the court’s past protocol. The dissent argued that the relators were really seeking a declaratory injunction which the Supreme Court had no jurisdiction to hear in an original action. Id. at 1112. The majority held that the relators had a right to request a writ of mandamus and prohibition because they had met the standard established as necessary. Id. at 1084-85.

11. See The Federalist No. 47 (James Madison).

12. See Ohio Const. of 1851. The Ohio Supreme Court has noted that the Ohio Constitution lacks a provision “specifying the concept of separation of powers.” City of S. Euclid v. Jemison, 503 N.E.2d 136, 138 (Ohio 1986). Instead, the doctrine is implicit in “those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” Id. at 138.

13. Sheward, 715 N.E.2d at 1085 (quoting Ohio v. Warner, 564 N.E.2d 18, 31 (Ohio 1990)).
preserved.”14 It has long been an established principle that when one branch encroaches on another branch, there is an unconstitutional exercise of power open to review and censure.15

B. One-Subject Rule

The one-subject rule also has a long and established history in Ohio. Article II, section 15(D) of the Ohio Constitution specifies that “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title.”16 This provision was adopted and became part of the Ohio Constitution of 1851.17 The first judicial decision providing an interpretation of the one-subject rule came in 1856 in Pim v. Nicholson.18 In that opinion, the court established the purpose of the rule as “prevent[ing] combinations, by which various and distinct matters of legislation should gain a support which they could not if presented separately.”19 The court provided a long-lasting principle that the one-subject rule is directory only, not mandatory.20 Furthermore, the only safeguard provided to prevent violation of the rule is the legislature’s “regard for, and their oath to support the Constitution of the State.”21 The Pim decision provided the groundwork for the court to take a non-activist approach in its review of violations of the one-subject rule.22 The court stated that only a “manifestly gross and fraudulent violation” might authorize the court to intervene, but the court assumed “that no such case will ever occur.”23

At the following constitutional convention, which ran from 1873 through 1874, some delegates voiced concerns with the one-subject rule.24 In light of the Pim

15.  Id.
16.  OHIO CONST. art. II, § 15(D).
17.  See John J. Kulewicz, The History of the One-Subject Rule of the Ohio Constitution, 45 CLEV. ST. L. REV. 591 (1997). The provision was enacted by the Constitutional Convention of 1850-1851 but generated no debate. Id. at 592-93. It was viewed as a necessary law after the period of legislative superiority that preceded the Constitution of 1851. See Sheward, 715 N.E.2d at 1098.
18.  6 Ohio St. 176 (1856).
19.  Id. at 179.
20.  Id. at 180.
21.  Id.
22.  Id.
23.  Id.
24.  See Kulewicz, supra note 17, at 595.
decision, a minority wanted the rule to be mandatory and the court to have explicit authority and duty to use the rule to invalidate laws that did not conform to its standards. However, the one-subject rule was not altered, and in 1876 the court reaffirmed its opinion on the subject:

In holding this provision to be directory, we do not mean, however, to be understood as saying that it is without obligatory force. On the contrary, it is a direction to the general assembly, which each member, under the solemn obligation of his official oath, is bound to observe and obey. To the legislator it is of equal obligation, with a mandatory provision. The difference between a mandatory and directory provision is this, and nothing more: the former avoids, the latter does not. This is a rule of decision, and is based on grounds of expediency. The rule is amply recognized by all courts of law, and the reason of the rule is this, that less injury results to the general public by disregarding than by enforcing the letter of the law.

The basic rule and the construction given it by the court in Pim remained intact after the convention and through subsequent Ohio Supreme Court decisions for a century.

In 1984, the court’s interpretation of the one-subject rule began to allow for more judicial oversight in cases in which a violation was alleged to exist. In Ohio ex rel. Dix v. Celeste, the court held that it could decide an issue that the Pim court had assumed would never occur, i.e. a “manifestly gross and fraudulent violation” of the one-subject rule. While the court held that the law at issue was constitutional, the decision broadened the review courts could hold over cases involving apparent violations of the one-subject rule. The decision in Dix stated that the primary purpose of the rule was to prevent logrolling. The one-subject

25.  Id. at 596.
26.  Id. at 595.
27.  Ohio ex rel. Attorney General v. Covington, 29 Ohio St. 102, 116-17 (1876).
28.  See Kulewicz, supra note 17, at 601. The author noted that the court “has observed consistently the intent of the Constitutional Conventions.” Id.
29.  See generally Kulewicz, supra note 17.
31.  Id. at 157. In its holding the court found that an appropriations provision of a bill providing funding for programs established in that same bill did not violate the one-subject rule. Id. at 158.
32.  Id. at 155. Logrolling, as defined by the court, is “the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could
rule "disallow[s] unnatural combinations" of provisions in bills before the legislature on the belief that such unnatural combinations were done for the tactical reason of logrolling. However, the court maintained its position that the rule was still directory in nature and was imposed to facilitate orderly legislative procedure, not to hamper legislation. The court cautioned that though it had "consistently expressed its reluctance to interfere with the legislative process," the court would not "abdicate in its duty to enforce the Ohio Constitution." This duty must be called upon when there is a "manifestly gross and fraudulent violation" of the one-subject rule. Such a violation occurs "when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act." When this occurrence exists, the court is left with a strong suggestion that the provisions were combined for tactical reasons. However, in line with the court's desire not to interfere unduly with legislative procedure, the rule is "not directed at plurality but at disunity in subject matter." The court believed it had found the proper balance in its holding.

As stated above, in applying this broadened construction of the rule in Dix, the court did not find a violation.

have obtained majority approval separately." Id.

33. Id.
34. Id. at 156. The court stated that "[i]t would be most mischievous in practice, to make the validity of every law depend upon the judgment of every judicial tribunal of the state as to whether an act or a bill contained more than one subject . . . . No practical benefits could arise from such inquiries." Id. (quoting Pim v. Nicholson, 6 Ohio St. 176, 180 (1856) (alteration in original)).
35. Id. at 157.
36. Id.
37. Id.
38. Id. The court also reiterated that laws in general carry a strong presumption of constitutionality that must be overcome. Id. at 155.
39. Id. at 158.
40. In finding that balance, the court stated:

[This decision] recognizes the necessity of giving the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.

Id. at 157.
41. Id. at 158.
One year later, in *Hoover v. Board of County Commissioners*, the court moved one step closer to actually finding a violation when it held that the law under consideration could be in violation of the one-subject rule. The court stated that the fact that more than one topic is found in the bill is not fatal, as long as there remains a "common purpose or relationship" in the bill. If a "blatant disunity" exists with no "rational reason" for the inclusion of more than one topic, the bill is an exercise in logrolling and will be held invalid.

Eventually, the court found a case in which it could hold that there existed a violation of the one-subject rule in *Ohio ex rel. Hinkle v. Franklin Board of Elections*. The law at issue made provisions for the Ohio judiciary and was a liquor control law that defined "residence district" for the purpose of exercising the local option privilege. The court found no rational relationship or common purpose between these two provisions. After finding the violation, the court severed the section dealing with the liquor control provision to cure the defect, and the remaining portions of the law remained intact. In order to cure the defect by severing the invalid sections, the court determined which subject was the primary

---

42. 482 N.E.2d 575, 580 (Ohio 1985). In *Hoover*, a taxpayer filed a complaint seeking to enjoin certain construction contracts awarded without the normally required public competitive bidding pursuant to an exemption listed in O.R.C. 14-051. Id. at 577. The court did not decide if the law in question violated the rule, but it held there was a cause of action and remanded it for further consideration. Id. at 580.

43. Id. at 580.

44. Id.


46. Id. at 770. The court said of the law at issue:

Am.Sub.H.B. No. 200 mainly addresses matters pertaining to the state judicial system: (1) it creates an environmental division in the Franklin County Municipal Court and a judge for that division, amends related provisions, and creates the Clermont County Municipal Court; (2) it adds a common pleas judge in Lucas County; (3) it makes revisions in the municipal and county court law; and (4) it changes the disposition of certain fines paid into municipal and county courts. We see no rational relationship or common purpose between provisions for the Ohio judiciary and Section 7, a liquor control law that defines "residence district" for the purpose of exercising the local option privilege.

Id.

47. Id.

purpose of the law and which was an unrelated add-on, and the former was saved by severing the latter.\textsuperscript{49}

Though originally interpreted as solely a prerogative of the legislature, acting as a self-imposed rule, the one-subject rule has expanded under the court's direction in the last fifteen years.\textsuperscript{50} The majority in \textit{Sheward}, using the rules spelled out above, found that the Tort Reform Act violated the one-subject rule.\textsuperscript{51}

THE COMPLAINT

Relators, Ohio Academy of Trial Lawyers, Ohio AFL-CIO, Richard Mason (executive director of Ohio Academy of Trial Lawyers), and William A. Burga (president of Ohio AFL-CIO) brought this original action in prohibition and mandamus to the Ohio Supreme Court.\textsuperscript{52} The respondents named were six sitting Ohio trial judges.\textsuperscript{53} Attorney General Betty Montgomery intervened on the respondents' behalf.\textsuperscript{54} The court entertained the following points of the relators' complaint:

(1) [A] writ of prohibition preventing respondents from implementing those

\textsuperscript{49}. \textit{See generally id.}\n\textsuperscript{50}. \textit{See generally Kulewicz, supra} note 17, at 601-05. The author noted that the court has stated a willingness to allow plaintiffs to invoke the one-subject rule in "manifestly gross and fraudulent" circumstances. \textit{Id.} at 605. However, the court also "recognizes the necessity of giving the General Assembly great latitude in enacting comprehensive legislation." \textit{Id.} at 604 (quoting Ohio \textit{ex rel.} Dix \textit{v.} Celeste, 464 N.E.2d 153, 157 (Ohio 1984)).
\textsuperscript{51}. A concise version of the rule that both the majority and dissent relied on was stated by Ohio \textit{ex rel.} Ohio AFL-CIO \textit{v.} Voinovich:

Section 15(D), Article II is directory rather than mandatory . . . . However, although we are most reluctant to interfere in the legislative process, we will not "abdicate [our] duty to enforce the Ohio Constitution." Accordingly, we will hold enactments invalid under Section 15(D), Article II whenever there is a "manifestly gross and fraudulent violation" of this provision of the Ohio Constitution. But "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." Ohio \textit{ex rel.} Ohio AFL-CIO \textit{v.} Voinovich, 631 N.E.2d 582, 586 (Ohio 1994) (citations omitted) (alteration in original).

\textsuperscript{52}. \textit{See Ohio ex rel.} Ohio Academy of Trial Lawyers \textit{v.} Sheward, 715 N.E.2d 1062, 1068 (Ohio 1999).

\textsuperscript{53}. \textit{Id.} at 1068.

\textsuperscript{54}. \textit{Id.} at 1069.
provisions in Am.Sub.H.B. No. 350 that intrude on judicial authority, (2) a writ of mandamus ordering respondents to follow “the rules of civil procedure, the rules of evidence, the relevant constitutional decisions and common-law [causes of action] * * *, notwithstanding contrary provisions in Am. Sub.H.B. 350,” and (3) pursuant to their ancillary claims, an order declaring that Am.Sub.H.B. No. 350 violates the Ohio Constitution and enjoining its implementation.55

Relators argued that the Tort Reform Act violated the doctrine of separation of powers and the one-subject rule, both in conflict with the Ohio Constitution, and was therefore unconstitutional and should be held invalid.56

THE COURT’S REASONING

A. Separation of Powers

1. The Majority Opinion

The majority found that the Tort Reform Act violated the principles of separation of powers by reenacting tort reform measures previously found unconstitutional.57 Writing for the majority, Justice Resnick stated, "The General Assembly has circumvented our mandates, while attempting to establish itself as

55. Id.
56. Id.
57. Id. at 1085-95. Statutes of repose had previously been held unconstitutional in Brenneman v. R.M.I. Co., 639 N.E.2d 425 (Ohio 1994). Id. at 1083. Requiring certificates of merit was in violation of Ohio Rule of Civil Procedure 11 in Hiatt v. Southern Health Facilities Inc., 626 N.E.2d 71 (Ohio 1994). Id. at 1087. The court decided in Pryor v. Webber, 263 N.E.2d 235 (Ohio 1970), that evidence of compensation from collateral sources is not admissible to diminish damages for which a tortfeasor must pay. Id. at 1088. Limits on punitive damages were found to be unconstitutional in Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994). Id. at 1090. In Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991), the court held that caps on general damages were unconstitutional. Id. at 1092. The court also held that a plaintiff need not prove he was exposed to a specific product on a regular basis near to where the plaintiff worked to prove that the product was a substantial factor in causing injury in Horton v. Harwick Chem. Corp., 653 N.E.2d 1196 (Ohio 1995). Id. at 1095. Finally, in Ede v. Atrium S. OB-GYN, Inc., 642 N.E.2d 365 (Ohio 1994), the court held that evidence of a common insurer between defendant and an expert witness is sufficiently probative of bias to outweigh any potential prejudice evidence of insurance might cause. Id. at 1096.
the final arbiter of the validity of its own legislation." The court explained that
the Tort Reform Act was "no ordinary piece of legislation that happens to
inadvertently cross the boundaries of legislative authority." By enacting laws that
previously had been held unconstitutional, the legislature had inexcusably crossed
the boundaries of legislative authority. The court interpreted this legislative
maneuver as an attempt by the General Assembly to direct trial court decisions to
apply unconstitutional legislative rules. This enactment constituted nothing less
than an attempt to forbid the courts to exercise their right and duty of judicial
review. Justice Resnick was particularly frustrated with the General Assembly's
statements of intent in the Tort Reform Act, in which the General Assembly

58. Id. at 1096. In defending its belief that the General Assembly had crossed its threshold of
power, the court quoted Alexander Hamilton extensively on the nature of judicial and legislative
powers. The following excerpt proved important to the court:

The complete independence of the courts of justice is particularly essential in a limited
Constitution . . . Without this, all the reservations of particular rights or privileges would
amount to nothing.

*  *  *

The interpretation of the laws is the proper and peculiar province of the courts . . . If there
should happen to be an irreconcilable variance between [the act and the Constitution], that
which has the superior obligation and validity ought, of course, to be preferred; or, in other
words, the Constitution ought to be preferred to the statute, the intention of the people to the
intention of their agents.

*  *  *

[Where the will of the legislature, declared in its statutes, stands in opposition to that of the
people, declared in the Constitution, the judges ought to be governed by the latter rather than
the former.]

Id. at 1096-97 (quoting THE FEDERALIST No. 78 (Alexander Hamilton)). The court continued by
quoting another writer: "[T]he difficult to imagine how an independent judiciary could possibly play
the role of keeping the legislature in check without also having the final say in what the constitution
means." Id. at 1097 (quoting George Anhang, Separation of Powers and the Rule of Law: On the
(1990)).

59. Id. at 1096.
60. Id.
61. Id.
62. Id.
OHIO ACADEMY OF TRIAL LAWYERS v. SHEWARD

expressed its desire to limit judicial review on this law. The majority reiterated long-established principles that hold that the courts are the proper place for laws to be interpreted and by encroaching on this power the General Assembly had violated the doctrine of separation of powers. The court held that because the Tort Reform Act enacted tort reform measures of the same nature as those that had been previously invalidated by the court, the Tort Reform Act was unconstitutional in toto.

2. The Dissent

Chief Justice Moyer wrote for the dissent on the issue of whether the enactment of the Tort Reform Act violated the separation of powers. The Chief Justice declared that by simply adopting unconstitutional statutes the General Assembly cannot usurp judicial power, for it is recognized that the court has “no authority to control future legislative initiatives of the General Assembly.” Similarly, just because the General Assembly hinted that it was limiting judicial review did not mean that it could limit judicial review.

B. One-Subject Rule

1. The Majority Opinion

The Ohio Supreme Court ruled that the Tort Reform Act violated the one-
subject rule of the Ohio Constitution, and therefore, the entire law was invalid.\textsuperscript{70} Justice Resnick stated that undoubtedly the Tort Reform Act "embraces a multitude of topics."\textsuperscript{71} The Act affected eighteen titles, thirty-eight chapters, and more than 100 sections of the Revised Code, as well as procedural and evidentiary rules and hitherto uncodified common law.\textsuperscript{72} The issue, then, was whether these various topics shared a common purpose or relationship and represented plurality as opposed to disunity.\textsuperscript{73} 

Justice Resnick wrote that an in-depth analysis of the Tort Reform Act led to the conclusion that the "commonality of purpose or relationship between [the provisions] becomes increasingly attenuated, and the statement of subject necessary to encompass them grows broader and more expansive, until finally any suggestion of unity of subject matter is illusory."\textsuperscript{74} The court stated that it was impossible to hold the Act constitutional in light of all the subjects it contained.\textsuperscript{75} Justice Resnick constructed the following spectrum to use in analyzing whether there was a violation of the one-subject rule:

These cases can be perceived as points along a spectrum. At one end, closely related topics unite under a narrowly denominated subject. As the topics embraced in a single act become more diverse, and as their connection to each other becomes more attenuated, so the statement of subject necessary to comprehend them broadens and expands. There comes a point past which a denominated subject becomes so strained in its effort to cohere diverse matter as to lose its legitimacy as such. It becomes a ruse by which to connect blatantly unrelated topics. At the farthest end of this spectrum lies the single enactment which endeavors to legislate on all matters under the heading of "law."\textsuperscript{76} 

The majority held that the Tort Reform Act fell near the far end of the

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 1101.
\item \textsuperscript{71} \textit{Id.} at 1099.
\item \textsuperscript{72} \textit{Id.}; see also supra note 6.
\item \textsuperscript{73} See Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1099 (Ohio 1999).
\item \textsuperscript{74} \textit{Id.} at 1100. To illustrate the point, Justice Resnick provided a list of some of the various topics in the Act: provision on wearing seat belts, section dealing with employment discrimination claims, class actions arising from the sale of securities with limitations on agency liability in actions against a hospital, recall notification with qualified immunity for athletic coaches, actions by a roller skater with supporting affidavits in a medical claim. \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 1101.
\end{itemize}
spectrum, the provisions were “blatantly unrelated” and attempted to legislate on all matters under the heading of “tort and other civil actions,” and therefore violated the one-subject rule.

The next issue before the court was whether any provisions found to be unconstitutional could be severed to save the remaining parts. Justice Resnick found that even though the court had severed the unconstitutional parts in cases where there had been a violation of the one-subject rule, severability was not an option in this case. The court found that the Tort Reform Act could not be severed because the Act was designed as a comprehensive reform of the civil justice system and that any attempt on the court’s part to determine which sections were primary would constitute a legislative act and would be beyond judicial authority. Similarly, the court determined that the passage of the bill was so dependent upon its unconstitutional component parts, that severing the Act to salvage a core would not be worthwhile. Accordingly, the court ruled, severability was not an option.

2. The Dissent

Justice Lundberg Stratton provided the dissent to the majority’s holding with regard to the one-subject rule. She wrote that “[u]ntil today, the one-subject rule remained directory and only a gross and fraudulent violation of the rule would render a statute or provisions thereof unconstitutional.” After repeating the

77. Id.
78. Id. at 1100.
79. Id. at 1101. Justice Resnick reasoned that upholding the Act would give the General Assembly the ability to revamp all Ohio law in two strokes, one for criminal law and one for civil law. Id.
80. Id.
81. Id. at 1102. The court in a few cases has found a violation of the one-subject rule and has severed the offending portions, as in Ohio ex rel. Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582 (Ohio 1994), which is discussed in the Analysis section of this note. However, Justice Resnick pointed out that the concurring and dissenting opinions in Voinovich expressed doubts on the propriety of applying the doctrine of severability to cases involving the one-subject rule. Id. at 1101.
82. Id. at 1102.
83. Id. The court based this conclusion on comments made by the bill’s architect and several key supporters. Id.
84. Id.
85. Id. at 1122 (Lundberg Stratton, J., dissenting).
86. Id. at 1123 (Lundberg Stratton, J., dissenting) (emphasis in original).
various rules associated with the one-subject rule that have previously been discussed in this note in the Historical Background section, Justice Lundberg Stratton followed a different analysis than the majority.  

The dissent found that the Tort Reform Act was aimed at a single subject—tort reform. The Act addressed tort cases, those cases "that pertain to private, noncontract, civil actions by which the injured party may seek redress for his or her injuries." The dissent concluded that while diverse, the provisions had the common purpose of reforming tort law, which did not represent a disunity of subject matter.

Concerning the issue of severability, the dissent found it ironic that the majority declined to attempt to sever any provisions because the majority believed that process to be beyond the province of the court, considering the court is overstepping its jurisdiction in allowing the case to be heard. Justice Stratton stated that the majority's conclusion "does not comport with this court's historical approach to addressing unconstitutional provisions within a statute." The dissent reiterated that in the rare instances in which a violation of the one-subject rule has been found, the offending portions have been severed. Therefore, if the majority believed there was a violation, it should have severed those offending provisions and left the remaining parts, as it had in the past, thereby not unduly hampering the legislative process.

ANALYSIS

A. Overview — "The end must justify the means."

This statement represents a sentiment that was defended and emphatically supported by the fifteenth century Italian political theorist, Niccolo Machiavelli.

87. Id. at 1122-27.
88. Id. at 1124.
89. Id. at 1125.
90. Id. at 1127 (Lundberg Stratton, J., dissenting).
91. Id. This discussion should be viewed in light of the dissent's belief that the relators never had standing to bring this suit. Id. at 1118-22 (Moyer, C.J., dissenting).
92. Id. at 1127.
93. Id.
94. Id. at 1128.
Machiavellianism represents a theory espousing political opportunism that allows the use of questionable methods to achieve desired political ends. A four-member majority of the Ohio Supreme Court utilized just such a method when it overturned the Tort Reform Act in toto. The court twisted and perverted longstanding rules of Ohio jurisprudence and the Ohio Constitution to meet its political desires.

The debate over tort reform has raged in Ohio for more than a decade, decisively dividing the "tort policies and power of the judicial branch and those of the legislative and executive branches of state government." Repeatedly, the General Assembly’s attempts at various tort reform measures have been found unconstitutional by a consistent four-member majority of the Supreme Court. The General Assembly’s latest attempt at providing civil justice reform came in the form of an extremely comprehensive law that covered admittedly every aspect of tort law. This new law left the ball— as the saying goes—in the judicial branch’s court to determine the law’s constitutionality. At that point, one would expect that the various provisions of the Tort Reform Act would be ruled on during the

96. Id.
97. See Werber, supra note 3, at 1156.
98. See Stephen J. Werber, Ohio Tort Reform in 1998: The War Continues, 45 CLEV. ST. L. REV. 539, 540 (1997). The author frequently mentions the majority’s political views regarding tort reform measures. See id. at 539-77. While it is not the intention of the author to put words in the mouths of the Justices, their beliefs concerning tort reform can be deduced from the way tort reform laws have been held unconstitutional over the past decade and a half. Werber writes that the court is "fostering its tort policy beliefs" through its analysis of tort reform laws. See Stephen J. Werber, Ohio Tort Reform Versus the Ohio Constitution, 69 TEMP. L. REV. 1155, 1159 (Fall 1996). The “four member majority” Werber speaks of in Ohio Tort Reform in 1998: The War Continues, 45 CLEV. ST. L. REV. 539, 540 (1997), has made it clear that the majority does not support laws that limit one’s ability to bring suit and recover damages in a tort case. See supra note 57. Thus, when this note speaks of the majority’s “political beliefs,” it refers to the majority’s dislike of tort reform laws as evidenced from recent Ohio case law. See supra note 57.
100. Id. at 1073. As a brief side note, the author would like to clearly express his belief that much, if not most, of the Tort Reform Act is unconstitutional for violating rights such as the right to trial by jury, equal protection, and due process of law; legal principles that have been used in the past to throw out provisions on caps for various damages, statutes of merit, etc. However, the author feels that this case should never have been heard nor decided the way it was for reasons the author will spell out in the remainder of this note.
normal course of law. In other words, out of real cases and controversies, injured plaintiffs would appeal, as a matter of law, provisions that violated their constitutional rights to be fully compensated for their loss.\textsuperscript{101} On the contrary, two statewide interest groups – the Ohio AFL-CIO and the Ohio Academy of Trial Lawyers – challenged the entire Act on constitutional grounds, and faced with an opportunity to nix the entire Act in one decision, the court heard and decided \textit{Sheward}.\textsuperscript{102}

The analysis of this note is arranged in four sections. First, the note will examine the standard of review a court should follow in determining the constitutionality of a statute. Second, the analysis will focus on the issue of separation of powers. Third, the note will examine the one-subject rule. Fourth, the issue of severability will be examined.

\textbf{B. Standard of Review}

Before examining the substantive issues, it is essential to understand the standard of review the court must exercise in determining whether a statute is unconstitutional. It is well-settled in Ohio that only if it appears beyond a reasonable doubt that the legislature and the pertinent constitutional provisions are clearly incompatible will an enactment be declared unconstitutional.\textsuperscript{103} Accordingly, all legislative enactments enjoy a strong presumption of constitutionality.\textsuperscript{104} A court is not in a position to determine the wisdom or policy of a statute, rather, it is only to determine if the legislature acted outside its legislative powers.\textsuperscript{105} With these rules in mind, it is apparent that the court in \textit{Sheward} should not have based its decision on its philosophical belief regarding tort reform in general. Instead, the court should have recognized – as opposed to just paying lip service to – the fact that a strong presumption of constitutionality existed in the Tort Reform Act.\textsuperscript{106}

\textsuperscript{101} See generally Werber, supra note 3.
\textsuperscript{102} 715 N.E.2d 1062 (Ohio 1999). Though not discussed at length here, it should be pointed out again that the circumstances in which the court held that the relators had standing to sue were also suspect, since the court appeared to invent a new standard of standing under the public rights doctrine. \textit{Id.} at 1119 (Moyer, C.J., dissenting).
\textsuperscript{103} \textit{See} Austintown Township Bd. of Trustees v. Tracy, 667 N.E.2d 1174, 1177 (Ohio 1996).
\textsuperscript{104} \textit{Id.} at 1177.
\textsuperscript{105} \textit{Id.} at 1176-77.
\textsuperscript{106} \textit{See} Sheward, 715 N.E.2d at 1099. The majority noted that “every presumption in favor of the
C. Separation of Powers

The doctrine of separation of powers was originally a conception of seventeenth century English political theory that was later developed and defined more clearly by the French Enlightenment, especially by Montesquieu in his work *The Spirit of Laws.* James Madison admired the idea and pushed for its incorporation into American democracy. In *The Federalist No. 47*, Madison wrote that without the separation between the three branches of government, and the checks and balances it provides, there would exist a "danger of being crushed by the disproportionate weight of [the] other parts." To Madison, the separation of powers provided in the Constitution was of the greatest intrinsic value, and a government without it was the definition of tyranny. Since the passage of the U.S. Constitution of 1787, that principle of government has been a staple of American democracy and was later incorporated into the governmental structure of the state of Ohio.

But what constitutes a violation of the doctrine of separation of powers? Certainly, if the governor were to decide the merits of a judicial action, a violation
would exist.112 But real situations are rarely so black and white. In Sheward, the relators claimed that the Tort Reform Act violated the doctrine because its passage led the legislature to act in the role of the judicial branch.113 If true, this would constitute a violation as well as disrupt our democracy and the operation of Ohio’s state government, for, as Madison wrote, if “the power of judging [were] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .”114

Was the Tort Reform Act such an example of the legislature acting in a position of judicial authority? No. Yet the relators made a case that there was a violation strong enough in the passing of the Tort Reform Act to trump the presumption of constitutionality each statute is afforded.115 In rebutting that presumption, the relators argued, and the majority agreed, that by enacting similar legislation that had been overruled in past decisions, the legislature was attempting to overrule the decisions of the court and thereby limit judicial review.116 The majority declared that the General Assembly had no right to refuse to be bound by the Supreme Court’s decisions.117 The rule of law the opinion stated in support of this assertion is that the General Assembly cannot annul, reverse, or modify a judgment of a court already rendered, nor require the court to treat as valid, laws that are unconstitutional.118

Stated another way, the first half of the rule declares that when rights have become vested through a judgment, they are beyond the authority of the General Assembly.119 The policy behind this rule is that if the General Assembly could

112. See The Federalist No. 48 (James Madison).
113. See Original Action in Prohibition and Mandamus at 17, Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999) (No. 97-2419). The relators’ complaint outlined that the Tort Reform Act conflicted with three rules of Ohio civil procedure, five rules of evidence, and reversed or impaired fourteen decisions of the Ohio Supreme Court. Id. at 12-17.
117. Id. at 1105.
118. Id. (citing Bartlett v. Ohio, 75 N.E. 939, 941 (Ohio 1905)). This has been a well-established rule since Bartlett. See 62 Ohio Jur. 3d Judgments § 146 (1985).
make such enactments, parties could appeal to the legislature when they are dissatisfied with judgments rendered by the court. While certainly a valid and well-established rule, this situation did not exist in Sheward. Instead, this case involved separate statutes altogether and different parties.

The second half of the aforementioned rule states that the legislature cannot require the court to treat laws that are unconstitutional as valid. Certainly, this is true and significant, for if the legislature had such authority, it would reign supreme over the judicial branch. The issue is whether the General Assembly did this when it enacted the Tort Reform Act. Justice Resnick believed the answer was "yes" when she held that in enacting the Tort Reform Act, the General Assembly "has resolved to deny the power of this court to render a conclusive interpretation of the Ohio Constitution binding upon the other branches . . ." To support this conclusion the court pointed out all the past cases that overturned tort reform measures and how similar some of the provisions were in the Tort Reform Act. The majority claimed that this re-enactment of unconstitutional provisions was a violation of separation of powers.

On its face, the majority decision can seem fairly reasonable, but upon closer investigation it falls well short of supporting a ruling of unconstitutionality. The dissent countered Justice Resnick's opinion with persuasive rules. First, a court decision cannot exceed its own authority by attempting to control future legislative initiatives. This principle is well-settled and was stated explicitly in 1913:

We cannot intervene in the process of legislation and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment of its constitutional powers. We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will not presume to control the exercise of that function of government by the General Assembly, much less by the people, in whom all the power abides.

120. Id.
121. See Bartlett v. Ohio, 75 N.E. 939, 941 (Ohio 1905).
123. See cases cited supra note 57.
124. Id. at 1120-21 (Moyer, C.J., dissenting).
125. Id. at 1120. If a court could dictate future legislative enactments, that would be blatant usurpation under the doctrine of separation of powers. See The Federalist No. 47 (James Madison).
126. Id. at 1120-21 (Moyer, C.J., dissenting).
It follows from this rule that in finding past tort reform enactments unconstitutional, the court had not declared, nor could it declare, that the General Assembly could never legislate such reform efforts in the future, for that would be a violation of the separation of powers.\textsuperscript{128} Therefore, the legislature was never under any directive declaring that it could not enact tort reform measures.\textsuperscript{129}

Second, the adoption of a statute similar, or even identical, to one already struck down, does not contradict a prior judgment of the court invalidating the first statute.\textsuperscript{130} The fact is that separate statutes are at issue, and they were passed during different sessions of the General Assembly.\textsuperscript{131} Since this case dealt with separate statutes, the General Assembly was not contradicting a prior court decision, thus not violating the doctrine of separation of powers.

Third, the argument that the General Assembly is trying to abrogate judicial review through its statements of intent, in which it declares that courts should follow the Tort Reform Act instead of past Supreme Court decisions, also falls short of convincing.\textsuperscript{132} This is because of the stated rule that the legislature’s statements of intent are never binding on the judiciary.\textsuperscript{133} Judicial review is an integral part of Ohio’s government and cannot simply be dismissed by a legislative enactment.\textsuperscript{134} Therefore, the notion that the legislature acted outside of its scope in limiting judicial review is mistaken, since the legislature cannot limit judicial review, and despite those statements of intent, the court can still examine the provisions to determine their constitutionality in the normal course of law.\textsuperscript{135}

\textsuperscript{128} See Sheward, 715 N.E.2d at 1120 (Moyer, C.J., dissenting).

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 1121 (Moyer, C.J, dissenting). Chief Justice Moyer notes that if in one of the past cases the court had declared that similar provisions of any future statute would be deemed unconstitutional, such an opinion would have been advisory and beyond the court’s power. Id. at 1120.

\textsuperscript{131} See generally Stephen J. Werber, Ohio Tort Reform Versus the Ohio Constitution, 69 TEMP. L. REV. 1155. The various tort reform measures at issue have been passed and invalidated for over the past decade and a half, spanning numerous terms of the General Assembly. Id.

\textsuperscript{132} See Sheward, 715 N.E.2d at 1121 (Moyer, C.J., dissenting). Chief Justice Moyer noted that, by stating that the courts should follow this law, the General Assembly is merely undertaking a vain act. Id. at 1120. If the law is unconstitutional, the court will invalidate it no matter what the legislature says. Id. at 1120.

\textsuperscript{133} Id. at 1121.

\textsuperscript{134} See Cincinnati, Wilmington and Zanesville R.R. Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 81 (1852).

\textsuperscript{135} See Sheward, 715 N.E.2d at 1121 (Moyer, C.J, dissenting).
The General Assembly, under the power granted it from the Ohio Constitution, enacted the Tort Reform Act.\textsuperscript{136} The fact that a number of the provisions were similar to past enactments found unconstitutional and that many of the provisions were unconstitutional as a matter of law did not per se violate the doctrine of separation of powers.\textsuperscript{137} But the four-member majority, which has a history of disapproving of tort reform,\textsuperscript{138} circumvented its own defined powers by finding a violation.\textsuperscript{139} The legislature merely passed a law.\textsuperscript{140} If portions of the law were unconstitutional, those provisions should be found as such as proper cases come before the court.\textsuperscript{141} Following that approach, the Tort Reform Act would be invalidated for the right reasons by using the appropriate method.\textsuperscript{142} Instead, the court allowed its political ideology to interfere with its judicial authority by contriving a violation of the separation of powers.\textsuperscript{143} To the majority, the end—invalidation of an unconstitutional act—supported the means—invalidating it for the wrong reasons. By holding that there was a violation, and by invalidating the Act quickly in one case, the court found a quick and convenient way to invalidate a law it disliked.

\textbf{D. One-Subject Rule}

In \textit{Sheward}, the one-subject rule was expanded well beyond its past limitations, as defined by case law.\textsuperscript{144} The majority held that the Tort Reform Act violated this

\begin{itemize}
\item[136.] \textit{Id.} at 1068.
\item[137.] \textit{Id.} at 1118-22 (Moyer, C.J., dissenting).
\item[138.] \textit{See supra} note 98; \textit{see also} cases cited \textit{supra} note 57.
\item[139.] \textit{See Sheward}, 715 N.E.2d at 1119 (Moyer, C.J., dissenting). The Chief Justice pointed out that the majority created a new judicial doctrine to grant standing to the relators. \textit{Id.} Chief Justice Moyer also indicated that the majority should have left the issue of constitutionality to a trial court proceeding. \textit{Id.} \textit{See also supra} note 130 and accompanying text.
\item[140.] \textit{Id.} at 1068.
\item[141.] \textit{Id.} at 1119 (Moyer, C.J., dissenting). The dissent stated: "The majority may be correct that one or more specific provisions of [the Tort Reform Act] are unconstitutional, but that is a determination that should be made upon a record developed in a trial court proceeding." \textit{Id.}
\item[142.] \textit{Id.}
\item[143.] \textit{See supra} notes 115-43 and accompanying text.
\item[144.] \textit{See Sheward}, 715 N.E.2d at 1097-1101; \textit{see also id.} at 1122-27 (Lundberg Stratton, J., dissenting).}

\end{itemize}
constitutional provision. This note, to the contrary, agrees with the dissent that no such violation existed. The Tort Reform Act, while admittedly comprehensive, dealt exclusively with tort reform law, which constitutes but one subject.

In their complaint, the relators contended that the Tort Reform Act touched on so many divergent topics as to make it unconstitutional. Unquestionably the Tort Reform Act covered numerous topics, but those topics represented plurality, not disunity of subject matter. It has long been held that as long as there is a common purpose to the provisions and the different topics are germane to one another, i.e. there is no disunity, the law will not be a violation of the one-subject rule. However, the court expanded its interpretation of the one-subject rule to find a violation. To understand this, it is necessary to take a closer look at a couple of the very few instances in which the Ohio Supreme Court has found a violation of the one-subject rule.

In Ohio ex rel. Ohio AFL-CIO v. Voinovich, the Ohio Supreme Court found that a violation of the one-subject rule existed. The statute in question, Amended Substitute House Bill 107, contained the following subjects: appropriations for the Bureau of Workers' Compensation; appropriations for the Industrial Commission; structural changes to the Bureau of Workers' Compensation; structural changes to the Industrial Commission; changes to the substantive provisions of the workers' compensation law; the creation of a new employment intentional tort; and the creation of a child labor exemption for the entertainment industry. The court found that the provisions creating a new

145. Id. at 1101.
146. Id. at 1127 (Lundberg Stratton, J., dissenting).
147. Id. at 1124-25 (Lundberg Stratton, J., dissenting). As evidence that tort reform constitutes but one subject, consider that tort reform law is dealt with as one topic in various law review articles, treatises, and in books.
149. See Sheward, 715 N.E.2d at 1127 (Lundberg Stratton, J., dissenting).
151. See Sheward, 715 N.E.2d at 1127 (Lundberg Stratton, J., dissenting).
152. 631 N.E.2d 582 (Ohio 1994).
153. Id. at 587.
154. Id. at 586.
employment intentional tort and creating the child labor exemption violated the one-subject rule.\textsuperscript{155} The remaining topics were valid since they all related to the same subject, i.e. workers' compensation, and therefore did not violate the one-subject rule.\textsuperscript{156} The court explained that the purpose of the statute – excluding the two severed portions – was to fund and structurally change the administrative bodies governing workers' compensation law, and to alter substantive and procedural law underlying the compensation of injured workers.\textsuperscript{157} The two excluded provisions – the intentional tort and the child labor exemption – were "completely unrelated" to workers' compensation, and therefore, violated the one-subject rule.\textsuperscript{158}

A second example of the court finding a violation of the one-subject rule was in Simmons-Harris v. Goff.\textsuperscript{159} The act at issue was Amended Substitute House Bill 117.\textsuperscript{160} The law contained 383 amendments in twenty-five titles of the Revised Code, ten amendments to renumber, and eighty-one new sections in sixteen titles of the Revised Code.\textsuperscript{161} The court found that Amended Substitute House Bill 117 was an appropriations bill which encompassed many items, as appropriations bills of necessity must.\textsuperscript{162} However, added on to this bill was a "School Voucher Program."\textsuperscript{163} The court decided that the "School Voucher Program" was in essence a rider attached to an appropriations bill.\textsuperscript{164} The court found that there is a "blatant disunity" between the "School Voucher Program" and the other items mentioned

\textsuperscript{155} Id. at 587.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 586-87. There are obviously multiple subjects, but plurality, not disunity, exists in these provisions concerning workers' compensation. Id. at 586. These two elements had a clear common relationship and purpose, the governance of workers' compensation. Id.
\textsuperscript{158} Id. at 587. The court stated that in a broad sense the child labor exemption and workers' compensation both dealt with labor but the act was aimed specifically at workers' compensation. Id. Similarly, the intentional tort created existed outside of the employment relationship and therefore is not related to workers' compensation. Id.
\textsuperscript{159} 711 N.E.2d 203 (Ohio 1999).
\textsuperscript{160} Id. at 205.
\textsuperscript{161} Id. at 215.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. As a rule, the court found that the creation of a substantive program in a general appropriations bill violates the one-subject rule. Id. at 216.
in Amended Substitute House Bill 117.\textsuperscript{165} As a result of this disunity, the court severed the provision creating the “School Voucher Program” and upheld the rest of the law.\textsuperscript{166}

Both of these cases are recent examples of the court finding a violation of the one-subject rule and therefore ruling that a portion of a bill was unconstitutional. These cases illustrate that there must be a “blatant disunity” in the subject matters included in the bill for the court to find a violation.\textsuperscript{167} Did the Tort Reform Act include subjects so blatantly unrelated? No.\textsuperscript{168} The Tort Reform Act included numerous topics, but they were all germane to the topic of tort reform as shown through its title—“Tort Reform Act of 1996.”\textsuperscript{169} The legislative intent of the bill was to legislate on the topic of civil proceedings in the state of Ohio, which represented one subject.\textsuperscript{170}

The majority, in its argument, accented the breadth of the bill and how it affected every aspect of tort law\textsuperscript{171} to distort one’s understanding of the one-subject rule. By highlighting how broad the Act was, the majority attempted to demonstrate that it constituted more than one subject. However, plurality existed in the Tort Reform Act.\textsuperscript{172} Certainly, statutes of repose and damages caps were different topics, but they were related in that they were both objects of tort reform.\textsuperscript{173}

The majority appeared to confuse multitude with disunity. Justice Resnick conceded:

While an examination of any two provisions contained in Am.Sub.H.B. No. 350, carefully selected and compared in isolation, could support a finding that “a common purpose or relationship exists among the sections, representing a potential

\begin{thebibliography}{99}
\bibitem{165} Id. at 216.
\bibitem{166} Id.
\bibitem{167} See supra notes 152-66 and accompanying text.
\bibitem{168} See supra notes 152-66 and accompanying text. A “School Voucher Program” has nothing to do with an appropriations bill; similarly, an exemption to the child labor law has nothing to do with the compensation a worker will receive for on-the-job injuries. However, in the case under consideration there is no disunity.
\bibitem{169} See 1996 Ohio Laws 3867.
\bibitem{170} See Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1122 (Ohio 1999) (Lundberg Stratton, J., dissenting); see also 1996 Ohio Laws 3867.
\bibitem{171} Sheward at 1099.
\bibitem{172} Id. at 1127 (Lundberg Stratton, J., dissenting).
\bibitem{173} Id. at 1122 (Lundberg Stratton, J., dissenting).
\end{thebibliography}
plurality but not disunity of topics," an examination of the bill in its entirety belies such a conclusion.174

What Justice Resnick appeared to be saying was that because there were so many provisions, disunity must exist. But there is nothing in the one-subject rule analysis that suggests that a violation will be found if there are a large number of provisions. As long as the provisions have a common purpose, the law must be upheld.175

Tort liability is, by definition, a broad area of the law.176 For this reason, the General Assembly must have authority to enact legislation which deals with each and every topic within it.177 The majority decided that such inclusiveness should not be allowed.178 Instead, the majority expanded the constitutional interpretation of the one-subject rule to find a way to invalidate the Tort Reform Act.179 There was no "blatant disunity" of subject in this statute, and yet the court used the one-subject rule as an easy way to invalidate a law it disagreed with ideologically. Tort reform is one subject, but it is a subject that many people strongly oppose.180 The majority, sharing such a view, was able to appease its political desires by capitalizing on the fact that the Tort Reform Act was broad. For that breadth, the law was found unconstitutional.181

E. Severability

The two exemplary cases analyzed above, Ohio ex rel. Ohio AFL-CIO v. Voinovich and Simmons-Harris v. Goff, also point out another problem with the
majority's decision. Never before has the court used the one-subject rule to invalidate an entire act; it has always limited its authority by severing only the offending provisions. The majority ignored this precedent by not even attempting to sever the Act, and followed the request of the relators in invalidating the entire law. As distressing as that may be, it is not nearly as mind-boggling as the reason the court used to decide not to attempt to sever. The court quoted an established rule that holds that severability will only be allowed provided it will not "fundamentally disrupt the statutory scheme."

Ohio v. Hochhausler provides a three-part test to determine whether a statute is severable:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? [and] (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

The relators stated that the issue came down to the question of whether the General Assembly would have intended the Tort Reform Act to be given effect without the invalid provisions. They proffered a few reasons why the answer should be "no." One reason offered is that the Act was expressly designed as a comprehensive piece of legislation on tort reform. Is that not the argument

182. Id. at 1127 (Lundberg Stratton, J., dissenting).
183. Id. at 1111.
184. Id. at 1101 (citing Ohio v. Hochhausler, 668 N.E.2d 457, 466-67 (Ohio 1996)).
185. 668 N.E.2d 457 (Ohio 1996).
186. Id. at 466-67 (quoting Geiger v. Geiger, 160 N.E. 28, 33 (Ohio 1927)).
188. Id.
189. Id. The other three reasons the relators gave were: 1) "all of the Act's provisions are justified by a single set of findings, the great majority of which do not even refer to any of the act's individual provisions, let alone attempt to explain or justify those varied provisions," 2) "passage of H.B. 350 was barely won, [it only gained passage because of logrolling]," and 3) without the "critical" invalid provisions the bill would not have passed. Id. at 47-49. However, in its opinion the court did not discuss these reasons. See Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062
refuting the existence of a violation of the one-subject rule? Irony does not begin
to express the results of this argument. But the majority followed this approach
when it gave its reasons for not wanting to sever.190 It wrote that:

Am.Sub.H.B. No. 350 is designed to comprehensively reform the civil justice
system, and any attempt on our part to carve out a primary subject by identifying
and assembling what we believe to be key or core provisions of the bill would
constitute a legislative exercise wholly beyond the province of this court.
Moreover, it appears . . . that the passage of the entire bill was so dependent upon
its unconstitutional component parts, particularly damage caps, statutes of repose,
and collateral source offsets, that any possible identifiable core would not be
worthy of salvation.191

Accordingly, severability was found not to be an option.192

There is an obvious incongruity in the majority’s opinion. Apparently,
according to the court’s decision, the Tort Reform Act constituted more than one
subject, but on the other hand, it represented an attempt to legislate in the single
area of tort reform. The absence of any one provision distorted its operation,
making it unified enough so that it could not be severed.193 This faulty logic helps
highlight how the court based its holding more on its ideological bent than on rules
of law. The majority wanted the Tort Reform Act thrown out as quickly as
possible, and the best way to do that was to find the entire Act unconstitutional and
claim that none of it could possibly be severed so that no part of it could be
saved.194

In the end it appears suspect that the majority did not attempt to sever,
especially since that had been the traditional course of action in one-subject rule
cases.195 But it corresponds with the theory of this note that the majority was more
concerned with the end than the means.

(Ohio 1999).
190. See Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1102 (Ohio
1999).
191. Id. at 1102.
192. Id.
193. Id. 1127 (Lundberg Stratton, J., dissenting). It captured more than one subject for purposes of
the one-subject rule discussion, but the Tort Reform Act represented one subject for purposes of
determining if any part of the Act could be severed.
194. Id. at 1102.
195. Id. at 1127 (Lundberg Stratton, J., dissenting).
CONCLUSION

The majority based its holding on the belief that the law violated the doctrine of separation of powers and the one-subject rule. However, to do this the majority had to broaden the scope of both of these concepts to levels the court had never reached before this decision. The belief that the General Assembly overstepped its designated bounds by passing the Tort Reform Act is tenuous at best. The majority's holding that the Tort Reform Act contains more than one subject is misplaced. Even if there were provisions that violated the one-subject rule, the established rule in Ohio is that those offending provisions would be severed.

The majority in Sheward took advantage of a political opportunity to fulfill its political desires. Tort reform is a hotly debated topic in Ohio, and many people have staunch views on one side or the other regarding its constitutionality. Whether tort reform measures are unconstitutional is not at issue in this note. The point is that the majority should not have decided the way it did in Sheward. If the Act or provisions of it were truly unconstitutional, those provisions should be invalidated when injured plaintiffs bring forth cases. Thus, the individual provisions could be invalidated for violating the due process of the plaintiff or for violating some other constitutional right, and the injured person could be fully compensated. The means employed by the Ohio Supreme Court to overturn the Tort Reform Act were not supported by Ohio jurisprudence. Instead, the court twisted two constitutional rules to invalidate the law.

As this note illustrates, the court's analysis is based on unsettling ground. In finding the way it did, and by stretching well-settled rules, the court left the civil justice system where it wanted it, and for the court the means it employed justify the end. The court was seduced by an opportunity to invalidate the Tort Reform Act when offered a simple and appeasing method, and it turned a blind eye to the law while following its ideological preferences.

196. Id. at 1097, 1101.
197. Id. at 1127 (Lundberg Stratton, J., dissenting).