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WHY LABOR AND EMPLOYMENT ETHICS?

Cynthia E. Nance*

I. INTRODUCTION

Why devote a symposium specifically to labor and employment law ethics? There are both sociological and legal reasons which makes this an area ripe for a discussion of ethics. The significance of work and employment in the lives of most people is well documented. Employment plays a central role in a working person’s life, for there are few things more important in a working person’s life than his or her occupation. In fact, employment termination has been referred to as “capital punishment.” Because workplace issues often invoke emotional responses from employers and employees, emotions can cause both parties to engage in irrational and/or unethical conduct. Therefore, it is critically

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1. See, e.g., Jacqueline Jones, American Work: Four Centuries of Black and White Labor 13 (1998) (stating that “[j]obs are never just jobs; they are social markers of great real and symbolic value.”).

2. See Frederick Douglass, The Narrative and Selected Writings 350 (Michael Meyer, ed., Modern Library 1984) (“Men are not valued in this country or in any country for what they are; they are valued for what they can do.”).

3. See, e.g., Dick Grote, Public Sector Organizations: Today's Innovative Leaders in Performance Management, PUB. PERSONNEL MGMT., April 2000, at 1, 13. “A commonly used metaphor holds that ‘Discharge is the capital punishment of organizational life.’” Id. However, Grote feels this metaphor is an overstatement and that the proper metaphor for discharge is a no-fault divorce. Id. As Grote states “‘[y]ou're a good person,’ the organization says to the individual when all the steps of disciplinary action have proved fruitless, ‘and we're a good employer. But your goals and needs and our goals and needs can't be reconciled. You need to find a place to work where you can be happy; we need to find someone to fill this job who can meet our expectations. We now must go our separate ways.’” Id.

4. See, e.g., Ron Lee, Ten Employment Mistakes Plaintiffs’ Lawyers Hope You Make, http://www.faegre.com/articles/article_1133.aspx (last visited Feb. 19, 2006). The author states: [E]mployment disputes are rarely black-and-white, right-and-wrong situations in which one party is lying and one party is telling the truth. Instead, these disputes involve a complex web of human relationships, in which statements and actions are misunderstood, mis-remembered, and misinterpreted, often through the lens of anger, guilt, and other intense emotions. Id. There is some conduct provoked by the intense emotions of the parties, which while not unethical, is irrational and should be avoided. A colleague on the faculty conveyed to me the story of a management lawyer who instructed his client to cut down the trees in front of the clients’ building during a strike, because the trees provided shade to the strikers. Interview with Carl Circo, Assistant Professor of Law, University of Arkansas School of Law (Sept. 25, 2005); See also George H. Singer, Employing Alternative Dispute Resolution: Working at Finding Better Ways to
important to examine issues concerning workplace rights and the ethical resolution of disputes arising in the course of employment. On a secondary level, these issues can be intellectually interesting and complex.

Moreover, the nature of the relationship between the parties to a workplace dispute makes labor and employment law ethics unique, particularly labor ethics. The history of collective bargaining between parties to a union contract is unique and contains many inherent conflicts. Collective bargaining itself is a legislatively imposed device that acts to balance the unionized workers’ power vis-a-vis their employer. There is friction between management and workers, because management believes worker unions are infringing upon its prerogative. Alternatively, workers view themselves as stakeholders in the corporation and thus believe they are entitled to a fair share of the corporation’s profits. This friction raises a larger issue that is not the subject of this paper, but worthy of exploration, which is whether opposition to unions in and of itself is unethical.5

From a legal perspective, there are additional reasons why labor and employment ethics are important. First, the practice of labor and employment law is broad and encompasses many diverse workplace issues. There is a wide spectrum of protective workplace statutes that regulate this area. There are protective workplace statutes that regulate everything from employee safety and health,6 an employee’s right to unionize,7 employee pensions,8 to the rights of an employee in the armed forces to return to work.9

Consider for example Lucia, who is an employee, an outspoken union supporter, a Latina over forty, pregnant, and who has just returned from military duty in Iraq. Upon arriving home, Lucia finds that (1) she has been replaced from her old job, (2) noise and fumes in the workplace are such that she and her coworkers are sickened daily, (3) although Lucia is a salaried employee, her paycheck is docked each time she is out due to morning sickness, and (4) Lucia’s supervisor constantly complains and belittles her work and speech in front of her coworkers. Think of all the issues this law school exam scenario raises. First, at issue in the above hypothetical exam example are statutory rights and potential common law claims. When resolving this hypothetical scenario, the counsel for both the employer and the employee are bound to abide by the applicable ethical rules.

Resolve Employer-Employee Strife, 72 N.D. L. Rev. 299, 299 (1997) (stating that “[e]mployment litigation is a little like holy war and a lot like divorce.”).


Second, the fora in which these rights are protected vary considerably. Therefore, a lawyer practicing labor and employment law must be aware of the rules of professional responsibility of both state and federal courts as well as any additional administrative requirements. Moreover, informing the client of the best forum in which to pursue or defend a claim raises ethical issues in itself, such as competent representation. Third, recent legislation, such as Sarbanes-Oxley, imposes additional statutory ethical requirements with which counsel must become familiar. Fourth, in the practice of labor law, there has been a tremendous growth in the use of alternative dispute resolution to resolve employment law issues. The reason for the growth is that more employers are including mandatory arbitration clauses in their employment contracts.

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10. See, e.g., 20 C.F.R. § 802.101 (2005), 29 C.F.R. § 102.177 (2005), and 29 C.F.R. § 2200.211 (2005); See also Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079-80 (E.D. Va. 1997). In an employment discrimination case, there was insufficient evidence of an attorneys’ knowing violation of the court’s rules, thus the court just gave the involved attorneys a strong warning. *Id.* The court reasoned:

> [T]he practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the court believes that the Attorneys should have known that this practice was improper, there is no specific rule against such ghost writing.

*Id.* The Court further states that “[o]pinion and order sets forth this Court’s unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.” *Id.* at 1080.

11. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2005) states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The duty of competency applies to the knowledge of procedure and court rules. *Id.* at cmt. 5; *See generally Joel F. Finger, Federal Rule of Civil Procedure 11 and Ethical Considerations in Employment Litigation, 723 PLI/CORP. 185 (1991); See also Zellars v. Liberty Nat’l Life Ins. Co., 907 F. Supp. 355, 359 (M.D. Ala. 1995).* The court dismissed the plaintiff’s claim, for the plaintiff filed an untimely charge of discrimination with the Equal Employment Opportunity Commission. *Id.* at 359. The court reasoned that the plaintiff’s failure to make a timely charge of discrimination with the Equal Employment Opportunity Commission was excused and the plaintiff was allowed to proceed.


alternative dispute resolution procedures raise several unique ethical issues which will be explored more below. Fifth, though less common, there are issues of labor and employment ethics which have criminal liability implications.14

Ethical issues raised in labor and employment law cases reflect the range of ethical considerations found in the Model Rules of Professional Conduct. For example, reported cases arising in the employment context have involved confidentiality issues,15 neglect,16 dishonesty,17 diligence,18 ex parte communication,19 discourtesy,20 and fees disputes.21 This paper will focus more specifically on four specific ethical issues in the context of a labor and employment law practice: (1) conflicts, (2) declining or terminating representation, (3) the labor and employment lawyer as third party neutral, and (4) employment issues raised by the Sarbanes-Oxley Act.

“88% of American corporations used mediation, and 79% used arbitration, in the previous 3 years. In addition, over 84% said that they were likely or very likely to use mediation in the future, while 69% said the same about arbitration.”

14. 29 U.S.C. § 439(c) (2000) (stating that “[a]ny person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports or statements required to be kept by any provision of this subchapter shall be fined not more that $10,000 or imprisoned for not more than one year, or both.”).

15. City of Reno v. Reno Protective Ass’n., 59 P.3d 1212, 1218-19 (Nev. 2002) (holding that a memorandum authored by city's labor relations manager that was sent by e-mail to chief deputy city attorney, two deputy city attorneys, and assistant city manager qualified for attorney-client privilege. The e-mail was privileged, even though city policy provided that employees had no expectation of privacy in using city equipment and that electronic data transmissions using city hardware or software could be classified as public documents.).

16. See Parrish v. Miss. Bar, 691 So. 2d 904, 907 (Miss. 1996) (holding that an attorney’s negligent representation of client in a workers’ compensation case warranted a one year suspension); see also Fla. Bar v. Bazley, 597 So.2d 796 ( Fla. 1992). The court imposed an eight-month suspension on an attorney for the attorney’s misrepresentation of the fact that his client had a personal injury suit against the employer, which was barred by workers compensation.

17. Attorney Grievance Comm’n v. Koven, 761 A.2d 881, 884-885 (Md. 2000) (holding that an attorney violates Model Rule 8.4(c) when the attorney intentionally alters Department of Labor letters and alien certification receipts, creates letters and faxes to mislead his client, and submits a false billing statement.).


19. See, e.g., Executive Airlines, Inc. v. Gore, 38 F. Supp.2d 402, 405 (V.I. 1999) (“[E]xecutive could not complain that the administrative law judge induced its counsel to believe that the hearing was postponed because that impression was formed through an alleged ex parte communication . . . . DOL regulations prohibit such contacts.”).


21. Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Lane, 642 N.W.2d 296, 302 (Iowa 2002) (holding that an attorney, who plagiarized a brief from a treatise, was not entitled to compensation for 80 hours of work at $200 per hour).
II. CONFLICTS OF INTEREST

The labor law field is rife with conflicts. The traditional notion of labor relation conflict focuses on the conflicting interests between the adversarial parties to a collective bargaining agreement. However, the potential for conflicts of interest exist within entities as well. A bulk of this paper will focus on the conflict of interest from a union context, because less has been written about the conflicts within the union as an organization relative to conflicts within the corporate context. Unions, as the exclusive representation of the employees in the workplace, must represent all members fairly. This is not as simple as it may appear at first glance.

A. The Union Attorney and the Union Member

Conflicts can arise between the interests of two union members or even between the union and one of its own members. It is the tension in the former situation upon which the movie “North Country” is based. “North Country” is loosely based on a class action sexual harassment suit brought by women miners. See Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997); See also Bd. of Educ. of City of New York v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) for an interesting conflict case in which the court refused to disqualify counsel with an arguably serious conflict. In Nyquist, the underlying issue was whether the city was required to use separate layoff lists for male and female teachers. Id. at 1243. The male teachers in the suit were represented by the union lawyer even though both male and female teachers were union members. Id. The court reasoned:

We note that while on one hand there is an element of unfairness to the women, on the other it seems probable that if [the union] were to take a position on the merits of this litigation, Mr. Sandner’s representation of the men would apparently be within the protection of the ‘fair representation’ cases . . . . This
situations, the union attorney must consider both their ethical duties and the statutory duties of the union.\textsuperscript{26} Model Rule 1.7 counsels the attorney on conflicts of interest involving current clients.\textsuperscript{27} The rule states that the attorney should not represent a client if the representation will involve a concurrent conflict of interest.\textsuperscript{28} A concurrent conflict of interest occurs when one client’s interest is directly adverse to another client’s interest.\textsuperscript{29} Model Rule 1.13 is also important in this context, for this rule describes the ethical responsibilities of a lawyer whose client is an organization.\textsuperscript{30} Model Rule 1.13 makes it clear that it is the organization that is the client.\textsuperscript{31}

A majority of the courts hold, consistent with Model Rule 1.13, that the union is the lawyer’s client.\textsuperscript{32} However, as one commentator notes, there are means that the question whether Mr. Sandner’s conduct is unethical could be a very close one.

\textit{Id.} at 1247. In a footnote, the court advised the women teachers to essentially take up the matter with their union. The court states, “[t]he unfairness may in part be due to the nature of the plan adopted by NYSUT which leaves so much to Mr. Sandner’s discretion. This suggests that the women should take whatever steps are possible within normal internal union processes.” \textit{Id.} at n.9.

26. \textit{See} Adrienne L. Saldana, \textit{Note, Conflicting Interests in Union Representation: Should Exclusivity Be Abolished?}, 6 GEO. J. LEGAL ETHICS 133, 133 (1992). The author states, “[t]he attorney-client relationship in the union setting is replete with conflicts of interests. The union attorney confronts these conflicts of interest in grievance arbitration when she attempts to accommodate the collective interest of the union and the individual interest of the employee-grievant.” \textit{Id.}

27. \textbf{MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2005)} states:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) The representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . . .

\textit{Id.;} \textit{See also} Restatement (Third) of the Law Governing Lawyers §121 (2000); \textit{See also} \textbf{MODEL RULES OF PROF’L CONDUCT R. 1.1(a) (2005)} which states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

28. \textbf{MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2005)}.

29. \textit{Id.}

30. \textbf{MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2005)} states “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

31. \textit{Id.;} \textit{See also} Restatement (Third) of the Law Governing Lawyers § 96 cmt. b (2000) (noting that lawyers representing only organizations do not owe duties of care, diligence, or confidentiality to the constituents of the organization).

32. Pearce, \textit{supra} note 24, at 1112; \textit{See also} Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985). The court states:

We do not believe that an attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has entered into an ‘attorney-client’ relationship in the ordinary sense with the particular union member who is asserting the underlying grievance. Although the attorney may well have certain ethical obligations to the grievant, his principal client is the union; it is the union that has retained him, is paying for his services, and is frequently the party to the arbitration proceedings.
other ways the court can approach this issue. The first, the majority view, is that “[t]he lawyer’s only duty of loyalty is to the union, its sole client. Any differences between the union and bargaining unit member, even if a union member, are irrelevant to the duty of loyalty and therefore fail to implicate Rules 1.7 or 1.9.”  

Other courts hold that both the bargaining unit member and the union are the lawyer’s client. Under Model Rule 1.13(e) this would be permissible, subject to the provisions of Model Rule 1.7. However, the potential for conflict is substantial under this view of the relationship. For instance, joint representation may potentially waive a client’s confidentiality and privilege. Moreover, if the grievant is dissatisfied with the outcome of the grievance, the grievant might bring a duty of fair representation claim. This claim would place the attorney in the position of having to reveal confidential information of both the union and

The legal theory we describe tracks the practical realities of labor-management relations in the United States today. The union member looks to his union to save his job, gives it credit when a dispute is resolved in his favor, and holds it responsible when his discharge is upheld or he loses other important rights. He views the union attorney as an arm of his union rather than as an individual he has chosen as his lawyer.

Id.; See also N.Y. State Ethics, Formal Op. 743 (2001) (stating lawyer for labor union may not distribute to other union members copies of arbitration decision containing information that employee, who was subject of proceeding, does not want publicized, unless lawyer has made clear to employee that he represents union rather than employee and that information disclosed by employee may be shared with others).

33. Pearce, supra note 24, at 1109; See also MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (2005) setting out the duty owed to former clients. The rule states, “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Id.


Defendant union would have the court conclude that the advice was given exclusively to the union, through its president Robert Lucas, such that no attorney-client relationship existed between [the law firm] and plaintiffs. To countenance such a position, the court would have to conclude that the law firm’s true client was either union president Robert Lucas or, on the alternative, the union itself as a separate entity, independent from its members. I am unpersuaded to make such conclusions. Legal representation is undoubtedly one of the benefits of union membership and for which plaintiffs paid their union dues. The advice the [law firm’s] attorneys provided at the July meeting related solely to plaintiffs’ claims and was directed solely at resolving their dispute. Therefore, I conclude that by advising plaintiffs of their legal options, [the law firm] functioned at the July meeting as counsel for union members Stone and Hall. Consequently, I find that an attorney-client relationship existed between the law firm and plaintiffs.

Id.

35. MODEL RULES OF PROF’L CONDUCT R. 1.13(g) (2005) states “[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.”

36. Pearce, supra note 24, at 1114.
the union member.\textsuperscript{37} Even in a situation where the parties initially agree, disagreements might later arise necessitating the lawyer’s withdrawal, which could result in harm to both parties.\textsuperscript{38}

Some courts use the derivative client approach, which views the client as a beneficiary of the union’s fiduciary obligations.\textsuperscript{39} “Under this approach, the lawyer should follow the primary client’s instructions unless they would wrongfully harm the beneficiary.”\textsuperscript{40} The implications of this approach for the union lawyer are serious. In some jurisdictions, the fiduciary is not allowed to assert a privilege against the beneficiary.\textsuperscript{41} This means that in a duty of fair representation suit, the grievants could obtain privileged information from the union. As can be seen, the union attorney may be faced with a number of ethical issues arising out of the representation.

B. The Union Attorney and the Nonmember

At this point, the discussion has focused on the potential problems a lawyer faces representing both the union and the union members. However, there are also ethical issues concerning the union attorney’s obligation towards non-union members.\textsuperscript{42} “The legal ethics rules sometimes distinguish the union lawyer’s obligations to bargaining unit members depending on whether or not they are

\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} MODEL RULES OF PROF’L CONDUCT R. 1.16(a) (2005) states that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law.” MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 10 (2005) clarifies the lawyer’s role, “[t]here are times when the organization’s interest may . . . become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.”; \textit{See also} MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 29 (2005).
\item \textsuperscript{39} Pearce, supra note 24, at 1116.
\item \textsuperscript{40} Id. at n.120. Pearce cites Air Line Pilots Ass’n v. O’Neill, 499 U.S. 65, 74 (1991) to argue that the Supreme Court has seemingly approved of this approach in that it has analogized the union’s duty of fair representation to the duty other fiduciaries owe their beneficiaries.
\item \textsuperscript{41} \textit{See} In re Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997) (holding that to the extent the employer acted in a fiduciary role, the employer could not assert the attorney-client privilege against a plan participant).
\end{itemize}
union members. In contrast, the duty of fair representation forbids discrimination between union and nonunion bargaining unit members. In this situation, the union attorney must make it clear to the non-union member that the attorney represents the union, not the non-union member. Also, the union lawyer should inform the non-union member that their conversations are not privileged. This advice is especially important in situations where it is likely that the non-union member might believe his or her conversations with the union attorney are privileged.

Equally important is the union attorney’s relationship to non-union members in cases involving employment litigation. This situation arises when the union attorney undertakes to represent unorganized employees in employment matters. As Catherine L. Fisk states:

It has been argued that union lawyers are prohibited by rules of professional ethics from representing non-members in employment matters. The contention is that union lawyers have a conflict of interest in representing workers whom the union does not yet represent, particularly if the union is funding the cost of the litigation.

The reason for this concern is that the union is thought to be funding the litigation for its own purposes, which is to pressure the employer and to curry favor with the employees. The conflict is arguably created because the union’s motives might dilute the union attorney’s loyalty towards his client, the unorganized employees. There have been cases which have disqualified counsel based on this concern.

The two relevant rules in this situation are Model Rule 1.7(b) and Model Rule 1.8(f). As noted above, Model Rule 1.7 prohibits representation when one client’s representation may be materially limited by the responsibilities to a third party. Model Rule 1.8(f) prohibits a lawyer from accepting compensation from a third party to represent a client. However, as the union and the individual

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43. Pearce, supra note 24, at 1110.
44. Id.
45. See Model Rules of Prof’l Conduct R. 4.3 (2005). The pertinent language of the rule states that, “[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” Id. In addition, if there is a “reasonable possibility” that the person’s interest will be in conflict with those of the client, the lawyer should not give legal advice to the unrepresented person and should advise that person to obtain counsel. Id.
46. Fisk, supra note 42, at 92.
47. Id.
48. Id.
50. Model Rules of Prof’l Conduct R. 1.8(f)(1-3) (2005). The rule states that: A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with
employee’s interests are likely to be convergent, a violation of these rules seems unlikely. Although arguments have been made that the union may drag out the litigation for publicity purposes, or even dismiss the suit in order to obtain a neutrality agreement from the employer, it is not in the union’s long-term organizing interest to behave in this manner.

C. Union and Management Attorneys and Officers/Managers

In addition to the already mentioned conflicts, there is the potential for a conflict between the members of the union and its leadership. Similarly, a management lawyer who represents a corporation run by corporate officers faces situations when the interest of a manager may be at odds with those of the corporation. I will not spend much time on this issue, because much has already been written about it. More has been written about potential corporate conflicts relative to those arising in a union setting. Model Rule 1.13 provides guidance to counsel in both situations. In the corporate employment law context:

[T]he appropriateness of multiple representation frequently arises in cases involving the potential joint representation of a corporate employer and an employee whose alleged conduct against the plaintiff forms the basis for the lawsuit. In certain situations, the corporate employer, to evade responsibility, must show that the employee in question was acting outside the scope of his official the client-lawyer relationship; and (3) information relating to representation of a client is protected . . . .

Id.

51. See, e.g., In Re Gorman, 531 F.2d 262, 269 (5th Cir. 1976) (finding that a union official on trial for corruption was improperly represented by a union attorney).

52. See, e.g., E. Norman Veasey, Separate and Continuing Counsel for Independent Directors: an Idea Whose Time Has Not Come as a General Practice, 59 BUS. LAW 1413 (2004); See also Kenneth L. Jorgenson, Counsel for the Organization: Employee Conflicts, BENCH & BAR MINN, August 2004 at 12; See also generally E. Norman Veasey, The Ethical and Professional Responsibilities of the Lawyer for the Corporation In Responding to Fraudulent Conduct by Corporate Officers or Agents, 70 TENN. L. REV. 1 (2002); See also generally Susanna M. Kim, Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation, 68 TENN. L. REV. 179 (2001); See also generally Debra Lyn Bassett, Three’s A Crowd: A Proposal to Abolish Joint Representation, 32 RUTGERS L.J. 387 (2001); Scott L. Olson, The Potential Conflicts Faced by In-House Counsel, 7 U. MIAMI BUS. L. REV. 1 (1988); See also generally Miriam P. Hechler, The Role of the Corporate Attorney Within the Takeover Context: Loyalties to Whom?, 21 DEL. J. CORP. L. 943 (1996).


Two out of three attorneys spend most of their professional time working for organizational clients. After years of neglect, the ethical problems of counsel to organizations are now attracting extensive attention from scholars and bar committees. Most has been lavished on corporate counsel, with government lawyers running a distant second. Counsel to voluntary associations have, however, received little attention.

Id. at 1-2.
responsibilities. The employee, on the other hand, has an interest in establishing he acted within the scope of his duties, especially where such a finding would entitle him to indemnity from the corporate employer. If, however, the corporation acknowledges that the employee was acting within the scope of his duties, no conflict exists and multiple representation is not inappropriate.54

The courts have taken two approaches towards the ethical duties of union counsel.55 First, the court can flatly apply the principles developed in the corporate context.56 Second, the court can use a more flexible approach and adopt the rules to the union context.57 This issue is worth exploring because of the differences between unions and corporations. Unlike corporations, whose goal raison d’etre is profit maximization, unions have diverse goals that range from promoting members’ interests to pushing for political and social reforms. The balancing of competing goals comes from the membership, not the leadership. This fact would seem to argue that the union lawyer not defer to the leadership. But, it is through the leadership that the wishes of the membership are made known.

On the other hand, “[d]isputes over democratic participation deeply implicate the lawyer’s duty of loyalty. Union lawyers are precious organizational resources. Not only are they paid for by the entire membership, most have built up an intimate and detailed knowledge of the union’s internal workings in the course of their representation, knowledge that can be of tremendous value to officers in suppressing rank-and-file challenges.”58

III. ISSUES OF WITHDRAWAL/TERMINATION AND EMPLOYMENT ETHICS

Lawyers are allowed to terminate representation of their clients under limited circumstances. Model Rule 1.16 is structured in term of mandatory and permissive withdrawal.59 For purposes of this discussion, the relevant Model Rule 1.16 provisions mandate that the lawyer withdraw representation where: (1) continued representation of the client would result in a violation of the rules of professional conduct or the law or (2) the client fires the lawyer.60 Model Rule 1.16 allows, but does not mandate a lawyer, to withdraw representation if (1) it can be done without a material adverse effect on the interests of the client, (2) the client is involving the lawyer in conduct the lawyer reasonably believes is criminal or fraudulent, or (3) the client insists on taking actions the lawyer finds

54. Duffy, supra note 20, at 3.
55. Pope, supra note 53, at 22.
56. Id.
57. Id.
58. Id. at 33.
60. Id. at 1.16(a)(1-3).
repugnant or with which the lawyer disagrees.61 Once the lawyer withdraws, the lawyer has a continuing duty under Model Rule 1.16 to maintain the client’s confidences.62

A. Sarbanes-Oxley

Due to the fact that employment lawyers wear several hats within the corporation, employment lawyers, particularly those who serve as in-house counsel, have much to ponder in the wake of corporate scandals and the enactment of the Sarbanes-Oxley Act. First, the Sarbanes-Oxley Act will give an entirely new set of responsibilities to in-house counsel employment lawyers. Second, employment lawyers will be put in the position of advising the corporation about the appropriate steps to take with an employee who is engaging misconduct. A plaintiff’s employment lawyer might become involved in this step, representing an employee who is being discharged or disciplined either for misconduct or for whistle blowing. Third, outside council employment lawyers need to be mindful of the role they play in investigations of corporate misfeasance, because under SEC’s proposed rules they may face potential liability.63

However, the most important change labor and employment lawyers have to confront with the new disclosure rules is the effect the new rules will have on attorney-client privileges.64 This section examines the Sarbanes-Oxley Act,65 the SEC’s modified rules,66 and their implications for labor and employment lawyers.

The first thing to note is that the Sarbanes-Oxley Act’s ethical obligations apply to attorneys who represent public companies.67 Section 307 of the Act entitled, “Rules of Professional Conduct for Attorneys” is the key provision for lawyers.68 It is actually quite brief and is set out in the footnote below.69

61. Id. at 1.16(b)(1-4).
62. Id. at 1.16(d).
67. Specifically, the rules cover firms with securities registered under the Securities and Exchange Act of 1934 §12, those required to file reports under 15(d) of the Act, and those that file or have filed a statement that is not yet effective.
69. Id. The code states:
Basically, section 307 requires the SEC to issue rules setting the minimum standards of professional conduct for attorneys appearing or practicing before the commission.\textsuperscript{70} The standard, from an amendment by Senator John Edwards, provides “only that the minimum conduct standards must include an ‘up the ladder’ procedure requiring lawyers to report to successively higher authorities within the corporation evidence of material violations of securities law, breach of fiduciary duties or similar violations.”\textsuperscript{71}

On Nov. 21, 2002, the SEC issued its proposed rule. The rule, which triggered a great deal of controversy, went far beyond the requirements of the Sarbanes-Oxley Act. In addition to an internal “up the ladder” reporting requirement for lawyers who have evidence of material violations, it also “permitted or required” outside lawyers to engage in a ‘noisy withdrawal’ when reporting up the ladder had not produced the desired result.\textsuperscript{72} And in some cases, it would have permitted attorneys to reveal client confidences to the SEC, including situations in which the attorney has to rectify the consequences of their clients’ previous violations.\textsuperscript{73} It is these latter provisions that have given rise to the objections of the American Bar Association.\textsuperscript{74}

In response to the objections raised by the American Bar Association and law firms representing issuers, the SEC published modified rules on February 3, 2003. The modified rules addressed specific concerns raised to the initial rules.

B. Concerns raised by the SEC’s Professional Conduct Rule

The SEC Professional Conduct Rules raise several major concerns: To whom does the rule apply? What triggers the reporting requirements? To whom

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule--

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

\textit{Id.}

\textsuperscript{70} \textit{Id.}


\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}; See also SEC Proposed Rule § 205.3(b)(4), § 205.3(d)(1), and § 205.3(e)(2) in Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205).

\textsuperscript{74} \textit{Id.}
must the attorney disclose and how does this comport with the existing rules of professional responsibility? Specifically how will attorney-client privilege be affected? The next section of the paper briefly addresses each of these concerns.

1. The Definition of Attorney

There is widespread concern that the language of the SEC Professional Conduct Rule is too broad and will cover even attorneys who do not appear before the SEC. 75 The rule, which is set out in the footnote below applies to attorneys “appearing and practicing before the commission.” 76 The comments to the rule explain that:

[T]he definition of the term has been drafted to make clear that it covers all communications (oral or written) with the Commission or its staff on behalf of an issuer, as well as conduct involving the preparation of any statement, opinion, or other writing which is submitted to Commissioners, the Commission, or its staff which is incorporated into materials submitted to the Commission or participation in the process of preparing such a statement, opinion, or other writing. Participation in that process covers both adding and excluding information or a particular characterization of information. The definition also makes clear that an attorney who advises an issuer not to make a filing or

75. See, e.g., Anthony E. Davis, Who Should Regulate Lawyers?- Recent Events, 229 N.Y.L.J. 3 (Jan. 6, 2003).


Appearing and practicing before the Commission includes, but is not limited to, an attorney’s:

(1) Transacting any business with the Commission, including communication with Commissioners, the Commission, or its staff;
(2) Representing any party to, or the subject of, or a witness in a Commission administrative proceeding;
(3) Representing any person in connection with any Commission investigation, inquiry, information request, or subpoena;
(4) Preparing, or participating in the process of preparing, any statement, opinion, or other writing which the attorney has reason to believe will be filed with or incorporated into any registration statement, notification, application, report, communication or other document filed with or submitted to the Commissioners, the Commission, or its staff; or
(5) Advising any party that:
(i) A statement, opinion, or other writing need not or should not be filed with or incorporated into any registration statement, notification, application, report, communication or other document filed with or submitted to the Commissioners, the Commission, or its staff; or
(ii) The party is not obligated to submit or file a registration statement, notification, application, report, communication or other document with the Commission or its staff.

Id.
submission to the Commission is also appearing and practicing before the Commission.77

As is clear from the language and the comments of the rule, the rule’s coverage is expansive. The rule could conceivably cover an employment lawyer who gives the general counsel advice on how to describe a compensation package or collective bargaining outcome in an SEC filing.78 This is because the rule applies to any attorney who participates in the process of preparing any statement, opinion or other writing that is filed with the SEC, such as an annual report.79 If the attorney inserted or deleted language from such a document, the attorney appears to be covered by this rule.80 This would have the consequential and questionable effect of imposing a securities based disclosure rule upon those who have little knowledge of the nuances of the practice area.81

2. The Reporting Requirements

Another tricky issue under the disclosure rule is determining exactly when the rule is triggered.82 Under the rule, an attorney must disclose:

\[
\text{[O]nly when an attorney becomes aware of information that would lead a reasonable attorney to believe a material violation has occurred, is occurring, or is about to occur, thus limiting the instances in which the}
\]


78. Id.

79. Id.

80. Frederick K. Koenen, Sarbanes-Oxley and the SEC: New Dilemmas for Attorneys, 17 No. 3 White-Collar Crime Rep. 17, 17 (2002) “It is also not necessary to interact with the SEC to be subject to the proposed rules. If an attorney tells a client that it does not need to file a registration statement with the SEC in a particular transaction, that attorney is subject to the SEC’s rules as well, even though the attorney may have had no contact with the SEC in that matter.”


We therefore recommend that the Commission provide that the Section 307 rules apply only to those lawyers with significant responsibility for the company’s compliance with U.S. securities law, including satisfaction of registration, filing and disclosure obligations, or with overall responsibility for advising on legal compliance and corporate governance matters under U.S. law. This functional approach would subject to the rules those lawyers in the best position to understand their obligations under the rules and to comply with them. Other lawyers who might be encompassed within the expansive proposed definition would not be free of regulation because they would still be subject to the professional obligations under Model Rule 1.13, as well as the other state court rules of professional conduct.

82. Although the up-the-ladder reporting requirements are important, they are not discussed in this paper except for a limited discussion on the extent to which they conflict with the Model Rules. For a much more thorough discussion of this topic, see Alfred P. Carlton, supra note 81 and Schwartz & Freedman, supra note 71.
reporting duty prescribed by the rule will arise to those where it is appropriate to protect investors.83

Apparently the impetus behind the “reasonably should know” language was a concern about lawyers who “abetted client misbehavior through willful blindness—deliberately failing to ask questions that would expose the client’s wrongful intentions.”84 One critic writes of the “reasonably should know” language:

Everyone can agree that willful blindness is wrong; indeed, it is precisely what Congressman Tauzin and other critics say took place at Enron and Tyco. But in the real world, when corporations may employ hundreds of outside lawyers to handle discrete matters, holding all of them responsible for what they ‘reasonably should know’ places a potentially crippling new duty to investigate on lawyers. ‘[It] requires the lawyer to be suspicious, indeed to become something of a detective,’ testified professor Thomas Morgan of The George Washington University Law School at the task force’s first public hearing in Chicago. ‘In short, it would turn the lawyer into a client’s auditor, a role that would transform the ordinary lawyer-client relationship from helper to critic.’85

Obviously, there will be times when it is clear to any good lawyer that the course the corporation is embarking upon is wrong or illegal. Keep in mind, however, the earlier discussion about the coverage of the rule. Is the standard that a reasonable securities lawyer realize something is amiss? Should a labor lawyer be expected to be as attuned to potential corporate wrongdoing? Are outside counsel expected to be as aware of potential wrongdoing as in-house counsel? Comment 1 to Model Rule 1.1 provides some guidance and states “[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question . . . .”86 The answers to these questions await the application of the rule.

3. Attorney Client Privilege Concerns

Model Rule 1.6 states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the

85. Id.
disclosure is impliedly authorized in order to carry out the representation . . . .” 87

Under Model Rule 1.13 when:

[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 that is a
violation of a legal obligation to the organization, or a violation of law
that reasonably might be imputed to the organization . . . then the
lawyer shall proceed as is reasonably necessary in the best interest of
the organization. 88

Model Rule 1.16(b)(1) states that a lawyer may withdraw from representing
a client if the “withdrawal can be accomplished without material adverse effect
on the interests of the client.” 89 The SEC’s proposed rules, on the other hand,
impose a much broader duty.

Under the SEC’s proposed rule, an attorney who is defending an issuer and
reports an issue “up the ladder” and does not receive a proper response from the
issuer on a violation that is ongoing, or about to occur, and is likely to result in
substantial injury to the financial interest or property of the issuer or of investor,
section 205.3(d)(1)(i) obligates the attorney, even as an advocate, to withdraw
from representation and notify the Commission that such withdrawal was for
“professional considerations.” 90

This so called “noisy withdrawal” provision has been the subject of much
criticism:

[A]s the commission proceeds down this road, it might consider
whether the new rule will defeat its very purpose by cutting off the flow
of information available to a public company inquiring into possible
violations. Presently, when a lawyer representing a public company is
interviewing its employees to gather the facts necessary to provide
advice on how to proceed, the lawyer must inform the employee that
she represents the company, that the company controls the privilege and
that the company can waive the privilege if it sees fit to do so.
Presumably, if investigating and litigating lawyers are bound by the new
rule, before interviewing a company employee, the attorney will likely
have to make the far more chilling disclosure that, depending upon what
the employee reveals, the lawyer may report the statement to the SEC -
whether or not the company waives privilege and whether or not the

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87. See Model Rules of Prof’l Conduct R. 1.6 (2005). There are two major exceptions
under the rule. First, a lawyer may reveal confidential information to prevent the client from
committing a criminal act. Id. at (b)(2). Second, a lawyer may reveal confidential information to
establish a claim or defense on her behalf against the client. Id. at (b)(5).
90. SEC Proposed Rule § 205.3(d)(1) in Implementation of Standards of Professional
pt. 205).
company authorizes the lawyer to make the report. The commission may want to consider how many interviews will continue past these warnings, and of those that do, how many will be productive in developing the facts that companies need in order to get good legal advice - including the advice needed to appropriately remedy past, present, or future violations.91

The SEC argues that obtaining such otherwise privileged or protected reports furthers the public interest. First, private litigants may benefit from the commission’s ability to conduct more thorough and expeditious investigations. Second, the public is benefited, for the public can obtain competent, trustworthy legal representation.

There are numerous additional issues that could be addressed in this discussion, such as the effect of the new rule on attorney work product and the developing area of internal investigations. Moreover, there is a much larger issue concern the propriety of the SEC’s establishment of a code of professional conduct, which is an area that previously has been the province of the state supreme courts. It is not a major leap to imagine the dilemma a lawyer might find themselves in when they are confronted with conflicting ethical requirements.

91. Strauss, supra note 64, at 6; See also Frederick K. Koenen, supra note 80, at 17. The author states:

The proposed rules could permit or require an attorney to disclose information in violation of the ethics rules of the jurisdiction in which an attorney practices. The SEC acknowledges the possibility of this conflict and argues that Sarbanes-Oxley gives the agency the authority to prepare rules governing attorney conduct before the SEC that preempt contrary state ethical rules. It is uncertain whether a court would agree that the SEC’s rules could preempt state laws in this case. Unless the SEC changes its proposed rules or unless Congress or the courts provide clarification of this question, an attorney will face the risk of violating state ethical rules by complying with the SEC’s requirements.

When combined with the up-the-ladder rule, the noisy withdrawal requirement places a much stronger burden on attorneys to monitor their clients’ compliance with recommended remedial measures. The SEC states in its comments to the proposed rules that the attorney must be reasonably satisfied that the compliance measures have been implemented; otherwise the attorney may need to inform the SEC that he or she is withdrawing. Attorneys are therefore being placed in a position like that of independent auditors who are to disclose problems in their financial reports of the company. Of course, unlike auditors, who are supposed to be independent of the company, the attorney is supposed to be his or her client’s advocate. A consequence of the noisy-withdrawal proposal may be to shift the role of the attorney representing a publicly traded company from advocate for the client to enforcer of the securities laws.

Id.
IV. CONCLUSION

As this brief summary attempts to make clear, the legal and ethical landscape for labor and employment lawyers has been altered by an increased scrutiny brought about in the wake of major corporate scandals. A careful consideration of these issues will help prevent lawyers from being blindsided by issues and help lawyers more competently represent their clients.
CLIENT COUNSELING AS AN ETHICAL OBLIGATION: ADVISING EMPLOYERS BEFORE THEY DISCRIMINATE

Samuel A. Marcosson∗

I. INTRODUCTION

The ethical practice of employment discrimination law on the defense side requires more of an attorney than merely providing strong representation for a client accused of discrimination. Before that accusation ever happens, the attorney must provide learned and aggressive counseling, designed both to educate the employer about its obligations, and to persuade the employer to adopt non-discriminatory policies and practices. This view of the attorney’s role arises from two distinct obligations: (1) the requirement to provide zealous representation and (2) the requirement to exercise independent professional judgment and render candid advice.

While some dimensions of these obligations are well-settled and non-controversial, in some respects, I will argue for an extension of our traditional notions of ethical practice to take into account the particular demands of representing employers in employment discrimination matters. And whether it is the well-settled applications of the rules of ethical practice, or the more arguable extensions I will discuss, an attorney’s recognition of the importance of these obligations is especially critical in the realm of compliance with employment discrimination laws. In Section I, I will discuss the attorney’s obligation to

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1. See discussion infra Part II.C.
2. Id.
3. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (2005); see also MODEL RULES OF PROF’L RESPONSIBILITY R. 1.3 cmt. 1 (2005) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).
5. See generally MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 71 (3d ed. 2004) (discussing the history of the ethic of zeal, and stating that zealousness continues today to be “the dominant standard of lawyerly excellence.” (quoting V(1) REPORT FROM THE CENTER FOR PHILOSOPHY AND PUBLIC POLICY 1, 4 (Winter 1984)); see also JAMES R. DEVINE ET AL., PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 503 (3d ed. 2004) (“The Rule 2.1 duty to advise clients . . . is perhaps the most fundamental and universal of the attorney’s duties to the client.”).
zealously and effectively represent his or her client’s interests, and argue that pre-emptive client counseling is essential to fulfill this duty. In Section II, perhaps more controversially, I will urge that an attorney not only may, but must, render advice that takes into account the moral dimensions of compliance with non-discrimination requirements.

Obviously, the thoughts I will express apply to lawyers who have the opportunity to provide the sort of counseling I will describe. Lawyers are often engaged to represent an employer on an ad-hoc basis, and are thus called into action only when an applicant, employee, or former employee files a charge of discrimination. These lawyers plainly have no duty to engage in preventive counseling. However, other lawyers who have an ongoing attorney-client relationship with a company, such as in-house counsel, are in a position to, and should, provide the advice and counsel I have in mind.

II. CLIENT COUNSELING REGARDING COMPLIANCE WITH ANTI-DISCRIMINATION LAWS IS NECESSARY TO FULFILL AN ATTORNEY’S DUTY TO ZEALOUSLY AND EFFECTIVELY REPRESENT HER CLIENT’S INTERESTS

Both Canon 7 of the American Bar Association Model Code of Professional Responsibility and Canon 7 of the Ohio Code of Professional Responsibility, impose upon attorneys a duty to zealously represent their clients’ interests. When it comes to compliance with anti-discrimination laws, it is my position that the duty of zealfulness cannot be fulfilled without engaging in substantial, careful, and ongoing client counseling. In the first part of this section, I will examine the general requirement of zealous representation and its application to the attorney’s counseling role. The next parts will look more specifically at the importance of effective client counseling in the context of compliance with employment discrimination laws.

A. Zealous Representation and Client Counseling

The Model Rules suggest that part of an attorney’s duty pursuant to Rule 1.3 includes a responsibility to act “with zeal in advocacy upon the client’s behalf.” In recent years, the notion of “zealous” representation has on

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6. See Model Rules of Prof’l Responsibility R. 2.1 cmt. 5 (2005) ("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.").
numerous grounds come under increasing criticism from commentators.\footnote{11} However, those critiques have little if any force in the context of client counseling.\footnote{12} Thus, I submit that it is possible to think of zealous advocacy as an unqualified good for purposes of how an attorney should approach his or her responsibility to render effective advice.

Professor Deborah Rhode has offered one compelling reason to look upon “zeal” as a less-than-unqualified good for attorney conduct: not all technically legal conduct represents a social good.\footnote{13} As Rhode states:

> An ethic of undivided client loyalty has encouraged lawyers’ assistance in some of the most socially costly enterprises in recent memory: the distribution of asbestos and Dalkon shields; the suppression of health information about cigarettes; and the financially irresponsible ventures of savings and loan associations.

To justify zealous advocacy in such contexts requires selective suspension of the moral principle at issue.\footnote{14}

To put the point another way, zeal can be put to good uses or bad uses, depending on the cause being served.

Zealous advocacy has been more frequently criticized on another ground: that it pushes attorneys in a direction that undermines civility in the profession.\footnote{15} Commentators have noted the seeming contradiction between the suggestion for zeal and other provisions of the Model Rules which point attorneys in the direction of tempering zeal.\footnote{16} Others have more directly suggested the problem that arises when zealous advocacy crosses a certain line:

> Early in their legal education, lawyers are introduced to the language of “zealous representation,” an expectation that left unchecked leaves little room for concerns about justice or fairness or civility. This standard of

\begin{itemize}
\item \footnote{12}{See generally Louis M. Brown & Edward A. Dauer, Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules, 1982 A M. B. FOUND. RES. J. 519, 526 (1982) (noting that in the context of nonadversarial law, the requirement of zealous advocacy is not as plain, due to the fact that the lawyer practicing preventive nonadversarial law is “often the only tribunal the parties will see.”).}
\item \footnote{13}{See Rhode, supra note 11, at 10; see also Schwartz, supra note 11, at 161-62.}
\item \footnote{14}{See Rhode, supra note 11, at 10.}
\item \footnote{15}{See generally Elkins, supra note 11, at 780-85; see L. Timothy Perrin, Lawyer as Peacemaker: A Christian Response to Rambo Litigation, 32 PEPP. L. REV. 519, 519-25 (2005).}
\item \footnote{16}{See, e.g., Robert W. Gordon, Why Lawyers Can’t Just Be Hired Guns, in ETHICS IN PRACTICE 42, 42 (Deborah L. Rhode ed., 2000) (“We often hear things like, ‘Lawyers must be zealous advocates for their clients, but of course lawyers are also ‘officers of the court’; and sometimes the duties mandated by these different roles come into conflict and must be appropriately balanced.”).}
\end{itemize}
zealousness can cause lawyers to behave in ways and pursue objectives that would be unimaginable in their life outside of law.17

These concerns about the concept of zealous advocacy are real and significant. However, they are less compelling in the context of client counseling than in situations in which attorneys act in an adversarial capacity.18 This is true for obvious reasons. When it comes to the issue of the balance between zeal and civility, the concern arises, by definition, when the lawyer represents the client’s interests against those of an adversary, particularly in litigation.19

As for Professor Rhode’s point that zealous advocacy may be an anathema to the broader social good, the zealous counseling I have in mind actually ameliorates that problem. As I will suggest in Section II, the attorney/counselor should be both zealous and include non-legal moral considerations in the advice she renders. Looked at in this context, being a “zealous” counselor means to seek out and aggressively take advantage of opportunities to advise the client about the moral obligations that are deeply embedded in the legal regime governing employment discrimination. This will promote, rather than undermine, the social good about which Professor Rhode is rightly concerned.

For these reasons, I do not hesitate to rely significantly on the notion that attorneys should advise their clients in a way that recognizes and fulfills a duty of zealous representation. Emphatically, this does not mean pushing the client right up to the very edge of its legal obligations. To paraphrase the late Senator Barry Goldwater, zealousness in the defense of eliminating employment discrimination is no vice.20

B. The Complexity of the Employment Discrimination Regime Makes Counseling Essential to Avoid Violations and/or Charges

The intricacies of the nation’s employment discrimination statutes exist at multiple levels.21 Employers are subject to overlapping (but rarely identical)
obligations imposed at the federal, state, and local level. Changes can be filed in a dizzying array of administrative and judicial fora, and one allegation of discrimination can produce challenges to the employer from many different fronts. Perhaps most critically, the substantive scope of the anti-discrimination laws varies in important particulars from law to law. It is almost impossible for an employer to find its way through this maze, even with a strong and capable human resources department, without able counsel on a continuing basis.

1. Multiple Levels of Enforcement

When Congress passed the Civil Rights Act of 1964, one of the critical arguments made by its opponents was that a federal statute would infringe on an area better left to the states. Even some members of Congress, who were quite sympathetic to the statute, conceded that it would be ideal, at least from the standpoint of gaining acceptance and minimizing resistance to anti-discrimination requirements, if the norms reflected in the statute were adopted by state legislatures and enforced by state agencies rather than imposed from Washington.

This resulted in a compromise: rather than pre-empt state anti-discrimination laws, Congress left room for state agencies to operate as the primary enforcers in this area, at least in those states where the legislatures chose to pass such laws and establish such agencies. The federal enforcement agency, the Equal Employment Opportunity Commission (“EEOC”), would defer to its state counterparts, permitting the states to have the first opportunity to investigate and resolve charges of discrimination on the grounds covered by Title VII of the Act (i.e., race, color, sex, national origin, and religion).

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22. See generally Thomas R. Haggard, Understanding Employment Discrimination 3-9 (2001) (discussing the various sources of employment discrimination laws and the obligations imposed by each source).
23. See generally 4 Harry M. Philo et al., Lawyer’s Desk Reference § 33.3 (9th ed. 2005).
25. See Philo et al., supra note 23 (“[T]he problem requires expert assistance.”).
26. See Courtney Simmons, Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise, 44 Emory L.J. 117, 149-50 (1995) (“During the legislative process, certain Senators strenuously opposed an earlier version of Title VII, fearing that it permitted the EEOC to intrude upon state efforts to combat discrimination.”).
27. See Marlene P. Frank, Comment, The Procedural Filing Requirements of Title VII in Deferral States: The Need for Legislative Action, 43 Ohio St. L.J. 675, 677-78 (1982) (noting that even in the original version of the Civil Rights Act, the mechanism included a critical role for state enforcement, a role that was ultimately expanded in the final version).
28. See Mohasco Corp. v. Silver, 447 U.S. 807, 820 & n.32 (1980) (quoting comments of Senator Dirksen explaining congressional intent to allow states “to work out their own problems at the local level”).
In practice, however, it is more complicated than the system might suggest. Employers cannot count on facing an initial state-level investigation followed by a possible EEOC process. Instead, the federal agency and its state counterparts may enter into “worksharing agreements” pursuant to which the state agencies waive their right to initial processing of certain charges and allow the EEOC to take the lead. The terms of these agreements vary from state to state, with different charges being subject to them, and different terms governing the circumstances under which the state agency might reassert its primary role.

The end result? A complicated mix of differing procedural steps in which the employer might face state investigation (and then possible enforcement action in state court), and/or a federal investigation (followed by a possible Title VII lawsuit filed either by the charging party or the EEOC itself), from the same underlying employment relationship or decision. There are few, if any, bodies of law that present the same (or even a comparable) level of possible combinations of state and federal, administrative and judicial, proceedings.

2. Substantive Coverage that Varies From Statute to Statute

Employers face challenges not only on multiple jurisdictional fronts, but also face challenges that differ depending on the employment discrimination statute

30. See HAGGARD, supra note 22, at 177 (“Title VII procedure continues to be a dangerous land mine for both plaintiffs and defendants.”); see also HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 278 (1997) (“The path to court is strewn with a series of intricate and time-consuming administrative procedures at the state and federal levels.”).

31. See LEWIS, supra note 30, at 280. The author states: [A]lthough § 706 appears to require that the state or local filing precede the filing of a charge with EEOC, it is apparent from the Court’s approval of deferral and work-sharing agreements that in practice EEOC is often the first, and sometimes the only agency to investigate and conciliate charges, even in deferral states.

Id.

32. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 112 (1988) citing Section 709(b), 42 U.S.C. § 2000e-8(b) as “authorizing the EEOC to ‘enter into written agreements’ with state and local agencies to promote ‘effective enforcement’ of the Act.” Id. The court also discussed worksharing agreements in general: “worksharing agreements typically provide that the state or local agency will process certain categories of charges and that the EEOC will process others, with the state or local agency waiving the 60-day deferral period in the latter instance.” Id. The court ultimately upheld worksharing agreements against the challenge that they violate Title VII’s preference for initial processing of charges by state agencies. Id. at 125.

33. This is due to the fact that worksharing agreements are individually negotiated by each state. See generally id. at 117-118 (noting that worksharing agreements are individually negotiated agreements and that “most worksharing agreements are flexible”).

34. See generally HAGGARD, supra note 22, at 177-180 (discussing the various procedural steps to be followed in Title VII cases).

35. For the most part, federal regulatory schemes as pervasive as that which governs the field of employment discrimination also result in pre-emption of state laws. Take, for example, the related field of employee benefits: the federal Employee Retirement Income Security Act (ERISA) broadly pre-empts state laws that seek to regulate employee benefits. Title VII, by contrast, explicitly builds continued state regulation into the federal framework.
that may be implicated in any employment decision.\textsuperscript{36} Just a few examples should suffice to make the point.

First, companies face disparate impact claims, which are claims that do not depend on a showing by the plaintiff of a discriminatory intent on the employer’s part.\textsuperscript{37} This is true under Title VII,\textsuperscript{38} the Americans with Disabilities Act (ADA),\textsuperscript{39} and the Age Discrimination in Employment Act (ADEA).\textsuperscript{40} As the Supreme Court made clear earlier last Term, however, the application of the disparate impact doctrine under the ADEA differs significantly from its use in other areas.\textsuperscript{41} This is due to language in the ADEA authorizing employers to make decisions on the basis of “reasonable factors other than age” (“RFOA”).\textsuperscript{42} In many disparate impact cases, the employer acts on the basis of a factor other than the prohibited characteristic – a written test, for example.\textsuperscript{43} Unlike the RFOA language included in the ADEA, however, Title VII does not contain language that narrows its coverage.\textsuperscript{44} More specifically, Title VII does not permit action where the differentiation is based on reasonable factors other than race.\textsuperscript{45} Thus, if the test is alleged to have had a disparate impact on the basis of race, Title VII contains no language upon which the employer may rely.\textsuperscript{46} But if the claim is that the test had a differential impact on the basis of age, the employer can invoke the ADEA’s RFOA provision.\textsuperscript{47}

For example, disparate impact challenges often arise under the ADEA in cases where employers are implementing a lay-off and use salary as the basis for some or all of the decisions.\textsuperscript{48} Often, the more senior workers will be the highest wage-earners, thus using salary will result in a disproportionate impact on older employees.\textsuperscript{49} In such an instance, the question under § 4(f)(1) of the ADEA is

\begin{footnotesize}
\begin{enumerate}
\item[36.] See generally \textit{8 EQUAL EMPLOYMENT OPPORTUNITY—RESPONSIBILITIES, RIGHTS, REMEDIES, supra note 21, at 9 (“There are a large number of different, and largely independent, sources of protection against discrimination in employment.”).  
\item[37.] \textit{1 BARRABRA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW} 81 (Paul Cane et al. eds., 3d ed. 1996).  
\item[39.] See \textit{Americans With Disabilities Act § 102(b)(3), 42 U.S.C. § 12112(b)(3)(A) (2000) (defining the term “discriminate” in the ADA to include actions “that have the effect of discrimination on the basis of disability”).  
\item[40.] See \textit{Smith v. City of Jackson}, 125 S. Ct. 1536, 1540 (2005) (holding that ADEA claim may be based on disparate impact theory).  
\item[41.] See generally \textit{id.} at 1541-45 (discussing Age Discrimination in Employment Act § 4(f)(1), 29 U.S.C. § 623(f)(1)).  
\item[42.] \textit{Id.}  
\item[43.] See \textit{Griggs}, 401 U.S. at 430.  
\item[44.] See generally \textit{Smith}, 125 S. Ct. at 1541.  
\item[45.] \textit{Id.}  
\item[46.] See generally \textit{8 LEX K. LARSON, EMPLOYMENT DISCRIMINATION} 137-4 (2d ed. 2005).  
\item[47.] See generally \textit{Smith}, 125 S. Ct. at 1541.  
\item[48.] See generally \textit{LARSON, supra} note 46, at 137-7 (listing layoffs as an example of employer practice which has been challenged as having a disparate impact on age).  
\end{enumerate}
\end{footnotesize}
whether salary is an RFOA.\textsuperscript{50} That question would not arise in a Title VII case.\textsuperscript{51} Thus, an employer who wishes to use a particular ground for a decision, and who seeks to ensure that it will not run afoul of the law due to the disparate impact that the proposed criterion may have on a protected class, must make a different assessment depending on the statute involved.

The differences between the ADA and the other federal employment discrimination statutes are even more profound.\textsuperscript{52} Unlike Title VII and the ADEA, the ADA imposes upon employers the burden to provide reasonable accommodations for the impairments that limit the ability of workers or applicants with disabilities to perform the jobs they hold or seek.\textsuperscript{53} At the most fundamental level, this means that employers must generally treat employees and applicants the same regardless of race, sex, national origin, religion, and age -- but in many instances \textit{must treat them differently when it comes to disability.}\textsuperscript{54} The entire mindset with which employers approach their non-discrimination obligations must shift when they approach decisions involving applicants who are protected by the ADA.

Employers also face a shifting landscape in dealing with the permissibility of their conduct in utilizing affirmative action programs. Under the Constitution (which of course affects only public employers),\textsuperscript{55} race-based affirmative action is subject to strict scrutiny under the Equal Protection Clause.\textsuperscript{56} Gender-based affirmative action, on the other hand, is judged under the test applied to gender classifications, which is intermediate scrutiny.\textsuperscript{57} Thus, a public employer is more free to act (with a less compelling justification and with a plan less narrowly tailored to serve the purpose) to remedy a gender imbalance in the workplace than to remedy a racial imbalance.\textsuperscript{58}

\textsuperscript{51} \textit{See Larson, supra} note 46, at 137-4 ("Title VII has no counterpart.").
\textsuperscript{52} \textit{See Samuel A. Marcosson, Of Square Pegs and Round Holes: The Supreme Court’s Ongoing “Title VII-ization” of the Americans with Disabilities Act,} 8 J. GENDER RACE & JUST. 361, 381 (2004) ("The ADA is profoundly unlike Title VII, and even the Age Discrimination in Employment Act of 1967 . . . .").
\textsuperscript{54} \textit{See Marcosson, supra} note 52, at 381-82 (drawing distinction between ADA and other employment discrimination laws by noting the ADA requires employers sometimes to take into account the protected characteristic, rather than ignoring it).
\textsuperscript{55} \textit{See John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW} 557 (7th ed. 2004).
\textsuperscript{58} \textit{See Concrete Works of Colo., Inc. v. City & County of Denver,} 321 F.3d 950, 959-60 (10th Cir. 2003) (gender-based affirmative action is subject to intermediate scrutiny).
But it is not only public employers who must worry about this difference. Private companies must also be concerned about the implications of the lawfulness of affirmative action plans, either because they are government contractors subject to federal affirmative action rules that may or may not be constitutional – a question that will vary depending on the groups being favored and disfavored – or because they attempt to adopt voluntary affirmative action plans that must comply with statutory requirements applicable to those plans.

C. Reactive Representation is Insufficient to Serve the Client’s Interests

In light of the complexity of the procedural framework governing the investigation and litigation of employment discrimination claims, there is no doubt that employers must have effective representation after a claim of discrimination has been filed. But that necessary element is far from sufficient. The avoidance of violations (or even the cost of defending against alleged violations) requires preventive counseling by the attorney. The attorney should advise the employer regarding human resource policies, employment hiring, employee training, and any other critical substantive decisions the employer makes which may affect employees and potentially trigger charges of discrimination.

A recent controversy involving Wal-Mart illustrates the risks involved with the failure to engage in preventive counseling and the value of effective lawyer-client counseling. The company’s vice-president for benefits prepared a memorandum for the board of directors, proposing a variety of steps to hold down the costs of Wal-Mart’s health care and other benefits. Among other items in the proposal, the author urged that Wal-Mart should “arrange for ‘all jobs to include some physical activity (e.g., all cashiers do some cart-
The author’s hope was that this would yield a healthier work force – one for which Wal-Mart would incur fewer health care costs – because it would “discourage unhealthy job applicants.”

My advice to Wal-Mart (not that they have solicited it) would be to never ever even think of such a policy. It would almost certainly violate the ADA for several reasons. First, the policy would have a disproportionate impact on people with physical disabilities. Second, the policy would discourage people with physical disabilities from applying. Third, the memo would be evidence that Wal-Mart had manipulated job descriptions to include non-essential functions for the purpose of keeping out workers with disabilities. Companies defend ADA lawsuits every day by trying to show that the applicant or employee was unable to perform the essential functions of the job. Wal-Mart would be unlikely to successfully defend a lawsuit on this ground. The memo would be Exhibit A to demonstrate that Wal-Mart’s claims about which functions are “essential” cannot be credited.

One of two things went wrong here. Either the memo was prepared and transmitted to the board without the benefit of close scrutiny by counsel, or the attorneys who cleared it did not do their job well enough. For the foreseeable future, every ADA case against Wal-Mart in which the company claims the plaintiff could not perform essential functions of the job will be met with the argument that Wal-Mart should not benefit from the typical deference employers get in defining a position’s functions. The mere preparation of this memo as an expression of corporate policy by a high-level decision-maker has opened the door to the argument that Wal-Mart manipulates job responsibilities to reflect the desire to keep people with disabilities out of the work force.

Of course, it is dangerous to criticize the memo based on an account of it in a newspaper article. Perhaps the memo was more nuanced than it appears in the

66. Id.
67. Id.
68. See supra note 39.
69. See generally 42 U.S.C. § 12112(b)(6) (2000). Defining the term “discriminate” in the ADA to include the use of:

[Q]ualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

Id.

70. See generally id.
71. See, e.g., Breitfelder v. Leis, 151 Fed. Appx. 379, 384-86 (6th Cir. 2005) (affirming summary judgment for employer where plaintiff could not perform any of the jobs of the light-duty position he had previously held and was seeking a transfer to sedentary duty).
72. See generally Americans with Disabilities Act § 101(8), 42 U.S.C. § 12111(8) (2000) (“[C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written job description . . . [it] shall be considered evidence of the essential functions of the job.”).
article, and perhaps it even dealt with the ADA-related difficulties it seems to raise. But even if that is so, the memo has created the risk that Wal-Mart’s policies can be characterized in the most negative possible light by talented plaintiffs’ lawyers and that a jury will see those policies in precisely the way I have described.

If, as I have argued, a company should almost never make significant decisions that affect its employees without the benefit of legal advice, then it follows that – from the attorney’s perspective – he or she cannot be rendering effective representation as called for in the Model Code without giving such advice. Of course, the attorney is not responsible for the client’s foolhardiness if he or she is not asked. However, as noted earlier, many attorneys have an ongoing relationship with their clients, such as in-house counsel or an outside firm that regularly represents the company. The hard questions are: (1) what responsibility should attorneys have to be proactive in urging the client to seek preventive advice and (2) to what extent should attorneys insert himself into the process of developing corporate employment policies? In my view, zealous representation in this context requires counsel to be aware of, and seek to take advantage of, opportunities to advise the client and, where possible, reshape corporate policies.

For example, when an employer is forming committees to evaluate practices and policies, counsel should ensure that in-house counsel is represented on the committee, or at least should urge decision-makers to have documents and proposals evaluated by counsel long before they are sent forward to ultimate decision-makers. Also, when an important decision affecting employment discrimination law is issued by the Supreme Court, or by the governing Court of Appeals, the attorney should take the opportunity to prompt the client to evaluate its practices in light of the new ruling. Perhaps the best example is the Supreme Court’s ruling in *Burlington Industries, Inc. v. Ellerth.* In this case, the Supreme Court differentiated between situations in which a supervisory employee engages in harassment and those situations where a non-supervisory co-worker engages in harassment. The Court placed critical importance on the issue of whether the employer has an effective policy in place that is communicated to employees. The Court’s complicated holding should have been a “teaching moment” for every attorney in a position to advise clients and influence revisions in corporate policies.

Further, counsel should insist that the employer’s decisions implementing policy be reviewed by counsel for compliance with employment discrimination

73. See generally Model Rules of Prof’l Responsibility R. 2.1 cmt. 5 (2005) (“A lawyer ordinarily has no duty to initiate investigation of a client’s affairs . . . .”).
74. See supra part I.
76. Id. at 762.
77. Id. at 765.
laws. At the very least, this needs to be done when the corporate policy affects a significant number of employees. While an individual hiring decision would not ordinarily be the occasion for the attorney to insert him or herself into the process, a decision to close a facility, lay off employees, or change the job description or requirements for a position (e.g., experience, education, and examinations) should not take place without advice of counsel. Ultimately, of course, the client is responsible for whether it follows counsel’s advice and to the degree it permits the attorney to have significant input. But the attorney with a long-standing relationship with the employer has an opportunity to offer that input. Many attorneys avail themselves of this opportunity.

In one case I worked on as an attorney at the Equal Employment Opportunity Commission, it became apparent to me that counsel for the employer had attempted to persuade his client that it was in the company’s interest to accept the limited non-monetary relief the Commission sought rather than litigate the case (twice) up to the Court of Appeals. After he had been pounded by the appellate panel for the second time, the look in the defense attorney’s eyes – a mix of frustration and bewilderment – spoke volumes about what happens when a lawyer is forced to defend positions (and keep litigating) when to do so is contrary to the advice he has given the client.

But whatever the client’s decision, the critical point is that the attorney took advantage of his relationship with the corporate decision-makers to offer counsel about the implications of the policy. I would like to think that his advice included a discussion about why application of the policy to the group of applicants involved in the case was fundamentally wrong. I think that would have been sound advice and it might have helped to persuade the client to abandon what was inevitably going to be an expensive and futile litigation. If an attorney who is in a position to provide such counsel fails or refuses to do so, I believe it is fair to question whether he or she has provided “zealous and effective” representation.

78. See Model Code of Prof’l Responsibility EC 7-7 (2005) (“[T]he authority to make decisions is exclusively that of the client . . . .”); Model Code of Prof’l Responsibility EC 7-8 (2005) (“[T]he decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . . .”).
79. Model Rules of Prof’l Responsibility R. 1.2 cmt. 6 (2005) (“The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client.”).
80. See, e.g., Susan Bisom-Rapp, supra note 62, at 14 & n.81 (noting that “defense attorneys find a tremendous market for their services as expert interpreters of employment law” and citing a Bureau of National Affairs survey to demonstrate human resource managers’ dependence on attorneys.).
81. I should stress that the attorney in the case never said a word to me about the advice he had given his client, and it is possible I misread the look on his face. But if a lawyer ever gave the impression he was soldiering on in the face of a client who did not accept his wise counsel, it was that day.
III. CLIENT COUNSELING ON COMPLIANCE WITH DISCRIMINATION LAWS FULFILLS AN ATTORNEY’S DUTY TO RENDER CANDID ADVICE BASED ON INDEPENDENT PROFESSIONAL JUDGMENT, DESIGNED TO SHAPE THE CLIENT’S BEHAVIOR TO MEET LEGAL AND MORAL RESPONSIBILITIES

The nation’s employment discrimination laws are not just run-of-the-mill economic regulations enacted under Congress’s Commerce Clause authority. To the contrary, employment discrimination laws reflect a fundamental moral judgment about the impermissibility of employer’s judging applicants and workers based on certain characteristics. The rules of professional responsibility require attorneys to render candid advice based on independent professional judgment, and that advice should reflect the moral dimension underlying Title VII, the ADA, and the ADEA.

Rule 2.1 of the ABA Model Code of Professional Responsibility states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer 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.

Similarly, Ethical Consideration 7.8 of Canon 7 of the Ohio Code of Professional Responsibility states:

A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

These rules strongly urge attorneys to refer to “moral, economic, social, and political factors” and to try to lead their clients to a decision that is “morally just.” Of course, these rules are stated in the permissive, for the attorney “may” do this, and it will “often be desirable,” but it is not required.

82. See generally Paul J. Spiegelman, Court Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralties of the Web and the Ladder in Employment Discrimination Doctrine, 20 HARV. C.R.-C.L. L. REV. 339, 351 (1985) (citing merit selection as an ideal that was violated by discrimination in the labor market, and noting this violation as one of the bases for the Civil Rights Act of 1964).


84. Id.


87. Id.; Nevertheless, some scholars have begun to suggest that attorneys— at least in some contexts— bear an obligation to go beyond counseling on purely legal considerations. See Larry O. Natt Gantt, II, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on
In the context of compliance with employment discrimination laws, however, I believe that the nature of the laws themselves has the effect of transforming the permissive into the required, or – at the very least – has altered the permissive “may” to the recommended “should.” The legislative histories and/or the language of Title VII, 88 the ADEA, 89 and the ADA 90 all contain language that speaks to the moral judgments the statutes reflect: that it is wrong to judge people on the grounds those laws put off-limits and that economic opportunity should not be limited by race, disability, or sex. Congress perceived a moral exigence underlying the anti-discrimination laws that transcended the claim, advanced by opponents, that employers should retain their freedom to contract with whomever they choose when entering into employment relationships.91

It seems to me that this merger of explicitly moral dimensions into the fabric of this body of the law has implications for the application of the rules regarding the rendering of morality-based advice. The lawyer rendering candid advice must refer to law and apprise the client of its legal obligations, even if the client would rather remain ignorant of those obligations.92 In the employment discrimination area, the laws explicitly include moral considerations, for Rule 2.1 says the attorney “may” refer to moral consideration if they are relevant to the client’s situation.93 For this reason, I submit that the required candid advice should include, not just the admonition that the client should conform its behavior to the law because it is the law, but should also include the moral considerations that animate employment discrimination laws.

The comments to Rule 2.1 suggest strongly that there may be areas wherein purely legal advice might be inadequate. The comment states, “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical

Nonlegal Considerations, 18 GEO. J. LEGAL ETHICS 365, 366 & n.6 (2005) (“In the wake of the Enron collapse and other corporate scandals, legal scholars have highlighted Rule 2.1 to contend that lawyers not only can but also should counsel clients on nonlegal issues, particularly moral concerns.”).


89. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C. § 621 (2000) (Findings and Purposes section of ADEA, noting the long history of discrimination against older workers “because it is the law, but should also include the moral considerations that animate employment discrimination laws.


91. See Marcosson, supra note 88, at 156-57 (noting that Congress rejected the claim that employers and businesses should retain the freedom not to contract with those whom they wished to avoid).

92. See generally MODEL RULES OF PROF’L RESPONSIBILITY R. 2.1 cmt. 1 (2005); Wendel, supra note 18, at 1173 n.23 (2005) (“[t]he lawyer must provide advice from a standpoint that is independent of the client’s interests.”).

93. See supra notes 88-90 and accompanying text.
considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.”94 If, as Professor Gantt suggests, “[A] lawyer’s general duties to provide competent representation and to communicate with his client may require nonlegal counseling in certain instances,”95 there seems a compelling case that compliance with Title VII and its successor employment discrimination laws is one of those instances.

The hard question, of course, is whether my proposed construction of Rule 2.1 and Canon 7 can or should become the basis for enforcement as a matter of attorney discipline.96 In my view, the answer should be yes. When rendering independent and candid advice to clients about their obligation to comply with the employment discrimination laws, attorneys should include material that impresses upon the client the immorality of failing to do so, as well as the economic effects that discrimination has on affected groups and individuals.

Imagine, for example, a case in which an employer is found liable for engaging in a pattern and practice of racial discrimination and is ordered to pay substantial, perhaps even crippling, compensation and damages. If, prior to the discrimination, the employer’s attorneys had the opportunity to advise the client, with respect to the illegal course of action it was about to follow, and failed to make a vigorous case that Title VII demanded more of them, then those attorneys fell short of meeting their responsibility. Further, if the attorney failed to include in that vigorous case the moral considerations embedded in Title VII, the same is true: they fell short of full compliance with Rule 2.1, and with Canon 7.

It should be clear, of course, that attorneys act appropriately if they render the advice I have described, even if the client fails or refuses to follow it.97 There are two possibilities that may arise in a situation in which counsel has stressed the morality of a client’s desired course of action. First, it may be that this course was in strict compliance with the letter of the law, even if the attorney believed it ran afoul of moral considerations. In that case, as Ethical Consideration 7-8 makes clear, “[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available

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94. MODEL RULES OF PROF’L RESPONSIBILITY R. 2.1 cmt. 2 (2005).
95. Gantt, supra note 87, at 372.
96. Professor Gantt points to a handful of cases of discipline imposed on attorneys who were found to have failed to render advice based on important nonlegal considerations. Id. at 378-79 (discussing cases). Arguably, the cases he mentions can be read to invoke nonlegal considerations not as the basis for discipline, but simply to explain why the legal advice the attorney rendered was inadequate. See, e.g., In re Marriage of Foran, 834 P.2d 1081, 1088-90 (Wash. Ct. App. 1992) (holding an attorney’s advice was inadequate because it produced unenforceable prenuptial agreement, and the moral consideration of “marital harmony” is not promoted if the attorney fails to emphasize to the parties the need for each to have independent counsel). Either way these cases are understood, they fit comfortably with my proposition that the interplay of moral considerations enmeshed into law can make it critical for lawyers to counsel their clients about those intertwined moral issues.
97. See supra note 78.
objectives or methods because of non-legal factors is ultimately for the client and not for himself.”

The other possibility is that the immorality of the proposed action will cross the line so as to also violate one of the employment discrimination laws. Again, the attorney is not ethically responsible for the client’s decision:

He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position.

In short, once the attorney has rendered advice about what the law requires, including its moral dimension, his or her duty has been satisfied.

IV. CONCLUSION

It is probably necessary to acknowledge that what I am urging here is outside the mainstream of the current understanding of the professional obligation regarding morality-based client counseling. There is little authority for transforming the license attorneys to advise clients based on moral considerations – even if it is stretched into a recommendation that they should do so – into a mandate that they do so, in this or any other area of law.100 The most that can be said from the existing cases is that the failure to advise the client regarding nonlegal (including moral) considerations might be an important factor in rendering a judgment that the attorney’s advice was inadequate, and hence in violation of the requirement to provide effective representation.101 Applied to the present context, an assessment of the adequacy of an attorney’s performance of the counseling function should include consideration of whether he or she stressed the moral considerations at stake in compliance with antidiscrimination laws.

Most critically, I hope to provoke a thoughtful dialog on whether this limited and careful regime regarding moral counseling should remain in place. Instead, we should expect more of attorneys. Those who are in a position to influence employer behavior have a nearly unique opportunity to help further the moral goals of the nation’s employment discrimination regime. Is it really too much to ask that we demand of ourselves, as a matter of the standards of our profession, that we take advantage of our position to advance the cause of eradicating race, sex, and other discrimination?

100. But see supra note 87 (discussing cases cited by Professor Gantt).
101. See supra note 87.
Ultimately, this may be more a matter of professionalism (and hence aspirational) than it is one of ethics (and hence a subject for application of disciplinary proceedings). But by proposing that we think of it in the latter, more serious terms, I hope to have emphasized its importance and triggered renewed commitment to the aspirations of a profession that has a critical part to play in achieving the moral goals that are at the heart of antidiscrimination law.
STANDARDS OF ETHICS
FOR THE EMPLOYEE BENEFITS PRACTITIONER*

by Susan Katz Hoffman**

I. INTRODUCTION

Attorneys representing employee benefit plans, plan sponsors, and trustees of multiemployer benefit plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”) confront ethics and privilege issues that are unusual and outside the experience of most attorneys whom generally represent employers and unions.1 These challenges may arise from the fact that the client is often acting in multiple roles – as officer of an employer or union, as trustee or fiduciary of a benefit plan, and frequently as a beneficiary of the plan itself.2 Where the client wears multiple hats, the lawyer also may act in varying capacities, and with varying degrees of protection under the generally-applicable evidentiary rules of attorney-client privilege and work product privilege.3 In addition, the attorney may be confronted with the generally-applicable restrictions and disclosure/consent requirements associated with the representations of multiple clients or representation of organizational clients.4

This article outlines the relevant provisions of the Model Rules of Professional Conduct and the development of the law relating to conflicts of interest and privilege affecting the practice of employee benefits law and the relationship between the lawyer and his or her fiduciary or plan sponsor clients.

II. RELEVANT PROVISIONS OF MODEL ETHICAL RULES

The Model Rules of Professional Conduct and related case law that concern employee benefits practitioners relate to confidentiality, privilege, and the standards that govern representing entities, multiple parties, parties acting in multiple roles, and fiduciaries.

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1. See generally Alexander C. Black, Annotation, What Persons or Entities may Assert or Waive Corporation’s Attorney-Client Privilege – Modern Cases, 28 A.L.R. 5th 1 (1995). This article discusses fiduciary duties in terms of corporate fiduciaries, which has been held as analogous to the role of the ERISA fiduciary in terms of attorney-client privilege. Donovan v. Fitzsimmons, 90 F.R.D. 583, 586-87 (N.D. Ill. 1981).
2. See generally Black, supra note 1.
3. Id.
4. Id.
Rule 1.6 addresses the confidentiality of information.\(^5\) Rule 1.6(a) generally prohibits a lawyer from revealing information relating to the representation of a client, unless the client consents.\(^6\) Rule 1.6(b) allows, but usually does not require, a lawyer to reveal confidential information to prevent the client from committing a criminal act that is likely to result in substantial injury to the financial interests or property of another, or to prevent or to rectify the consequences of a client’s criminal or fraudulent act in which the lawyer’s services had been used.\(^7\) Also, Rule 3.3, involving “candor toward the tribunal,” may require disclosure of information otherwise protected by Rule 1.6.\(^8\)

The Comments indicate that if the lawyer’s services are to be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw from the representation.\(^9\) If Rule 1.6 does not otherwise permit disclosure, the lawyer still may give notice of the fact of withdrawal to any other party and may withdraw or disaffirm any opinion, document, or affirmation.\(^10\) This approach is usually referred to as a “noisy withdrawal.”\(^11\) If the lawyer is called as a witness to give testimony concerning the representation, the lawyer may testify if the client consents, but otherwise must invoke the attorney-client privilege if applicable.\(^12\) The lawyer then would testify only in accordance with a final order of the court.\(^13\)

Rule 1.7 addresses conflicts of interest.\(^14\) Rule 1.7(a) states that a lawyer may “not represent a client if that representation involves a concurrent conflict of interest” with another client.\(^15\) “A concurrent conflict of interest exists if the representation of one client “will be directly adverse to another client,” or if...there is a significant risk that the lawyer’s representation “will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.”\(^16\) Rule 1.7(b) allows the lawyer to represent a client despite the existence of a concurrent conflict of interest if the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client and if each client consents in

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6. Id. at R. 1.6(a).
7. Id. at R. 1.6(b).
8. Id. at R. 3.3; Despite the client protection found in Rule 1.6, Rule 3.3(b) forces an attorney to disclose to the tribunal, if necessary, any information revolving around his client being engaged in criminal or fraudulent conduct related to the proceeding. Id.
9. Id. at R. 1.6 cmt. 14 (2003).
10. Id.
11. See id. at R. 3.3 cmt. 10; Valerie Breslin & Jeff Dooley, Whistle Blowing v. Confidentiality: can Circumstances Mandate Attorneys to Expose their Clients?, 15 GEO. J. LEGAL ETHICS 719, 719 (2002).
13. Id. at R. 1.6(b)(6).
14. Id. at R. 1.7.
15. Id.
16. Id.
writing to the adverse representation after consultation. However, even with consent, the lawyer cannot represent a client when the representation is prohibited by law, or when the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

When representing multiple clients in a single matter (joint representation), the consultation must include an explanation of the implications of the joint representation and the advantages and risks involved. The lawyer should explain the limits and extent of confidentiality that may apply as between the lawyer and the jointly-represented clients and, where permitted by the jurisdiction, may seek an advance waiver of future conflicts that would allow the lawyer to continue to represent a client or clients if a direct conflict arises among the jointly-represented clients.

Rule 1.13 addresses the situation of a lawyer representing an organization, such as a benefit plan, corporation, trust, union, or estate. Rule 1.13(a) states that the lawyer represents the organization “acting through its duly authorized constituents.” Rule 1.13(b) states that if an officer or other employee of the organization is engaged in action that would be harmful to the organization, the lawyer may take appropriate steps to protect the best interests of the organization, including asking for reconsideration, advising that a separate legal opinion be sought for presentation to appropriate authority within the organization, or referring the problem to the “highest authority that can act in behalf of the organization.” Rule 1.13(d) observes that the lawyer is obligated to advise the organization’s officers, employees, etc. that the client is the organization, and not the individual, if it appears that the individual’s interests may be adverse. Rule 1.13(e) permits the lawyer to represent the organization and its individual officers or employees, subject to the disclosure and consent requirements of Rule 1.7. The organization’s consent must, of course, be provided by an official unrepresented party, or by the shareholders.

17. Id.
19. Id. at R. 1.7 cmts. 2, 4.
20. See id. at R. 1.7 cmts. 29-32.
21. Id. at R. 1.13.
22. Id.
23. Id.
25. Id.
26. Id.
III. APPLICATION OF THE CONFLICTS RULES

A. Disqualification of Counsel

The importance of explaining the lawyer’s role is illustrated by Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co.27 In that case, the law firm generally represented a multiemployer pension plan.28 The lawyer obtained information from one of the trustees and convinced him to sign an affidavit that was used to oppose a defendant’s motion to dismiss.29 When that trustee was later named as a defendant in the same action, he was able to obtain a disqualification of the law firm, on the grounds that it had effectively formed an attorney-client relationship with him.30 Even though a lawyer representing a pension fund generally does not represent the trustees individually, the court found that the trustee reasonably “believed that P&G [the law firm] was acting as his counsel.”31 Although Rule 1.13 refers to the lawyer’s belief that confusion is likely, in the “context of this case” the court considered “irrelevant whether P&G believed that [the trustee] knew that P&G represented the Fund only.”32

Similar concerns may arise when a lawyer representing an entity seeks to represent officers or employees of the entity. Two relevant cases involved a dispute between former union officials and fund trustees, and their replacements.33 In Niagara-Genesee Carpenters I, the fund counsel was disqualified from representing the former trustees, on the grounds that the current trustees were entitled to the fund counsel’s undivided loyalty.34 The court held that “[i]n aligning himself with the plaintiffs, [fund counsel] may be improperly representing the interests of some of the Fund participants and beneficiaries against the interests of [others]” instead of meeting counsel’s “fiduciary responsibility to represent the interests of all the beneficiaries.”35 In Niagara-Genesee Carpenters II, the defendant’s law firm was also disqualified, because it was representing both the defendant trustees and the union local.36 The court similarly held that the law firm’s “allegiance is to the local as an

28. Id. at *1.
29. Id.
30. Id. at *3-4.
31. Id. at *4.
32. See id.
35. Id.
entity, and thus to all its members.”37 If the plaintiffs succeeded in proving that the defendants had improperly replaced the plaintiffs as officers and trustees, the interests of the defendants were “plainly adverse” to those of the local and its members “who have legitimate interests in the democratic functioning of the organization and the proper adherence to its constitution and bylaws, and in the impartial behavior, as fiduciaries,” of the defendant general agent of the local and the defendant fund manager.38

In Pressman-Gutman Co. v. First Union National Bank, a single-employer profit sharing plan and its officer/plan trustees, represented by a single law firm, sued the bank trustee and its sub-advisor for breach of fiduciary duty allegedly resulting in investment losses.39 The defendants filed a third party complaint against the officers, alleging that they breached their fiduciary duties in giving improper instructions to the bank, and then moved to disqualify counsel.40 The court held in its first decision that the law firm could not represent both the plan and the officers, and in its second decision held that the law firm could not even continue to represent the plan because it might have learned confidential information in the process of representing the officers.41 Thus, the law firm that initially filed the action was excluded from any further participation in the lawsuit.42

In Kayes v. Pacific Lumber Co., former plan participants sued the company and others for breach of fiduciary duty arising from the purchase of group annuity contract from Executive Life Insurance Company after the company terminated the participants’ prior pension plans.43 Counsel for plaintiffs also represented plaintiffs who were involved in other litigation against some of the same defendants, with respect to individual Executive Life annuities.44 In affirming the disqualification of plaintiffs’ counsel, the Court noted that the “responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties by

37. Id. at 68.
38. Id. at 67.
40. Id. at *1-2.
41. Id. at *1, 8.
42. Id. at *8.
43. Kayes v. Pac. Lumber Co., 51 F.3d 1449 (9th Cir. 1995), cert. denied, 116 S. Ct. 301 (1995). See also, Molina v. Mallah Org., Inc., 804 F. Supp. 504, 512 (S.D.N.Y. 1992) (holding lawyer could not simultaneously represent unions, union trustees, and employees in suit against employers alleging interference with employees’ right to participate in multiemployer plans, even though conflict was potential and not probable; lawyer was allowed to continue to represent employees only).
44. Kayes, 51 F.3d at 1465.
In cases other than class actions, however, the appearance of impropriety, without more, likely is insufficient grounds for disqualification.\textsuperscript{46} In \textit{Lynde v. Blue Cross and Blue Shield}, the employer’s attorney was disqualified from representing that employee in a suit against the employer’s insurance carrier (alleging wrongful termination of the insurance contract), where the insurer asserted late premium payment by the employer as a defense.\textsuperscript{37} Even though the employee had waived any claim against her employer and had waived the conflict, the court found that the only way to guarantee that the employee had freedom to decide who to sue was to disqualify the attorney, even though the attorney was not violating any ethical rule.\textsuperscript{48}

A former representation also may be grounds for disqualification, if the current representation is adverse to the former client’s interest.\textsuperscript{49} For example, in \textit{Healy v. Axelrod Construction Co. Defined Benefit Pension Plan and Trust}, two brothers were trustees of the corporation’s pension plan, but only the brother who was sole shareholder of the corporation was an active trustee.\textsuperscript{50} The shareholder died, and the corporation’s law firm subsequently advised the surviving brother with respect to a plan participant’s claim for benefits.\textsuperscript{51} The law firm filed a motion to dismiss on behalf of the plan, the corporation, the shareholder’s estate and the surviving brother, after advising the surviving brother that the firm would represent him only for purposes of the motion to

\begin{footnotesize}
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\item Id. at 1465 (citing Sullivan v. Chase Inv. Servs. of Boston, Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978)).
\item See, e.g., Mason Tenders Dist. Council Welfare Fund v. Hazardous Waste Eng’g Consultants, Inc., 93 Civ. 1802, 1995 WL 303612 (S.D.N.Y. May 17, 1995); Defendants sought to disqualify plaintiffs’ counsel on the grounds that members of the firm had formerly been associated with former counsel for plaintiffs whom the defendants claimed had administered a conspiracy that injured the defendants. \textit{Id.} at *3. The court found no basis for holding that a successor firm should be disqualified for crimes committed by former partners “in connection with the representation of the same client without any relationship to the current representation” in the absence of any allegation of wrongdoing on the part of the partners or associates of the successor firm. \textit{Id.} See also, Hechenberger v. Western Elec. Co., 570 F. Supp. 820 (E.D. Mo. 1983) (stating counsel could represent both employer and plan in case challenging setoff of workers compensation benefits), aff’d, 742 F.2d 453 (8th Cir. 1984), \textit{cert. denied}, 469 U.S. 1212 (1985); Lewis v. Pension Plan of Local 819, No. 90CV2970, 1992 WL 151905, at *1-2 (E.D.N.Y. 1992) (holding attorney could represent both plan and plan administrator because while a possible conflict existed, the two parties claimed they were united in their interest and plaintiff failed to allege specific facts to prove a conflict of interest existed).
\item \textit{Id.} at *4.
\item See, e.g., U.S. v. Davis, 766 F.2d 1452, 1547 (1985) (stating no conflict of interest existed when the previous representation by attorney did not adversely affect the party and when such representation was only for a short period of time); Metamorfyx, L.L.C. v. Belkin Components, No. 02 C 0771, 2002 WL 1308633, at *2 (N.D. Ill. June 14, 2002) (recognizing that “former representation of plaintiff creates a conflict of interest”).
\item \textit{Id.} at 617-18.
\end{enumerate}
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dismiss. The motion to dismiss was denied, and the firm thereupon terminated its representation of the surviving brother. His new counsel then filed cross-claims for indemnification from the plan, and moved to disqualify the corporation’s law firm from representing the other defendants on the cross-claim. The court granted the motion on the grounds that the prior and present representations were substantially related under Illinois Rule 1.9(a), which is substantially similar to Model Rule 1.9(a), since both representations were in fact part of the same litigation and since the law firm failed to rebut the presumption of shared confidences between the surviving brother and the corporation.

Similarly, in *Webb v. E.I. du Pont de Nemours*, the defendant was able to obtain disqualification of plaintiff’s attorney. The attorney had been employed by the defendant for twenty-seven years, and he had spent the last three years reviewing domestic relations orders for qualification under ERISA. When the defendant introduced an affidavit claiming that it had never approved a domestic relations order similar to plaintiff’s, the lawyer introduced an order that he had approved while working for defendant and that he claimed was similar. Without reaching the question of whether the prior advice was privileged, the court found that the prior employment constituted legal representation, despite the lawyer’s claim that a non-lawyer also can review domestic relations orders and therefore his service was not “legal”, and that even if his client could be construed as the corporation as plan administrator/fiduciary, the fact that the corporation was sued in that capacity made his current representation of the plaintiff clearly adverse to his former client.

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52. *Id.*
53. *Id.* at 618.
54. *Id.*
55. *Id.* at 618, 621-22. The court applied a “three-step analysis” in determining whether the attorney should be qualified:
   First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If we conclude a substantial relationship does exist, we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption would also make the disqualification proper.
57. *Id.* at 619-620.
58. *Id.* at 160.
59. *Id.* at 63-64.
A former representation, however, does not always lead to disqualification. In *Painters Welfare Fund v. Peat, Marwick, Main & Co.*, the plaintiffs sought to disqualify defense counsel because the firm had previously represented the fund trustees in a delinquency collection case against an employer. The court determined that the present case, in which the fund alleged a breach of fiduciary duty by the fund’s accountants, was not substantially related to the prior matter, and it was unlikely that the counsel had obtained confidential information from the fund in a delinquency action, but reserved the right to revisit the motion if more evidence was found during discovery.

In *McGinn v. DeSoto, Inc.*, a member of the law firm representing the defendant fiduciaries in a case brought by plan participants previously belonged to a law firm that represented the plan and its trustees. The plaintiffs argued that the plan’s lawyer really represented the participants and therefore the lawyer could not represent the fiduciaries in opposition to them. The court rejected this argument, holding that the principle set forth in *Washington Star* is limited to overcoming claims of attorney-client privilege, and cannot be used to compel disqualification.

B. *Loss of the Attorney-Client Privilege*

A number of courts have held that advice given by an attorney to a plan fiduciary is not subject to the attorney-client privilege, when the party requesting access to the advice is a beneficiary of the plan. The theory adopted by these courts is that the fiduciary “cannot use the attorney-client privilege to narrow the

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60. See e.g., Clark v. Bank of New York, 801 F. Supp. 1182 (S.D.N.Y. 1992) (plaintiff’s former attorney could represent defendant in unrelated case, so long as representation was not simultaneous); UFCW Health & Welfare Fund v. Darwin Lynch Admin., Inc., 781 F. Supp. 1067 (M.D. Pa. 1991) (fund counsel could sue administrator on behalf of fund, even though counsel had previously represented administrator jointly with fund in benefit claim action brought by a former participant; court found that issues were divergent even though same plan document and SPD were at issue).


62. *Id.* at *8-10.


64. *Id.* at *1-2.


66. *See, e.g., Riggs Nat’l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976). The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust.

*Id.; Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992) (holding “an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration”).
fiduciary obligation of disclosure owed to the plan beneficiaries." 67 A basis for these cases is the shareholder derivative suit Garner v. Wolfinbarger in which the court held that in a case in which the plaintiffs are pursuing the interests of shareholders, the management defendants cannot interpose the attorney-client privilege if the shareholder-plaintiffs can "show cause why it should not be invoked in the particular instance." 68

Although Garner appears to require a showing of good cause, 69 most courts applying it in the ERISA context had presumptively allowed for discovery by plan participants where the legal advice to be disclosed related to the actions of plan fiduciaries. 70 The first reported ERISA case to apply this rationale was Donovan v. Fitzsimmons, where multiemployer plan trustees attempted to invoke the attorney-client privilege in response to the Department of Labor’s motion to compel production of documents relating to a challenged investment. 71 In denying the privilege, the court stated:

[F]iduciaries exercise their authority not for themselves but for the benefit of their beneficiaries. Just as corporate shareholders may have need for access to information to determine whether their authority is being exercised as contemplated, so do pensioners and potential recipients of fund assets share that same need. Moreover, the Garner approach is not premised on concepts peculiar to corporate law, but rather has its underpinnings in the common law of trust relationships. While this court need not decide whether the Garner rule is applicable in all fiduciary situations, it is apparent that the pension fund trustee analogue to the derivative action is particularly well-suited to the rule’s application. 72

The Garner approach was expanded in Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., where the plaintiffs sought a share of the pension plan’s surplus on plan termination, claiming that a pre-termination amendment was unlawful. 73 The plaintiffs attempted to introduce an affidavit

67. Long Island Lighting Co. v. Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997)
68. See Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970); This proposition is founded on the well-established practice of allowing shareholders to see the pertinent financial records of their corporation. Id. at 1104 n.21.
69. Id. at 1103-04.
70. Donovan v. Fitzsimmons, 90 F.R.D. 583, 586, 588 (N.D. Ill. 1981), Long Island Lighting Co. v. Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997) (“the ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan”); Riggs Nat’l Bank of Wash., D.C. v. Zimmer, 355 A.2d 709, 713-14 (Del. Ch. 1976) (holding that communication not privileged when communication was used to ultimately benefit the beneficiary).
71. Donovan, 90 F.R.D. at 584-85. The Court stated that while Garner established that the attorney-client privilege was not a bar in trust fiduciary suits, Garner did not impose a bar on the attorney work product doctrine since the attorney and not the client/shareholder/beneficiary is the party intended to be protected. Id. at 587-88.
72. Id. at 586-87.
prepared by a former attorney for the defendant corporation, and the defendants asserted the attorney-client privilege. The court denied the privilege on the grounds that “when an attorney advises a fiduciary about a matter dealing with the administration of an employees’ benefit plan, the attorney’s client is not the fiduciary personally but, rather, the trust’s beneficiaries.” The court considered the “good cause” requirement appropriate in a corporate setting but inapplicable “in a trustee relationship [where] there exists no legitimate need for a trustee to shield his actions from those whom he is obligated to serve.”

Following Washington Star, most courts have rejected reliance by fiduciaries on the attorney-client privilege, without a requirement that the plaintiffs show good cause. However, even this principle can be defeated when the plaintiff and the defendant fiduciaries have clearly become antagonists. For example, in Wildbur v. ARCO Chemical Co., plaintiff sought a benefit and the court repeatedly remanded the claim to the plan administrator. The case returned to the federal district court when the benefit was again denied on appeal. The plaintiff attempted to depose both in-house counsel and outside litigation attorneys concerning advice given to the plan administrator in deciding the appeal. The court held that the fiduciary exception did not apply to the litigation attorney because all of the lawyer’s communications were made for the purposes of the pending lawsuit. Similarly, the in-house counsel could be deposed only with regard to advice provided before the lawsuit was filed.

74. Id. at 907-08
75. Id. at 909.
76. Id. at 909 n.5.
78. Belluardo v. Cox Enter. Inc. Pension Plan, No. 04-3505, 2005 WL 3078632, at *6 (6th Cir. Nov. 18, 2005) (unpublished) (declining to address the lower court’s holding that communication between plan administrator and counsel will be protected by attorney-client privilege after a law suit has been filed); Geissal v. Moore Med. Corp., 192 F.R.D. 620, 625 (E.D. Mo. 2000) (attorney-client privilege and work product doctrine attach only to communications between plan administrator and attorney after the plan participant had become upset by the administrators actions, which caused a divergence between the interests of the participant and the administrator and brought about the need for protection of such legal advice and communications).
79. Wildbur v. ARCO Chemical Co., 974 F.2d 631, 634-35 (5th Cir. 1992), reh’g denied, 979 F.2d 1013 (5th Cir. 1992).
80. Id. (discussing and upholding the magistrate judge’s conclusions in prior proceedings over such issues).
81. Id. at 645.
82. See id. at 645-46. “The magistrate judge found that there had never been a mutuality of interest that would create a fiduciary relationship between [the plan’s] trial counsel…and the plan beneficiaries because all [counsel’s] communications with the plan administrator were made for the purpose of defending the pending lawsuit and did not deal with plan administration.” Id.
83. Id. at 645.
court found that the filing of the lawsuit destroyed the mutuality of interest that justifies a fiduciary exception to the attorney-client privilege. 84

More recently, courts have been willing to review the status of the defendant, to determine if the defendant was in fact acting as a fiduciary when the legal advice was provided. 85 For example, in Long Island Lighting Co., 86 the court refused to allow discovery related to advice to a corporation regarding proposed plan amendments, on the grounds that the corporation was acting as a non-fiduciary, not plan administrator, in considering and then adopting the amendments. 87 The court rejected the argument (based on Washington Star) that by using the same attorney for both fiduciary and non-fiduciary functions, that the corporation had waived the privilege with respect to the non-fiduciary functions. 88

The court read Washington Star as stating merely that the corporation could not defeat disclosure of legal advice provided with respect to plan administration, by retaining the same counsel as counsel to the corporation. 89 The court noted that at the time, the status of the employer as a non-fiduciary when amending the plan was an open question. 90 The court directly addressed the concern that had been raised by Washington Star:

An employer’s retention of two lawyers (one for fiduciary plan matters, one for non-fiduciary matters) would not frustrate a plan beneficiary’s ability to obtain disclosure of attorney-client communications that bear on fiduciary matters . . . The issue presented on this petition is not one of attorney conflict, which is solved by multiplying the number of lawyers: by authorizing the employer to act as plan fiduciary in the first place . . . ERISA has surely absolved the employer of the lesser conflict of using a single lawyer (or its in-house counsel) to advise it in both capacities. Instead, the issue presented here is a discovery question that depends on the existence (or not) of a fiduciary duty that is located in the employer, not the lawyer. 91

84. See id. at 645-46.
85. See In re Unisys Corp. Retiree Med. Benefits ERISA Litig., No. MDL 969, 1994 WL 6883 at *1-2 (E.D. Pa. Jan. 6, 1994) (stating that the court would review the invocation of attorney-client privilege at trial because of the importance of the matter and its possible effect on the case even though the motion on this issue was submitted less than one month before and could have been dismissed for untimeliness); Everett v. USAir Group, Inc., 165 F.R.D. 1 at *4-5 (D.D.C. 1995) (addressing attorney-client privilege).
86. Long Island Lighting Co. v. Long Island Lighting Co., 129 F.3d 268 (2d Cir. 1997).
87. Long Island Lighting Co., 129 F.3d at 270, 273. But see, Fischel v. The Equitable Life Assurance, 191 F.R.D. 606 (N.D. Cal. 2000), in which the court analyzed allegedly-privileged documents in light of the distinction drawn in Mett, infra, but did not address whether documents providing advice on plan design changes under consideration were settlor advice or fiduciary advice, treating all as relating to fiduciary issues.
88. Long Island Lighting Co., 129 F.3d at 272-73.
89. Id. at 268.
90. See id. at 273.
91. Id. at 272.
The Ninth Circuit adopted the approach of *Washington Star* and *Long Island Lighting* in upholding an order that a lawyer to pension fund trustees must testify before a grand jury.\(^{92}\) In *United States v. John Doe*, the Justice Department was investigating the relationship between multiemployer pension fund trustees and an investment monitor, in an effort to determine if the trustees seeking to hire the monitor were receiving kickbacks.\(^{93}\) The attorney who represented the union-appointed trustees was subpoenaed.\(^{94}\) The court held that an attorney advising a trustee regarding fund management bears an attorney-client relationship with the beneficiaries of the plan as much as with the trustee, and therefore cannot interpose the attorney-client privilege as against the beneficiaries in any matter involving plan administration.\(^{95}\) The court also held that the government may “assert the ‘trustee-beneficiary’ exception when it is seeking to vindicate the rights of ERISA beneficiaries.”\(^{96}\)

The Ninth Circuit limited the scope of *John Doe* in a later decision, applying the adversarial concept developed in *Wildbur* to bar the testimony of the plan fiduciaries’ lawyer in a criminal prosecution relating to administration of the plan.\(^{97}\) In *United States v. Mett*, the defendants were convicted of various crimes related to their withdrawal of $1.6 million from their company’s retirement plans, including filing of false reports (by failing to disclose the withdrawal on Form 5500’s), embezzling, and continuing to serve as fiduciaries after their conviction on fraud charges (unrelated to the embezzlement).\(^{98}\) During the trial on the benefit-related crimes, testimony and memoranda were admitted from the attorney who, at various times and simultaneously, represented the plans, the employer, and the fiduciaries.\(^{99}\) The memoranda were written after the fiduciaries had withdrawn about half of the money that they eventually converted to the company’s use and after their conviction for fraud.\(^{100}\) The memoranda advised the fiduciaries that they could not continue to serve as fiduciaries, that the withdrawals were unlawful and could lead to civil and criminal liability, and that they had to be disclosed on the Form 5500’s.\(^{101}\)

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92. See generally *United States v. Doe*, 162 F.3d 554, 556 (9th Cir. 1998). The *Doe* court did not cite *Garner* as the progenitor of the *Washington Star* approach, but rather relied on *Riggs Nat’l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), which the Ninth Circuit viewed as creating “a new narrow exception” to the attorney-client privilege with respect to inquiries by beneficiaries into the actions of trustees, without any necessity of a “good-cause” showing. *Id.* at 556, 556 n.3.

93. *Id.* at 555.

94. *Id.*

95. *Id.* at 556.

96. *Id.* at 557 (citing *United States v. Evans*, 796 F.2d 264 (9th Cir. 1986) (per curiam) (upholding the admission of lawyer’s testimony where the lawyer had been hired by the defendant in his capacity as trustee).

97. See generally *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999).

98. *Id.* at 1061-62.

99. *Id.* at 1062.

100. *Id.* at 1064.

101. *Id.* at 1062.
On appeal, the Ninth Circuit panel agreed that the fiduciary exception set forth in John Doe “has its limits – by agreeing to serve as a fiduciary, an ERISA trustee is not completely debilitated from enjoying a confidential attorney-client relationship.”102 Exploring the nineteenth-century British origin of the exception, the panel noted that fiduciaries were required to disclose advice given to fiduciaries regarding their obligations to beneficiaries, but not advice after suit had been brought by the beneficiaries, advising the fiduciaries of “how far they were in peril.”103 Even though no action was pending against the fiduciaries at the time the attorney’s advice was provided, they had recently been convicted of fraud, and employees were asking difficult questions.104 As the panel noted, “Trouble was in the air.”105 Therefore, the fiduciaries had good reason to seek advice regarding their personal exposure to liability, and the memoranda themselves addressed the trustees’ peril more so than simple plan administration.106 The court characterized the advice as not for the benefit of the plan or its beneficiaries, or relating to plan administration, and as addressed to the fiduciaries as clients in their personal capacity.107 In opposition to the government’s position that any advice relating to fiduciary duties is subject to the exception, the panel noted that such a position would vitiate any attorney-client privilege for fiduciaries, would discourage fiduciaries from seeking legal advice, and that when the fiduciary is seeking advice for his own protection, the interests of the beneficiaries may no longer be relevant.108 More fundamentally, the panel felt that “hard cases should be resolved in favor of the privilege, not in favor of disclosure.”109

The defendants in Mett argued that the disclosure of their attorney’s advice was not harmless error because it undermined their defense that the employees of the business would have supported their withdrawals of the pension funds in order to save their jobs, and that because their intent was to protect the beneficiaries, they lacked the necessary scienter for the crimes.110 While agreeing that the disclosure was not harmless error (and therefore ordering a new trial), the panel also held that the implied authorization defense was invalid because the beneficiaries cannot consent to the looting of their pension benefits, even to save their jobs (analogizing to the anti-alienation rule).111

The Seventh Circuit has now joined the Second and Ninth Circuits in finding that legal advice relating to plan modifications or termination remains privileged,
despite the fiduciary exception. In Bland v. Fiatallis North America, Inc., the court also indicated that the plaintiffs might have lost their ability to take advantage of the fiduciary exception when they dropped their claim of fiduciary breach, although the remaining litigation concerned plan interpretation, and the allegedly privileged documents were to be introduced to prove that the employer had interpreted the plan to provide vested benefits (the basis of the plaintiffs’ claim). But on remand, the court directed the magistrate to consider whether the work product exception applied under the “extraordinary need” exception.

In Coffman v. Metropolitan Life Ins. Co., the plaintiff sought memoranda and correspondence between the employer’s in-house counsel and the plan administrative committee. The plaintiff argued that the fiduciary exception applied to eliminate privilege, or that the employer waived the privilege by disclosing the substance of some of the conversations between the lawyer and the committee in the course of the claims procedure. The court held that the fiduciary exception applies to documents produced to assist the committee in processing the claim (even though they refer to the plaintiff’s attorney), but that it does not apply to documents produced after the final denial of the claim (when an adversarial position is established between the administrator and the claimant). However, language in the opinion could lead to a conclusion that if the documents relate to the ability of the committee to defend against any challenge to its decision, they may be protected even if they are produced before the claim is finally denied. A claim of work product was rejected on the grounds that the documents did not include the mental impressions, conclusions, opinions, or legal theories concerning the threatened litigation, and that they did not appear to have been produced in anticipation of litigation. No waiver was found because the disclosure related to a document that was subject to the fiduciary exception, and in the end, only one challenged document was protected.

Despite these recent cases, other courts have held that privilege may be lost as the result of multiple representation. Multiple representation may occur when a lawyer advises corporate employees acting on behalf of a corporate plan

112. See generally Bland v. Fiatallis, N. Am., Inc., 401 F.3d 779, 788 (7th Cir. 2005).
113. See id.
114. Id.
116. Id. at 297.
117. See id. at 299.
118. See id.
119. Id. at 300.
120. Id.
sponsor client that is also a fiduciary of a benefit plan. Also, lawyers who represent a sponsoring union or employer association frequently serve as counsel to the multiemployer plan. If litigation follows such multiple representation, communications about plan administration may not be protected under attorney-client privilege. Thus, such joint representation may require consultation about the risks and advantages, particularly the effect on client-lawyer confidentiality and the attorney-client privilege.

In *Martin v. Valley National Bank*, for example, the Department of Labor (DOL) brought an action against a bank trustee and ESOP fiduciaries, alleging that the bank violated its fiduciary obligations in connection with the ESOP’s participation in a leveraged buy out of the plan sponsor. The DOL obtained production of documents generated by the law firm that acted as legal counsel to the bank with respect to the ESOP, on the grounds that if a lawyer simultaneously represents clients with respect to plan matters, one such client cannot invoke the privilege against the other client at a later time when the client’s respective interests are in conflict.

In *Wsol v. Fiduciary Management Associates, Inc.*, the plaintiff plan fiduciaries established that the work product privilege attached to a report written to the fiduciaries by an attorney reviewing the quality and legal compliance of the defendants’ services. The defendants argue that the privilege had been waived because the plaintiffs voluntarily had given a copy to the Department of Labor. Relying on *Mett*, the court held that the government is aligned with the plan fiduciaries and the plan participants, and therefore disclosure to the government is not disclosure to an adverse party or a third party; the found no waiver of the privilege.

122. See *Kayes*, 51 F.3d at 1458-60 (stating that “by withdrawing funds from plan assets a corporate officer of a plan sponsor was a fiduciary, whether or not the sponsoring corporation authorized him to make such withdrawals”).


126. See *id.*


128. *Id.* at *1*.

129. *Id.* at *4*.
C. Work Product Doctrine

Even if the court would conclude that the fiduciary exception to attorney-client privilege applies to a document, the document still may be protected by the work product doctrine if the work was prepared in anticipation of threatened litigation.\(^{130}\) Even if the work product doctrine applies, however, the other party may obtain access to the document if the party has “substantial need of the materials” in the preparation of his or her case and if the party cannot obtain the substantial equivalent of the materials by other means without undue hardship.\(^{131}\) For example, in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, the participant’s attorney called the plan administrator and demanded interest on a past-due benefit payment.\(^{132}\) The plan’s attorney then drafted a research memorandum analyzing the merits of the claim for interest.\(^{133}\) The Third Circuit reversed a magistrate’s order that the memorandum was protected by the work product doctrine, on the grounds that the proponent of the privilege bears the burden of demonstrating that the document was prepared in anticipation of possible litigation, and would not have been prepared absent the threat of litigation.\(^{134}\) Because the defendant had asserted only that “the memorandum was written in connection with the claim” to interest, this was insufficient evidence to establish that it was prepared in anticipation of possible litigation.\(^{135}\)

On remand from the Supreme Court, the district court in *Giessal v. Moore Medical Corp.* determined that legal advice on which the plan administrator relied in terminating Mr. Giessal’s COBRA coverage was not privileged, but that once Giessal retained counsel to challenge the termination, the adversarial position was established and all further advice was subject to the work product privilege.\(^{136}\)

IV. LAWYER’S LIABILITY FOR VIOLATION OF ETHICAL RULES UNDER ERISA

A. Is Lawyer a Fiduciary Under ERISA?

In *Useden v. Acker*, the court held that an attorney’s occasional rendering of investment-type advice, in the context of advising on plan design, did not depart from the usual professional functions of a lawyer or otherwise give the lawyer

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131. *See id.* at 87.
133. *Id.*
134. *Id.* at 139.
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effective or realistic control over the plan’s assets.137 Therefore, the attorney did not have fiduciary status.138

A few cases arose from allegations that attorneys for plan participants were fiduciaries under ERISA when they received settlement funds from a third-party tortfeasor, as to which the plan had claimed a right of subrogation, and then advised the participants to dispose of the settlement funds so as to defeat the subrogation claim.139 The courts have held that the attorneys in these situations are not fiduciaries because the settlement funds are not plan assets and because they bore no fiduciary or other professional obligation to the plan.140 In one recent case, however, a district court allowed a plaintiff to sue the attorneys for a bankrupt benefit plan for knowing participation in a breach of fiduciary duty based on an allegation that the law firm received funds for legal services, knowing that such funds were required by a prior court order to be refunded to the plaintiff.141

In Laborers’ Pension Fund v. Arnold, the plaintiff, a multiemployer pension fund, sued its former attorney, asserting that the attorney was a fiduciary and breached his duties by improperly compromising delinquent contribution claims on behalf of the fund and misrepresenting his practices to the trustees.142 The court found that the attorney’s actions were within the “usual scope of the professional-client relationship” and that an attorney does not become a fiduciary unless the attorney “undertakes tasks that transcend” that usual scope.143

In a rather unusual case, however, the Ninth Circuit determined that a law firm that was sued in state court for charging excessive fees to a multiemployer plan could remove the case to federal court, on the theory that the plaintiffs’ claims, if proven, constituted knowing participation in a prohibited transaction by a party-in-interest, and therefore were completely preempted by ERISA.144

137. See Useden v. Acker, 947 F.2d 1563, 1577-78 (11th Cir. 1991).
138. Id. at 1578.
140. See Chapman, 3 F.3d at 1508-13 (11th Cir. 1993). But see, Greenwood Mills, Inc. v. Burris, 130 F. Supp. 2d 949, 957-58 (M.D. Tenn. 2001). The court agreed that the participant’s attorney was not a plan fiduciary, but found that §502(a)(3) of ERISA provided a cause of action to enjoin the attorney’s participation in a violation of the plan’s subrogation provision, and that appropriate equitable relief was to order the attorney to disgorge the fees retained from the settlement proceeds, less reasonable attorney’s fees on an hourly rate basis. Id. at 957-61.
143. Id. at *3.
144. Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F. 3d 1212, 1222-23 (9th Cir. 2000), remanded and reh’g denied, 208 F.3d 1170 (9th Cir. 2000).
B. Is a Lawyer Liable for the Client’s Wrongdoing?

In Federal Deposit Insurance Corp. v. O’Melveny & Meyers, the FDIC, as receiver for a failed savings and loans, sued the bank’s former counsel, alleging professional negligence, negligent misrepresentation, and breach of fiduciary duty for services rendered in connection with public offerings.145 The claim survived summary judgment on the grounds that the firm owed its client a duty to make a reasonable effort to verify the facts upon which the attorney relied in rendering a legal opinion.146

More recently, a Kansas state court dismissed claims against two law firms that represented a public plan’s investment advisor with respect to investments made on behalf of the plan.147 One law firm had represented the advisor generally with respect to its relationship with the plan, but did not represent the advisor with respect to an investment in a corporation that the law firm also represented and in which one of its partners had an investment and served as an officer.148 The other law firm represented the advisor in that investment and the first law firm represented the corporation.149 The plaintiff alleged that the two law firms had knowingly participated in breaches of fiduciary duty by a plan trustee and by the advisor and that the law firm that handled the investment had an affirmative duty to advise the plan fiduciaries that the investment was imprudent.150 The court held that active participation in a breach of trust requires more than mere knowledge by the attorneys of the facts of the transaction and requires more than mere negligence.151 Rather, some element of collusion is required.152 The court also held that the law firm that represented the corporation was not obligated to provide any advice to the advisor or the plan with respect to that transaction because its prior representation of the advisor or plan was unrelated.153 With respect to the law firm handling the transaction, the court held that the law firm was never asked to perform financial due diligence or to advise on prudence, and that the plaintiffs had not presented evidence that the law firm was aware of any breaches committed by their clients or by any of the plan’s other fiduciaries.154 The court issued this opinion despite the fact that one of the law firm partners was also an investor in the failed investment because that law firm did not represent the fiduciary with respect to that

146. Id. at 749, 752.
148. Id. at *1-11.
149. Id.
150. Id. at *11.
151. Id. at *25.
152. Id.
154. Id. at 21.
investment, although it represented the fiduciary in other matters. The Kansas Supreme Court upheld the dismissal of the claims against the law firm.

In *Chicago Truck Drivers etc. v. Brotherhood Labor Leasing*, a law firm was found in contempt of court and was required to pay the plaintiff multiemployer pension fund all fees collected from its bankrupt client. The basis for the court’s holding was a factual finding that the law firm advised the employer to pay its legal fees and other creditors before paying the pension fund interim withdrawal liability payments awarded by a district court. The court decided that the district court’s order was effectively an injunction, that the law firm should have known that, and that ERISA requires interim payments in any event. The dissent observed that the finality of the order was open to question (the fund had filed a motion to amend judgment), the law firm withdrew before the order was revised and finalized, and that law firms shouldn’t be held in contempt for advising troubled companies about what to do even if they are wrong on the substance of their advice, as long as it was provided in good faith.

V. CONCLUSION

While for many years benefits practitioners aware of the fiduciary exception to attorney-client privilege were required to practice as if all advice would eventually be open to disclosure, the modern trend, as typified by the Second Circuit’s decision in *Long Island Lighting* and the Ninth Circuit’s decision in *Mett*, is to narrow the scope of the fiduciary exception – to permit an attorney to represent clients in their non-fiduciary capacity with the protection of attorney-client privilege while simultaneously representing clients in their fiduciary capacity without any privilege. Even when acting on behalf of a fiduciary client, the attorney’s advice may be privileged if it is provided in the context of litigation or, as in *Mett*, when “[t]rouble was in the air.” Nevertheless, the wise practitioner still may wish to assume that all advice may eventually be disclosed, particularly if the recipient of the advice, even though subject to privilege) chooses to waive the privilege for various reasons.

Despite the favorable trend in the law, it is also good practice for the attorney to ensure that, at the beginning of the representation, there is a clear understanding with the client as to (a) who is the client (the individual or the

155. Id. at 25.
156. Id.
158. Id. at 958.
159. Id.
160. Id. at 959-62.
161. See *Long Island Lighting Co. v. Long Island Lighting Co.*, 129 F.3d 729, 272 (2d Cir. 1997). See also *United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999).
162. See *Mett*, 178 F.3d at 1064 (9th Cir. 1999).
entity and, if the entity, the plan or the sponsor), (b) the degree to which the client may expect the attorney’s advice to be subject to the privilege, and (c) the degree to which the attorney’s representation is part of a joint representation of multiple clients or a single client in multiple capacities and the consequences of such representation. Careful exploration of these issues may well lead clients to elect to obtain separate counsel for a benefit plan under certain circumstances and may also avoid inadvertent disclosure by client representatives of their personal matters, under the mistaken impression that the entity lawyer is “their” lawyer. For all these reasons, it is useful for the labor or benefits practitioner to revisit the privilege and conflict rules periodically and to ensure continued compliance in representation of benefit plans and their sponsors and fiduciaries.
OLDER, WISER AND MORE DISPENSABLE: ADEA OPTIONS AVAILABLE UNDER SMITH V. JACKSON: DESPERATE TIMES CALL FOR DISPARATE IMPACT

by Dennison Keller*

I. INTRODUCTION

“Old and wise.” In our lexicon, it is a descriptive marriage of words as familiar as “bacon and eggs,” “salt and pepper,” and “Fred and Ginger.” Though the term has become a cliché, Solomon Short once commented, “any great truth can -- and eventually will -- be expressed as a cliché.”

Today’s elders have unquestionably earned the moniker. They are the most educated senior population in the history of the United States. Since 1970, the percentage who had completed high school rose from 28% to 70%. In 2000, the median net worth of elderly households (with a householder aged 65+) was almost $109,000 -- nearly double that of the total population. In a literary tribute to the seniors who weathered the Great Depression and World War II, transforming America into an economic and military powerhouse, NBC News anchor Tom Brokaw described this country’s senior citizens as, “the greatest generation any society has ever produced.”

The lucrative trail blazed by their industry has been followed fastidiously by their children. The median net worth for older Baby Boomers age fifty-five to sixty-four is over $112,048. For households headed by those forty-five to fifty-four, the median net worth is $83,150. The baby boomers have also continued their parents’ strides in higher education. More than 85% of those forty-five to sixty-four have at least a high school education, and more than 25% have earned at least a bachelor’s degree.

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3. Id.
7. Id.
As a class, today’s senior workers are mentally and emotionally armed with unprecedented wealth and academic fortitude, not to mention decades worth of accumulated real life experiences. Yet, aside from the occasional literary or oratory accolade, the reality is that elder employees have been punished for their achievements as much as they have been applauded for their success. Once a worker reaches a certain level of age or income, too often the reward is a pink slip. Over the past ten years 168,547 claims of age discrimination have been filed with the United States Equal Employment Opportunity Commission (EEOC). These numbers, as staggering as they are, represent only federal actions and do not even include all of the lawsuits filed under state anti-discrimination statutes. Yet, in seven of those ten years, the EEOC found “reasonable cause” that discrimination likely occurred in fewer than 5% of the cases. In each year, fewer than 20% of the cases reached so-called “merit resolutions,” which are defined as outcomes, including settlements, favorable to the charging parties.

However, with its March decision in Smith v. City of Jackson, the United States Supreme Court shifted the winds and placed them squarely at the backs of older workers. The holding in Smith now allows elder employees to sue under the Age Discrimination in Employment Act (ADEA) on a theory of disparate impact, instead of having to prove disparate treatment. A split had emerged among the Circuit courts prior to the Smith case. A majority of them categorically disallowed any age discrimination cases to be brought on a disparate impact theory. While much has been written about the Smith case, this article will attempt to predict the future of ADEA litigation by looking to the past. The circuit courts allowed disparate impact claims prior to the United States Supreme Court’s ruling in Hazen Paper Co., v. Biggins. This article will analyze and review those cases, and determine future actions that might be winners and losers under Smith. Plus, it will dissect how the unemployment rate has direct

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11. See supra note 9.
12. Id.
14. Id. at 1537.
15. Compare Criley v. Delta Airlines, Inc., 119 F.3d 102, 105-06 (2d Cir. 1997) (allowing disparate impact theory of liability under the ADEA), with Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) (holding that disparate impact claims may not be brought under the ADEA).
16. Adams, 255 F.3d at 1326. See also Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999).
17. Smith, 125 S. Ct. at 1544-45.
bearing on the number of ADEA claims filed, and how the Smith ruling may affect those complaints.

A perfect storm is on the horizon. If the steady front of an aging workforce meets a cyclical gust of unemployment on a jet stream provided by the Supreme Court in Smith v. City of Jackson the EEOC may have to brace for an ADEA tempest, the likes of which it has never seen.

II. THE HISTORY OF THE ADEA

As Congress tried to tackle obvious disparities in the American workplace in the 1960’s, it recognized that discrimination based on age was rooted in different rationales than the invidious stereotypes rooted in race, sex, national origin and the like.18 Therefore, it “chose not to include age within discrimination forbidden by Title VII of the Civil Rights Act of 1964.”19 Instead, Congress called on Secretary of Labor Willard Wirtz to study the issue.20 The Wirtz Report determined that arbitrary discrimination on the basis of age was a significant factor in the American workplace, and recommended adopting legislation to eliminate it.21

President Lyndon Johnson sent a message to Congress in January of 1967, urging passage of a law that would prohibit discrimination in employment on account of age.22 With little fanfare, Congress enacted the Age Discrimination in Employment Act, and Johnson signed it into law.23 In the text of the Act, Congress recognized that in the face of rising productivity, older workers find themselves disadvantaged in their efforts to retain and regain employment.24 It acknowledged that the setting of arbitrary age limits had become common practice, and that the incidence of unemployment was high among older workers when compared to their younger colleagues.25

23. Id.
25. Id.
A key motive for passage of the ADEA was the elimination of discrimination in hiring older applicants. It was believed that the elimination of such discrimination would diminish long term unemployment in older workers, thus reducing elderly poverty. However, as Lawrence A. Frolik and Alison McChrystal Barnes point out in their work, Elder Law Cases and Materials, “only about 10 percent of ADEA cases involve discrimination in hiring; the rest deal with unlawful dismissal on the basis of age. The overwhelming majority of ADEA plaintiffs are white male professionals and managers contesting the termination of their employment.”

III. ADEA PROTECTIONS

The ADEA states three general goals in its text: “to promote [the] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”

The Act protects individuals who are forty years of age or older. The ADEA’s protections apply to both employees and job applicants. The EEOC stresses that, “[u]nder the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.” It is also unlawful to retaliate against an individual for opposing labor practices that discriminate based on age, or for filing an age discrimination charge, or for testifying or participating in an investigation or litigation under the ADEA.

The Act applies to employers with at least twenty or more employees, including state and local governments and the federal government. However, in Kimel v. Florida Board of Regents, the United States Supreme Court ruled that the United States Constitution’s Eleventh Amendment prohibits enforcing the ADEA onto states that have not consented to be sued under the act. Yet, the Court also noted that almost every state had its own version of an anti-age discrimination law which may be wielded freely to protect older employees of state and local governments.

26. Frolik & Barnes, supra note 22, at 95.
27. Id.
28. Id.
32. See sources cited supra note 31.
33. Id.
34. Id.
35. Frolik & Barnes, supra note 22, at 100. See also Kimel, 528 U.S. at 78-9.
36. Frolik & Barnes, supra note 22, at 100. See also Kimel, 528 U.S. at 91.
The ADEA also applies to employment agencies and labor organizations. It is unlawful to post a “help wanted” sign or advertisement indicating an age preference. In fact, a violation occurs when any preference or limitation based on age is indicated. The law, however, does not apply to partners, directors or owners of enterprises. They are not considered employees, and therefore are not protected by the Act.

IV. EXEMPTIONS, DEFENSES AND EXCEPTIONS

At first blush, the ADEA seems to provide comprehensive protections to seniors. However, the law provides numerous exemptions, defenses, and exceptions that tear gaping holes in the net of coverage. The result of these loopholes is that employers win far more discrimination suits than they lose. Of the 17,837 complaints filed with the EEOC in 2004, the agency found “reasonable cause” to believe that discrimination occurred in only about 3% of the cases. There was no “reasonable cause” in 60% of them. Only 17% reached a so called merit resolution” with outcomes favorable to the charging parties. In 2003, the numbers were even less attractive to plaintiffs.

The paltry success rate for plaintiffs is, no doubt, due in part to a fact long acknowledged by the courts -- age discrimination is difficult to prove. The Act’s exceptions, defenses, and exemptions combine to make that task even more difficult, if not downright impossible for some older workers.

37. See sources cited supra note 31.
39. See sources cited supra note 38.
41. See sources cited supra note 40.
44. See supra note 9.
45. Id.
46. Id. The “no reasonable cause” designation is based on evidence obtained in the EEOC investigation. See U.S. Equal Employment Opportunity Commission, Definition of Terms, http://www.eeoc.gov/stats/define.html (last visited Sept. 28, 2005). The “no reasonable cause” label is not necessarily the end of the line for the plaintiff, as it does not preclude pursuance of state action. Id. See also Kimel, 528 U.S. at 91 (noting that almost every state has its own version of an anti-age discrimination law).
48. See supra note 9 (finding “reasonable cause” in only 3% of cases, no “reasonable cause” in 69%, and a “merit resolution” in 14.7% of the claims).
49. See generally Riggle v. CSX Transp. Inc., 755 F. Supp. 676, 681 (D. Md. 1991) (“It is difficult to prove discriminatory principles of proof . . . .”). See also Huff v. UARCO, Inc., 122 F.3d 374, 388 (7th Cir. 1997) (“Employers who engage in discriminatory conduct rarely expressly reveal their discriminatory intent, and these cases are especially difficult to prove.”).
Firefighters and law enforcement officers offer a prime example.\textsuperscript{50} The ADEA recognizes a possible rational correlation between age and job competency in regard to firefighters and some law enforcement officials such as police and prison guards.\textsuperscript{51} In 1996 Congress amended the Act to allow public employers to discriminate on the basis of age in the hiring and mandatory retirement of firefighters and law enforcement officers.\textsuperscript{52}

The ADEA also allows employers to retire executive and high policymakers once they reach age sixty-five.\textsuperscript{53} However, if the employer does so, the retired individual “is entitled to an immediate, nonforfeitable annual retirement benefit of at least $44,000 or a straight-line annuity of an equivalent value.”\textsuperscript{54}

In addition, the ADEA contains specific provisions allowing employees to sign away their right to sue under the act.\textsuperscript{55} However, the waiver must follow specific standards formulated in a 1990 amendment known as the Older Workers Protection Act.\textsuperscript{56}

\textbf{A. Reasonable Factor Other Than Age [RFOA]}

As noted above, Congress chose to exclude aged individuals from its list of protected classes in the Civil Rights Act of 1964 [Title VII].\textsuperscript{57} However, as the \textit{Smith} Court noted, “except for substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national origin,’ the language of [29 U.S.C. § 623(a)(2)] is identical to that found in section 703(a)(2) of the Civil Rights Act . . .”\textsuperscript{58} Yet, the ADEA “contains language that significantly narrows its coverage by permitting any ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age’ [RFOA].”\textsuperscript{59} The provision allows an employer to assert that age did not factor into the decision to fire or not to hire,

\begin{itemize}
\item 51. \textit{See} sources cited supra note 50.
\item 52. \textit{Id.}
\item 54. \textit{See} sources cited supra note 53.
\item 55. 29 U.S.C. § 626(f) (2000).
\item 56. \textit{See} 29 U.S.C. § 626(f)(1) (2000); \textit{See also} Frolik & Barnes, supra note 22, at 147-48 stating:
\item To be valid the waiver must: be written in understandable language; specifically refer to rights or claims under the ADEA; not apply to rights or claims arising after the date the waiver is signed; provide the employee additional consideration for signing; advise the employee to consult an attorney before signing; give the employee at least 21 days to consider the agreement or at least 45 days if the waiver is part of an exit incentive or employment termination program; be revocable by the employee for at least 7 days after being signed; and if the waiver is part of an employment termination program, the employee must be provided details as to whom the program applies.
\end{itemize}
but that some other legally permissible cause, such as poor job performance, was the true reason behind its actions.60

Exactly what constitutes a reasonable factor other than age has traditionally hinged on whether the courts interpreted the ADEA under a disparate impact or disparate treatment rubric.61 In a disparate treatment case, liability turns on whether age actually motivated the employer's decision.62 As the Hazen court explained, “[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.”63 In contrast, the disparate impact theory, first announced in the racial discrimination case of Griggs v. Duke Power Co., mandates that even facially neutral procedures that operate as built-in headwinds to those seeking fair employment will be deemed as discriminatory.64

Under a disparate treatment analysis, the Supreme Court ruled in Hazen that an employer who terminated an employee to prevent the employee’s pension from vesting did not violate the ADEA, even though the vesting was directly linked to years of service.65 The Court held that an employee’s “age and years of service are analytically distinct.”66 The Court went on to say that “[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears.”67 In fact, the decision went so far as to say that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.68

Even under a disparate impact theory, federal courts have held that although high salary and age are related, “there is nothing in the [ADEA] that prohibits an employer from making employment decisions that relate an employee’s salary to contemporaneous market conditions... and concluding that a particular employee's salary is too high.”69 In Bay v. Times Mirror Magazines, Inc., a fifty-four year old vice president making close to $200,000 a year was replaced in a company restructuring by a thirty-four year old and a forty-one year old, both of whom made considerably less money.70 The plaintiff alleged that the moves “were part of a deliberate effort to replace older, highly compensated employees with younger, less costly employees.”71 The company replied that its decisions

60. Frolik & Barnes, supra note 22, at 137.
61. See generally Smith, 125 S. Ct. at 1536.
63. Id.
66. Id. at 611.
67. Id. (emphasis in original).
68. Id. at 609.
70. Id. at 114.
71. Id. at 116.
were based on the plaintiff’s resistance to the restructuring program and his stated dissatisfaction with reporting to his new superiors.\textsuperscript{72} The court held that “so long as the employer's decisions view each employee individually on the merits, do not impose a general rule that has a disparate impact on older workers . . . and are based solely on financial considerations, its actions are not barred by the ADEA.”\textsuperscript{73}

This article delves further into the disparate treatment and disparate impact theories under its analysis of \textit{Smith v. City of Jackson} infra. However, under any calculus, it is clear that termination decisions based on factors that may accompany advancing age have been deemed legitimate.\textsuperscript{74} An employer may terminate an older worker for diminished vigor, a deteriorating level of competence, and even for declining health related to advancing age.\textsuperscript{75} What the employer may not do is fire solely because the worker has reached a certain age.\textsuperscript{76}

\textbf{B. Bona Fide Occupational Qualification Exception [BFOQ]}

In addition to protecting potentially discriminatory employment decisions based on a reasonable factor other than age, the ADEA also grants an exception based on a bona fide occupational qualification [BFOQ].\textsuperscript{77} Specifically, the text says that it is lawful, “to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”\textsuperscript{78} A similar provision is found in Title VII with respect to all protected classes except race.\textsuperscript{79} As Frolik and Barnes summarize, “[t]he BFOQ defense is frequently cited by the employer who admits that age was a factor in the decision not to hire or to fire, but who offers a legally justifiable excuse for the need to rely upon age.”\textsuperscript{80}

\textit{Usery v. Tamiami Trail Tours, Inc.} is the bellwether case regarding the BFOQ.\textsuperscript{81} Citing safety considerations, the defendant bus company followed a policy of refusing to hire persons over forty as bus drivers.\textsuperscript{82} The Court of Appeals for the Fifth Circuit held for the defendants, but also said that the BFOQ has limited scope and application, and is to be construed narrowly.\textsuperscript{83} The court

\begin{itemize}
\item 72. \textit{Id}.
\item 73. \textit{Id.} at 117.
\item 74. \textit{Frolik \& Barnes}, supra note 22, at 137.
\item 75. \textit{Id}.
\item 76. \textit{Id}.
\item 78. \textit{Id}.
\item 80. \textit{Frolik \& Barnes}, supra note 22 at 139.
\item 81. \textit{Id.}; See also \textit{Usery v. Tamiami Trail Tours, Inc.}, 531 F.2d 224, 226 (5th Cir. 1976).
\item 82. \textit{Usery}, 531 F.2d at 226.
\item 83. \textit{Id.} at 230.
\end{itemize}
said the test for qualification for the bona fide occupational qualification defense is:

an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons of a certain class] would be unable to perform safely and efficiently the duties of the job involved. However, even when the employer cannot carry this burden, if it demonstrates ‘that it is impossible or highly impractical to deal with [this certain class of persons] on an individualized basis, it may apply a reasonable general rule.’ One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class.  

*Uxery* also required that “the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business . . . .”  A peripheral necessity would be an unacceptable justification of the BFOQ. Courts have often viewed BFOQ defenses favorably when they are used to justify the mandatory retirement of airline pilots.

V. Smith v. City of Jackson: This Changes Everything.

If the nebulous nature of age discrimination and the numerous exemptions of the ADEA represent a stacked deck in a game where the house wins more often than not, the United States Supreme Court has recently provided plaintiffs with an ace in the hole that may dramatically tip the odds. The card that is sure to be played over and over again is the ruling in *Smith v. City of Jackson*.

This watershed case arose out of a mere trickle running through the town of Jackson, Mississippi, where in 1998, city leaders sought to deepen the talent pool of its municipal employees. It surmised the best way to do this was deepen the pockets of both its current and future workers, so it granted pay raises to all city employees. Jackson officials said the “purpose of the plan was to ‘attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.’”

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84. *Id.* at 235.
85. *Id.* at 236 (emphasis in original).
86. *Id.*
89. *Id.* at 1539.
90. *Id.*
91. *Id.*
Jackson leaders recognized, in particular, that the pay scale for its new police hires was below the regional average. Therefore, although it granted raises to all of its police officers, those officers with less than five years experience received proportionately greater hikes than those with longer seniority. Most of the older officers who had more than five years experience, were over forty, and were therefore within the protection of the ADEA.

The plaintiffs brought their suit under the ADEA, basing their argument on two different theories: disparate treatment and disparate impact. Under the disparate treatment claim, the officers asserted that Jackson deliberately discriminated against them because of their age. Alternatively, following a disparate impact argument, the plaintiffs contended that they were simply adversely affected by the plan due to their age. The district court granted summary judgment to the city on both claims. The court of appeals did not rule definitively on the disparate treatment claim, but did hold that that disparate impact claims were categorically unavailable under the ADEA.

In granting certiorari and hearing the disparate impact claim, the United States Supreme Court took on the task of resolving a split that had emerged in the circuit courts regarding claims of disparate impact under the ADEA. The Second, Eighth, and Ninth Circuits have allowed claims to proceed under a disparate impact theory, while the First, Third, Sixth, Seventh, Tenth, and Eleventh have not. The circuits that have dismissed the disparate impact theory have scaled their analyses from two primary toeholds: the language and history of the ADEA itself, and the Supreme Court ruling in Hazen. Courts hostile to the disparate impact theory seize, in particular, on the RFOA exception contained in the language of 29 U.S.C. § 623(f). As mentioned supra, the language of the ADEA is nearly identical to that of Title

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92. Id.
93. Id.
94. Smith, 125 S. Ct. at 1539.
95. Id. (The concept of disparate treatment and disparate theory is explained supra).
96. Id.
97. Id.
98. Id. at 1537.
99. Id.
100. Smith, 125 S. Ct. at 1546. See also Adams, 255 F.3d at 1326.
101. Compare Criley v. Delta Airlines, Inc, 119 F. 3d 102, 105 (2d Cir. 1997); Lewis v. Aerospace Cnty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997); Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000) (allowing disparate impact), with Mullin v. Raytheon Co., 164 F.3d 696, 700-01 (1st Cir. 1999), cert. denied, 528 U.S. 811, 120 S. Ct. 144, 145 L. Ed. 2d 40 (1999); DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076-77 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006-07 (10th Cir. 1996); Adams, 255 F.3d at 1326 (disallowing disparate impact).
102. See Adams, 255 F.3d at 1325-26; Mullin, 164 F.3d at 701; Francis W. Parker School, 41 F.3d at 1077-78. See also 29 U.S.C. § 623(f) (2000).
103. See cases cited supra note 102.
VII, with one huge difference - the RFOA provision. Since litigants pursuing damages under Title VII are free of the RFOA burden, courts have held that it is logical to allow them to root their claims in the disparate impact soil tilled by the Griggs case. In contrast, the RFOA acts like a pestilence to ADEA litigants. These circuits reason that since Congress included the exception in one piece of legislation, and not the other, it must have intended for the protected classes to be treated differently. Therefore, they conclude that it is misguided to allow a disparate impact claim under the ADEA to flower in the land of Griggs. In Mullin v. Raytheon Co., the First Circuit said:

Thus, if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that ‘only age discrimination is age discrimination.’ Such a circular construction would fly in the teeth of the well-settled canon that ‘[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.’

The Supreme Court appeared to have followed the logic of those dismissing disparate impact when it decided the Hazen case. As mentioned above, Hazen involved an employer that terminated an employee to prevent the worker’s time-based pension from vesting. The Court said that the action may violate the Employee Retirement Income Security Act, but not the ADEA. It also stated explicitly that it was not deciding whether a disparate impact theory of liability was available under the ADEA. However, many courts hostile to the idea seized on the ruling’s strong language. The decision said, “[d]isparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence

105. See cases cited supra note 102.
106. Id.
107. Id.
108. Id.
109. Id.
110. Hazen Paper Co., 507 U.S. at 610.
111. Id. at 604.
112. Id. at 612.
113. Id. at 611.
114. See Adams, 255 F.3d at 1326 (“While the Hazen Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot.”). See also Mullin, 164 F.3d at 701 (“. . . Hazen Paper foretells the future, that Griggs is inapposite in the ADEA context, and that proof of intentional discrimination is a prerequisite to liability under the ADEA.”); Francis W. Parker School, 41 F.3d at 1077.
decline with old age.” Courts have interpreted this parlance as a signal that the Supreme Court did not believe that a disparate impact avenue was available through the ADEA.

In March 2005, the Supreme Court said once and for all that the circuit courts disallowing disparate impact claims under the ADEA were wrong. In *Smith v. City of Jackson,* the Court emphasized the similarities between Title VII and the ADEA rather than dwelling on their differences, and ruled that both authorize recovery on a disparate impact theory. It reasoned, “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” The Court continued, “[n]either [Title VII] nor the comparable language in the ADEA simply prohibits actions that ‘limit, segregate, or classify’ persons; rather the language prohibits such actions that ‘deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s’ race or age.” The plurality concluded, “the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer.”

Despite opening the door to disparate impact cases, the Court did not slam the window shut on its prior ruling in *Hazen.* It merely emphasized again that *Hazen* was a disparate treatment case, not a disparate impact case. The Justices reminded the lower courts that “we were careful to explain [in the *Hazen* case] that we were not deciding ‘whether a disparate impact theory of liability is available under the ADEA[].’” In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs.*

While the Supreme Court made clear that it wanted aged individuals to avail themselves of the same disparate impact protections provided to other classes under *Griggs,* it still noted the differences between ADEA and Title VII litigants, and indicated that it does not wholly disagree with rationales forwarded by the circuit courts rejecting the disparate impact theory. The high Court stated expressly that the scope of disparate impact liability under the ADEA is

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116. See *Adams*, 255 F.3d at 1325-26; *Mullin*, 164 F.3d at 701; *Francis W. Parker School*, 41 F.3d at 1077-78.
118. *Id.* at 1544.
119. *Id.* at 1541.
120. *Id.* at 1542 (emphasis in original).
121. *Id.* (emphasis in original); See also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).
122. *Smith*, 125 S. Ct. at 1543.
123. *Id.*
124. *Id.*
125. *Id.* at 1544.
narrower than under Title VII. It recognized that Congress’ inclusion of the RFOA provision is indicative of the fact that “intentional discrimination on the basis of age has not occurred at the same levels of discrimination against those protected by Title VII.” In addition, the Court noted that a 1991 amendment that expanded Title VII coverage on a disparate impact theory did not include potential ADEA cases, thus, guaranteeing that age discrimination relying on disparate impact would be narrowly construed.

Proving that its warnings of narrow application were more than mere fodder, the United States Supreme Court rejected the claims of the litigants in the Smith case. The plurality also laid down a test for future potential ADEA litigants to follow, stating that “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is ‘responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.’” The Court emphasized that the officers in this case had failed to identify the specific practice being challenged. It noted that the plaintiffs’ age did not affect their compensation, but rather their years of service did. Not only that, the Court also determined that Jackson’s pay raise plan was based on a reasonable factor other than age. It found that the pay increases were in furtherance of the city’s “legitimate goal of retaining police officers.”

While the decision regarding the ultimate outcome of the case was unanimous, the disparate impact decision is much more tenuous. Only four of the justices firmly positioned themselves as supporting disparate impact liability. Justice Scalia concurred in the decision and even the reasoning behind the Court’s disparate impact decree. However, he thought the Court should bow in deference to the EEOC and let that agency decide. He did this believing that the EEOC had already come out in favor of allowing disparate impact treatment.

Justice O’Connor wrote a concurrence, in which Justices Kennedy and Thomas joined, strongly criticizing the Court’s acceptance of a disparate impact

126. Id.
127. Id. at 1545.
128. Smith, 125 S. Ct. at 1545.
129. Id.
130. Id. (quoting Watson, 487 U.S. at 994) (emphasis in original).
131. Id.
132. Id. at 1545-46.
133. Id. at 1545.
134. Id. at 1545.
135. Id. at 1546.
136. Smith, 125 S. Ct. at 1546.
137. Id. at 1539.
138. Id. at 1538. Justices joining in the opinion were Stevens, Souter, Ginsburg and Breyer. Id. at 1538. Chief Justice Rehnquist did not participate in the decision. Id.
139. Id. at 1547.
theory.\textsuperscript{140} She wrote, “[t]he ADEA’s text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims.”\textsuperscript{141} Nor was she accepting of Justice Scalia’s deference to the EEOC’s supposed accepting stance, stating, “the agencies charged with administering the ADEA have never authoritatively construed the statute’s prohibitory language to impose disparate impact liability.”\textsuperscript{142}

VI. BACK TO THE FUTURE?

While the High Court may have christened a new era in ADEA litigation, we are not in completely uncharted waters here. As the Court said in \textit{Smith}, “for over two decades after our decision in \textit{Griggs}, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a ‘disparate impact’ theory in appropriate cases.”\textsuperscript{143} It noted that “[i]t was only after our decision in [the \textit{Hazen} case] that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.”\textsuperscript{144} One needs only to fix his sextant on the courts of the past to anticipate where future age discrimination currents may carry.

A. Past Winners

As the Eighth Circuit Court of Appeals pointed out in \textit{Leftwich v. Harris-Stowe State College}, statistical evidence is clearly an appropriate method to establish disparate impact.\textsuperscript{145} In fact, some have noted that statistical analysis is the cornerstone of a disparate impact case.\textsuperscript{146}

In \textit{Leftwich}, the Missouri legislature took control of Harris-Stowe College from the St. Louis Board of Education and established the city school as a state college.\textsuperscript{147} A new board of regents decided to hire a new faculty, one much smaller and more cost efficient than the previous staff.\textsuperscript{148} The plaintiff, Dr. Leftwich, was a tenured chair of the biology department at the old city college who was not offered either a tenured or non-tenured position at the new state college.\textsuperscript{149} Instead, the school gave a non-tenured position to a thirty year old who scored lower than Leftwich in evaluations.\textsuperscript{150} Leftwich presented statistical evidence that showed that the mean age of the tenured faculty at the "old" city

\begin{thebibliography}{99}
\bibitem{footnote1} \textit{Id.} at 1549.
\bibitem{footnote2} \textit{Id.}
\bibitem{footnote3} \textit{Id.}
\bibitem{footnote4} \textit{Id.}
\bibitem{footnote5} \textit{Id.} at 1542-43.
\bibitem{footnote6} \textit{Smith}, 125 S. Ct. at 1543.
\bibitem{footnote7} \textit{Leftwich v. Harris-Stowe State Coll.}, 702 F.2d 686, 690 (8th Cir. 1983).
\bibitem{footnote9} \textit{Leftwich}, 702 F.2d at 689.
\bibitem{footnote10} \textit{Id.}
\bibitem{footnote11} \textit{Id.}
\bibitem{footnote12} \textit{Id.}
\bibitem{footnote13} \textit{Id.}
\end{thebibliography}
college was 45.8 years, while the mean age of non-tenured faculty was 34.3 years. He also presented a statistical correlation test which showed a positive, significant correlation between age and salary for faculty members at Harris-Stowe College.

The Eighth Circuit said, “federal courts have held that economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA for an employment selection criterion.” The court added, “[w]hen . . . a member of a protected class is eliminated from consideration for a job on the basis of a selection criterion that had a discriminatory impact, the fact that other members of his or her class were hired does not prevent the rejected employee from establishing a prima facie case, nor does it provide the employer with a defense to a disparate impact case.”

The case of Geller v. Markham also involved an educator who used statistical evidence to show that she was denied employment by a school system that favored younger workers. In Geller, the plaintiff was a fifty-five year old who was hired to teach art for the defendant school district, only to be replaced two weeks later by a twenty-five year old. In particular, the plaintiff attacked the district’s “Sixth Step Policy,” a salary grade reached by teachers with more than five years experience. The board had adopted a stated policy of hiring teachers who were below the sixth step. The plaintiff introduced expert statistical testimony establishing that almost 93% of the state’s teachers over forty had more than five years experience, while only 62% of teachers under forty had taught more than five years. The court found the “sixth step” policy discriminatory as a matter of law.

In Franci v. Avco Corp., 126 plaintiffs sued, claiming that they were unfairly targeted because of their age in a company downsizing, and that the defendant company refused to hire them back even when it started to replenish its workforce. Managers charged with carrying out the layoffs were given a specific goal of reducing salaries. The plaintiffs offered statistical evidence to show that the workers who were dismissed were the highest paid, and oldest of the labor pool. The court said, “[t]he correlation between experience and

151. Id. at 690.
152. Id.
153. Leftwich, 702 F. 2d at 692.
154. Id. at 691 (citing Connecticut v. Teal, 457 U.S. 440, 444 (1982)).
155. Geller v. Markham, 635 F.2d 1027, 1030 (2d Cir. 1980).
156. Id.
157. Id.
158. Id.
159. Id.
160. Id. at 1034. Contra Hazen Paper Co., 507 U.S. at 612; Smith, 125 S. Ct. at 1545 (holding that years of service are analytically distinct from age).
162. Id. at 257.
163. Id. at 259.
membership in the protected age group rendered discriminatory what were professed to be neutral reductions in salary expenses." In addition, the court found the company in violation of the ADEA for refusing to rehire the displaced workers even as it recruited recent college graduates for the same positions.

A reduction in force also spurred on litigation in Blum v. Witco Chemical Corp. Here, three chemists, all age fifty-six or older, were laid off in a company downsizing. The plaintiffs presented evidence which showed that chemists who were under forty had a 100% retention rate, while approximately two-thirds of the chemists over forty were terminated. Strengthening the plaintiffs’ case even further was the fact that the company hired a twenty-five year old three weeks later. The corporation defended by claiming that the chemists were terminated because their areas of expertise were too specialized to be of value elsewhere in the company. The court affirmed a jury verdict for the plaintiff saying, “the chance that the plaintiffs were terminated for non-age-related reasons was almost nonexistent.”

In Dace v. ACF Industries, the plaintiff was a fifty-three year old man who was demoted from the punch-press position for which he was qualified, and replaced by a forty year old. The plaintiff showed that his employer would have saved money by demoting him, rather than a younger man, since the company would have to pay more separation pay to an employee with greater seniority. The testimony also showed that the manager responsible for carrying out the moves was familiar with the years of salaried service of employees and their overall years of service. The trial court granted a directed verdict to the defendant. However the circuit court found the evidence was sufficient to raise an issue of age discrimination. The court said, “discrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees is improper under the ADEA.”

B. Past Losers

Despite all of the above decisions favorable to the older displaced workers, many other terminated employees convinced the courts to hear their claims under

164. Id. at 258.
165. Id. at 261.
167. Id.
168. Id. at 371.
169. Id.
170. Id.
171. Id. at 372.
172. Dace v. ICF Indus., 722 F.2d 374, 377 (8th Cir. 1984).
173. Id. at 378.
174. Id.
175. Id. at 375.
176. Id. at 379.
177. Id. at 378.
a disparate impact analysis, only to return home on the losing end. In *Palmer v. United States*, a forest service worker who was terminated in a downsizing, and not replaced, failed to make out even a prima facie case.\(^{178}\) The plaintiff introduced statistical evidence that showed the age of employees filling a number of key positions declined over an eight year period.\(^{179}\) The court found his statistical sampling incomplete and incorrect, noting that statistics used to compile a prima facie case are not irrefutable.\(^{180}\) It emphasized, “to show a prima facie case of disparate treatment based solely on statistics he must show a ‘stark pattern’ of discrimination unexplainable on grounds other than age.”\(^{181}\)

In *Butler v. Portland General Electric Co.*, the plaintiffs were two field supervisors who had worked their way up through the company over decades-long careers.\(^{182}\) Their positions were eliminated in a planned company-wide reduction in force.\(^{183}\) One plaintiff was forty-four, the other fifty-two.\(^{184}\) The plaintiffs had applied for sales positions within the company to no avail.\(^{185}\) Their expert witness presented a study which showed that the average age of the sixteen employees who were given the sales positions was just under thirty-eight, while the average age of the five terminated employees was almost forty-nine.\(^{186}\) However, the court found that to reach a statistical conclusion from a sampling of twenty-one or fewer people is questionable.\(^{187}\) In addition, the court noted that the plaintiffs were applying for sales positions which required a different set of skills and training than their previous roles within the company.\(^{188}\) It explained, “it is inappropriate to compare groups without taking into consideration the effect of relevant variables, such as differences in employee skills and job duties, and that statistical models which fail to take into account the interactive effect of variables are seriously flawed.”\(^{189}\) Finding the plaintiffs’ statistical evidence unreliable, the court granted summary judgment in favor of the defendant.\(^{190}\)

In *Pottenger v. Potlach Corp.*, a sixty-year old executive was replaced with a forty-three year old after the company president had decided that Potlach had an “old management team” with an “old business model.”\(^{191}\) The plaintiff’s

\(^{178}\) Palmer v. United States, 794 F.2d 534, 536 (9th Cir. 1986).
\(^{179}\) *Id.* at 539.
\(^{180}\) *Id.*
\(^{181}\) *Id.*
\(^{183}\) *Id.*
\(^{184}\) *Id.*
\(^{185}\) *Id.*
\(^{186}\) *Id.* at 789.
\(^{187}\) *Id.* at 790.
\(^{188}\) Butler, 748 F. Supp. at 790.
\(^{189}\) *Id.*
\(^{190}\) *Id.*
\(^{191}\) Pottenger v. Potlach Corp., 329 F.3d 740, 743-46 (9th Cir. 2003).
termination was just the precursor to a much larger reduction in force. A statistical expert determined that the reduction disproportionately affected older workers, showing that employees sixty and over had a 50% chance of being displaced, where workers younger than forty had just a 10% chance. Yet, the court ruled in favor of the defendant. It found that the statistical analysis took no account of other relevant variables such as the employees’ job performance. In addition, the court determined that the plaintiff could not avail himself of the disparate impact analysis because his termination was not part of the larger reduction in force, even though the company discharged him just two months earlier. Overall, the court found that the defendant had articulated a legitimate, nondiscriminatory reason for terminating the plaintiff: a lack of confidence that the aging executive could make the hard decisions necessary to turn around his ailing division.

VII. A TOUGHER ROAD AHEAD

While prior cases may illuminate previous journeys down the path of disparate impact age discrimination litigation, it is clear that today’s plaintiffs will not be able to merely follow the footsteps of their forerunners if their desired destination is an ADEA victory. The courts have simply erected too many roadblocks and detours along the way.

One obstacle heavily utilized by past defendants is the business necessity affirmative defense. Once a plaintiff establishes his prima facie case, the employer may counter by showing that the employment practice is justified by a business necessity, and is related to successful performance of the job for which the practice is used. The business necessity test asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class. As the Leftwich court noted, “[t]he defendants’ burden of

192.  Id. at 744.
193.  See Brief of Appellant, Pottenger v. Potlach Corp., No. 02-35235 (9th Cir. June 24, 2002), 2002 WL 32103339 at *16.
194.  Pottenger, 329 F.3d at 751.
195.  Id. at 748.
196.  Id. at 749.
197.  Id. at 746.
198.  Zachary L. Karmen, Annotation, Disparate Impact Claims Under Age Discrimination Act Of 1967, 186 A.L.R. Fed.1 (2003). Compare Leftwich, 702 F.2d at 692 (holding that a cost savings plan that deterred the hiring of older, higher salaried workers was not a business necessity), with Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1471 (8th Cir. 1996) (holding that city’s physical fitness test for firefighters was a business necessity sufficient to defend an ADEA disparate impact claim);
199.  Geller, 635 F.2d at 1032.
200.  Smith, 125 S. Ct. at 1546.
demonstrating business necessity is a heavy one. They must show that their selection plan has ‘a manifest relationship to the employment in question’ . . . “.201

Yet, that burden has lightened significantly over the past fifteen years, beginning with the United States Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*.202 This disparate impact case was based on Title VII racial discrimination rather than age discrimination.203 The plaintiffs worked for a salmon canning company and alleged that the defendant’s discriminatory hiring practices blocked minorities’ access to the higher skilled and higher paying jobs.204 Though the plaintiffs presented statistics showing that non-whites made up over half of the company’s lower-wage cannery department, the Supreme Court found that the plaintiffs failed to make out a prima facie case.205 The Court said that mere statistics were not enough, and that a plaintiff must demonstrate that the application of a specific or particular employment practice created the disparate impact.206 It explained that if the plaintiff did make out a prima facie case, the question will shift to any business *justification* that petitioners offer for their use of these practices.207 The majority further articulated that there is no requirement that the employer’s practice be "essential" or "indispensable" to his business for it to pass muster.208 It also emphasized that the burden of persuasion remains with the plaintiff.209

Unhappy with this new disparate impact rubric and the restrictions it would place on future racial discrimination litigation, Congress amended Title VII to expressly modify the Court’s holding in *Wards Cove*.210 However, as noted above, Congress did not extend the same, more expansive coverage revisions to the ADEA.211 Consequently, future courts must apply the *Wards Cove* limitations to age discrimination cases.212

*Wards Cove* has already left its mark on a handful of ADEA decisions. In *Abbot v. Federal Forge, Inc.*213 the defendant closed one plant and began hiring at another, but imposed a moratorium on re-hiring its former union workers who were also demanding the reinstatement of past seniority benefits.214 Of the workers that were hired, fewer than 19 % were over forty, while almost 45% of

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201. *Leftwich*, 702 F.2d at 692 (quoting Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983)).
203. *Id.* at 647-48.
204. *Id.*
205. *Id.* at 652.
206. *Id.* at 657.
207. *Id.* at 659 (emphasis added).
209. *Id.*
211. *Smith*, 125 S. Ct. at 1545.
212. *Id.*
the laid-off workers who could not get rehired were in the protected class.\textsuperscript{214} Citing \textit{Wards Cove}, the Sixth Circuit ruled that the plaintiffs drew irrelevant statistical conclusions, and further articulated that even if a disparity could be shown, minimizing the substantial cost of labor is a legitimate business interest.\textsuperscript{215}

In \textit{Houghton v. SIPCO, Inc.}, the Eighth Circuit overruled a district court’s decision that required the defendant employer to justify its allegedly discriminatory employment practices by a business necessity.\textsuperscript{216} The court said that there was not a mere difference in semantics between a business necessity under the old regime, and a business justification allowed under the post \textit{Wards Cove} calculus.\textsuperscript{217} It noted that a justification is easier to meet than a necessity.\textsuperscript{218}

In \textit{MacPherson v. University of Montevallo}, a case similar to \textit{Smith}, two college professors in their fifties sued their employer, claiming the school’s practice of paying market rate salaries to new faculty, but not too old, was discriminatory.\textsuperscript{219} The court said even if the plaintiffs could prove a disparate impact, it was irrelevant.\textsuperscript{220} Looking to \textit{Wards Cove} for guidance, the court found that the goal of attracting highly qualified new applicants was a legitimate business reason to continue the potentially discriminatory practice.\textsuperscript{221} It did give plaintiffs some hope, indicating "a plaintiff may still be able to prevail if he can persuade the factfinder that an alternative practice exists which would meet the employer's legitimate goals without producing an adverse effect on the protected group."\textsuperscript{222} However, it also warned that the plaintiffs have to do more than merely suggest an alternative practice.\textsuperscript{223} The proffered alternative must be equally effective as the employer's chosen practice in achieving its legitimate employment goals.\textsuperscript{224}

\section*{VIII. A NUMBERS GAME}

Even if older jurisprudence shores up the ground broken by the Supreme Court in \textit{Smith}, those intimately involved with the case disagreed over the decision’s long term impact on the legal landscape.\textsuperscript{225} Thomas C. Goldstein, who represented the police employees, predicted that there will not be a jump in

\begin{itemize}
\item \textsuperscript{214} Id. at 873.
\item \textsuperscript{215} Id. at 875.
\item \textsuperscript{216} Houghton v. SIPCO, Inc., 38 F.3d 953, 959 (8th Cir. 1994).
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} MacPherson v. Univ. of Montevallo, 922 F.2d 766, 769-70 (11th Cir. 1991).
\item \textsuperscript{220} Id. at 772.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 771 (citing \textit{Wards Cove}, 490 U.S. at 659).
\item \textsuperscript{223} Id. at 773.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Susan J. McGolrick, \textit{Age Discrimination: Supreme Court 5-3 Recognizes Disparate Impact Claims Under ADEA}, DAILY LABOR REP., Mar. 31, 2005, at AA-1.
\end{itemize}
ADEA disparate impact claims because the same precise rule has already been in place in half the country for a decade. Jackson’s attorney, Glen D. Nager, echoed those sentiments, declaring, “any employment practice that is reasonable is legal.” However, Laurie McCann of the American Association of Retired Persons’ Foundation Litigation proclaimed the ruling to be “a huge shot in the arm for older workers.” Meanwhile, Ann Elizabeth Reesman, general counsel of the Equal Employment Advisory Council, said flatly that, “creating a new cause of action means more lawsuits.”

Yet, trying to predict the sum totals of future ADEA litigation by relying solely on the Supreme Court’s language in Smith is like trying to solve an algebra equation by exclusively crunching the value of “y”. In both cases the “x” factor is missing, and in the calculus that is the ADEA, “x” equals the unemployment rate.

There is no denying that the swelling size of the aging population must be accounted for in the formula. In 2004, the number of workers age forty-five and older cracked the 52 million plateau. By the year 2030, there will be more than 150 million U.S. citizens age forty-five or older. They will comprise more than 42% of the total population. That is up from just over 97 million and a little more than 34% of the total population in the year 2000.

However, time has proven that a mere swell in demographics alone does not always directly correlate to a spike in claims filed. While the number of older workers has steadily increased over the past fifteen years, the number of ADEA claims received by the EEOC has been sporadic. In 2004, almost 18,000 workers filed claims, compared to over 19,000 in 2003. Claims bottomed out in 1999 with just over 14,000. There were more filed in 1992 than in any year in the past decade, with the exception of 2002.

ADEA charges are more precisely predicted when analyzed through the prism of the labor marketplace. A weak economy usually hits older workers

226. Id.
227. Id.
228. Id.
229. Id.
232. Id.
233. Id.
234. See supra note 9.
235. Id.
236. Id.
237. Id.
238. Id. (19,573 claims were filed in 1992. 19,921 claims were filed in 2002).
hardest. As the AARP notes, “[w]hen business is bad . . . employers look to shed their most expensive workers, who disproportionately are their oldest. . . . Then, too, in a tight job market older workers are likely to find it more difficult to land comparable jobs after they’ve been laid off.” In the five most active years for complaints the average unemployment rate was 6.6%. In four of those five years, the unemployment rate was 6% or higher, and in 2002 the rate was near the 6% plateau, at 5.8%. Contrast that to the five least active years when the unemployment averaged 4.6%. In four of those five years, the unemployment rate fell below 5%. With correlations like these emerging even before the Supreme Court’s ruling in Smith, it is doubtful the limitations placed on its disparate impact holding will slow the rush to the courthouse the next time the labor market tightens.

IX. CONCLUSION

The face of America is changing right before us. It is becoming older and grayer, with the deep lines that form only with the passage of time. Yet, just as a senior citizen ages, a demographic metamorphosis does not take place overnight. It evolves slowly and gradually over years and generations. However, even at that slow, deliberate clockwork, the law can have difficulty keeping pace with the needs of a transitioning society. Consequently, a day in the sun may be just now arriving for the thousands of senior workers who feel they are discriminated against every year, intentionally or otherwise. It is undisputed that proving, and winning an age discrimination case will continue to require a yeoman’s effort. It is equally clear, however, that the Supreme Court’s decision in Smith has blazed a trail for a new wave of complainants to come forward and make their case. How many older workers over the past decade have hit dead ends with an EEOC bureaucrat who told them that one must prove discriminatory intent? How many have walked into a private counselor’s office convinced that they have been wronged, only to be told that they have no remedy? When the hands of the current economic growth cycle sweep toward their inevitable

240. Id.
242. Id.
244. Id.
245. See supra note 9.
246. See generally Riggle, 755 F. Supp. at 681 (“[i]t is difficult to prove discriminatory principles of proof . . . .”).
247. See Smith, 125 S. Ct. at 1545-46.
twilight hour, and our “greatest generations” stare into the coming darkness that is unemployment, we will surely find out.