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Covert Motivations Raise Ethical Questions in Motions to Disqualify Women Judges

By Raymond J. McKoski – November 16, 2017

Judges have suffered attacks on their impartiality solely because they are women. For example, motions seeking to disqualify judges have alleged that a female judge should not preside over sex discrimination cases or sexual assault cases because a woman judge will automatically favor a female victim. See, e.g., Johnson v. State, 430 S.E.2d 821, 822 (Ga. Ct. App. 1993). Similarly, litigants have claimed that "motherly instincts" should preclude a woman judge from hearing a case involving child abuse. See, e.g., Allee v. Morrow, 28 P.3d 651, 652 (Or. Ct. App. 2001). Reminiscent of an argument offered against allowing women to serve as jurors, a wife in a divorce action sought disqualification of a woman judge because she would likely be improperly influenced by an attractive man like the wife's husband. Rivero v. Rivero, 216 P.3d 213, 233 (Nev. 2009). Even more reprehensible, another litigant submitted an affidavit in support of a disqualification motion alleging that the judge's bias against the affiant was the result of the judge acting like a "woman scorned." Sworn Affidavit of Bradlee Dean, Dean v. NBC Universal, No. 2011 CA 006055B (D.C. Super. Ct. July 9, 2012).

The bad news is obvious: Inexcusable and contrived claims of partiality based on sex undermine the legitimacy of the judiciary and serve to resurrect long-abandoned stereotypes of women in general. The good news is that in the later part of the twentieth century and first decade of the twenty-first century, these baseless attacks on the integrity of female judges have declined from their heyday.

However, in many states an avenue of judicial disqualification exists by which lawyers and litigants may remove a woman judge from a case without disclosing that the true reason for the recusal request is the judge's sex. Eighteen states permit the automatic disqualification of a trial court judge simply upon the timely motion of a party: Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. The federal courts have not adopted an automatic disqualification process. For a description of the preemptory challenge system, see Raymond J. McKoski, "Disqualifying Judges When Their Impartiality Might Reasonably be Questioned: Moving Beyond a Failed Standard," 56 Ariz. L. Rev. 411, 468–72 (2014).

Many of these states merely require an affidavit from the moving party mechanically stating that the litigant believes that the judge is so prejudiced that a fair trial is impossible. Other
peremptory challenge states require no affidavit or other declaration that the challenged judge is biased. Thus, in most states that allow preemptory judicial disqualification, litigants and lawyers may invoke the recusal procedure for the covert purpose of removing a judge because of the judge's "undesirable" personal characteristic, such as race, sex, or gender identity.

Arizona has addressed this shortcoming in peremptory disqualification rules by requiring that anyone who files a motion for the automatic disqualification of a trial judge certify that "the request is made in good faith and not . . . for reasons of race, gender or religious affiliation." *Ariz. R. Crim. P. 10.2*; see also *Ariz. R. Civ. P. 42(f).* A more comprehensive provision might track language in the 2007 ABA Model Code of Judicial Conduct and require a movant to affirm that the recusal request is not based on the judge's "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, [or] marital status. . . ." *Model Code of Judicial Conduct R. 2.3(B) (Am. Bar Ass'n 2007).* Even if ignored or violated on occasion by persons seeking automatic recusals, a provision similar to that of Arizona announces to the public that challenging a judge's impartiality because of an immaterial personal characteristic is inimical to the American system of justice.

As the states adopting the procedure have concluded, the peremptory disqualification of judges may increase public confidence in the judiciary. But the legal system cannot countenance rendering a judge ineligible to carry out his or her sworn duty because of the judge's race, sex, gender identity, religion, or other irrelevant personal characteristic. All persons are equal before the law, and that includes judges.

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Legal Field Growth Is Rooted in Lateral Recruitment

By Timothy Lynch – November 16, 2017

Will Rogers once said, "Even if you are on the right track, you'll get run over if you just sit there." He was not talking about the legal industry, but his humorous quip is something that law firm leaders should be mindful of when they are developing their strategic plans because most industry analysts agree that the demand for legal services as a whole, which has been flat for several years, does not appear to be improving anytime soon. In fact, the Thomson Reuters Peer Monitor Index (PMI) found that the demand for legal services was negative in the latter part of 2016. This means that most firms (and lawyers) are finding it hard to grow organically.

The reasons for this flat-to-negative demand for legal services is the subject of many articles and books. Richard Susskind is one author who has written several books on the future of the legal profession—one being Tomorrow's Lawyer. Susskind writes about factors that have led and will continue to lead to obstacles when it comes to resolving the growth challenges in the legal industry. Susskind identifies technology and client-driven cost pressures as two of the primary reasons why the demand for legal services is not growing.

Before the age of the Internet and the growth of nontraditional legal service providers like LegalZoom, lawyers were the primary source of knowledge and service for all clients. Susskind and other pundits have opined that greater access to information coupled with the economic shift caused by the Great Recession has led many legal consumers (large and small) to cut back on the amount that they are spending on traditional legal services by relying more on in-house legal expertise, using online and nontraditional legal services, and demanding alternative fee structures to meet their legal needs.

Adding to the industry problem of the tightening demand for legal services is the "graying of the bar," which is a demographic reality. The American Bar Foundation (ABF) tracks some of these demographics in its Lawyer Statistical Report, last issued in 2016. In 1991, 46 percent of the bar was under the age of 40, and 20 percent of the bar was over the age of 55. In 2005, these percentages changed dramatically with only 26 percent of the bar then under the age of 40 compared with 34 percent being over 55. Although the ABF study does not show the current percentages, conventional thinking is that that disparity is even wider today due to decreasing law school admissions over the past decade and a still-troubled entry-level job market. The ABF's Lawyer Statistical Report shows that law school enrollment dropped by almost 20,000 from 2011 to 2014. Further, the ABF reports that less than 60 percent of the 2015 graduating class had full-time employment within 10 months of graduation. So the industry has fewer and fewer new lawyers while the average age of the bar continues to increase.
Adding to the issue of an aging bar is the pending retirement of the baby boomer lawyers. Many large firms offer generous retirement and pension benefits to their partners. Many of these plans are unfunded. Dewey & LeBoeuf, Heller Ehrman, and WolfBlock are just a few law firms that went under, in part, because younger rainmakers left their firms. Some of those departures were no doubt fueled by concern that more and more law firm profits were needed to meet obligations of the retiring partners. Julie Triedman of *The American Lawyer*, who has been regularly reporting on the risks to firms relating to pension liabilities, reported that more than half of the AmLaw 200 partners are baby boomers. Also, Altman & Weil has reported that 63 percent of firms it surveyed in one study reported that more 25 percent of firm revenue was tied to lawyers over the age of 60. So there is a lot of revenue connected to these aging lawyers.

Despite these economic and industry challenges, law firms remain profitable and many are reporting rising revenue. Some of the rise in revenue and profitability is due to rate increases, but most firms that are growing are doing so by lateral acquisition of legal talent. Altman & Weil’s Merger Line shows that there has been a dramatic increase in law firm mergers since 2010, a year in which 39 law firm mergers were reported. From 2013 through 2016, the average number of law firm mergers has skyrocketed to 87.5 a year.

Most law firm leaders now recognize that growing by lateral acquisition is essential for growth. For those firms that have unfunded pension liabilities, it is essential to have an increasing pool of revenue and profits so that they can not only pay their younger rainmakers but also pay the baby boomers in retirement. If the soon-to-be-retiring partners feel insecure about their retirement nest eggs, not only will younger rainmakers depart for greener pastures but the industry will see more and more baby boomers parting ways with their current firms and moving their business to firms that can pay them what they are worth today as well as in retirement.

This is good news for those lawyers who are looking to leave their current firms because the market for lateral recruiting is and will continue to be a "seller's market" for the next decade. Lateral partners need to become savvier in asking questions about their potential new firm's long-term financial soundness as well as management's plan to help integrate them into the firm culture. As more senior level lawyers look to leave their firms, they will be looking for their new firm to help their team—which likely includes younger service partners with little or no experience in client acquisition—with organic growth. Very few firms today offer meaningful training and development programs for service partners to become rainmakers.

For buying law firms to compete successfully in this increasingly competitive marketplace, they will likely need to develop a lawyer-centric mentality. Law firm leaders will have to build and
strengthen platforms and programs that will allow laterals to integrate into the new firm's culture and not just survive but thrive. That means that the law firms that are most likely to "win" in this marketplace will need to implement development programs for lateral teams to help with client acquisition. These law firms should follow Susskind's advice and continually innovate in order to satisfy not just the evolving client needs but also those of the senior rainmakers who may be losing confidence in their existing firm's ability to survive their retirement.

While law firm succession planning is a topic for another article, the firms that develop succession plans—not only to account for paying out the baby boomers but also to develop and encourage the next generation of law firm leaders to successfully transition the firm clients to a generation of lawyers that heretofore have largely been following the lead of the baby boomers when it comes to law firm management—are the ones that will be on buy-side of the mergers for years to come.

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Battling Non-Solicitation Clauses in Employment Agreements in the Social Media Age

By Michael Skapyak – November 16, 2017

The social media revolution needs little introduction. Since the proliferation of Facebook in 2006, other social media sites such as Twitter, Instagram, LinkedIn, and Snapchat have gained popularity and spread information instantly. As technology advances, people, particularly millennials, spend an increasing amount of time interacting through social media platforms. It's estimated that the average person currently spends around two hours per day on various social media sites. Evan Asano, "How Much Time Do People Spend on Social Media?", SocialMediaToday, Jan. 14, 2017. Consequent to this obsession, the use of social media has become vital for businesses. Enterprises have become millennial-conscious and employ creative uses of social media for sales and promotion and to facilitate consumer interaction.

Correlated with the increased use of social media is the increasing turnover rate for millennial employees. Dubbed the "job-hopping generation," millennials are more likely than their non-millennial colleagues to change jobs. Amy Adkins, "Millennials: The Job-Hopping Generation," Gallup News, May 12, 2016. The 2016 Gallup study suggests that 21 percent of millennials switched jobs in 2015, which is three times greater than their non-millennial counterparts. Similarly, millennials are less complacent in their current places of employment. The Gallup study found that 60 percent of millennials are open to a different job opportunity, 15 percentage points higher than their non-millennial counterparts. On the whole, these data imply that the next generation of employees are trending toward less loyalty to their employers and more investment in their own individual careers.

In conjunction, these two factors spell bad news for employers: the increasing loss of customers with relationships with these transient employees. As employees become more transient and self-promoting, companies are increasingly at risk for losing business to their transient former employees. Employers usually try to protect themselves from losses by requiring new hires to sign agreements embedded with restrictive covenants, such as non-compete and non-solicitation clauses. However, these contractual protections face a heightened scrutiny by courts and have been recently regarded as inapplicable to passive social media interaction between former employees and restricted classes.

The Enforceability of Restrictive Covenants
State law governs the enforceability of restrictive covenants. States generally deviate from the typical contract law stance when analyzing their enforceability because of the public policy implications of these covenants. Ernest E. Badway et al., Fox Rothschild, LLP, National Survey on
Restrictive Covenants (2016). However, this is not a new stance for the courts. Werlinger v. Mutual Serv. Cas. Ins. Co., 496 N.W.2d 26 (N.D. 1993) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 130, at 1012 (5th ed. 1984). Beginning in the Middle Ages and continuing through the 1600s, restrictive covenants were deemed illegal because of their restraint on trade. Id. (citing VIII W. Holdsworth, A History of English Law 56–59 (2d ed. 1937, 2d impression 1973). Then, after the 1600s, reasonableness exceptions in time and geography gained popularity. The courts realized that although restrictive covenants hindered trade, there were some circumstances where they protected legitimate business interests. These same exceptions for restrictive covenants are used today. Id. Although restrictive covenants are generally viewed unfavorably, a vast majority of states allow non-compete and non-solicitation agreements. Id.

Consequently, employer plaintiffs face a high bar when convincing courts that their restrictive covenants are enforceable. Moreover, when social media are factored into a particular case, plaintiffs need to clear an additional hurdle to convince courts that there has been a breach of their restrictive covenant with a former employee. Once it has been established that a restrictive covenant is enforceable, particularly a non-solicitation agreement, the determination of whether there has been a breach of contract hinges on how the court defines solicitation within the context of social media.

To understand how courts define solicitation in social media interactions, some explanation of the basic mechanics of the frequented social media platforms bears explanation.

Facebook. Facebook allows users to create their own webpage with whatever information they would like to share for public viewing. Users grow their network by adding "friends"; depending on privacy settings, this allows mutual access to content. Each user has a "wall" where he or she can post "status updates" and receive communications from other members. "Status updates" or communications allow others to comment or "like" the message as a way of interacting. All of these communications are accessible to other users' "newsfeeds" (live updates of users' networks). A user can then comment or like a communication from their newsfeed, just as on another user's wall.

LinkedIn. LinkedIn is dissimilar to Facebook—its primary purpose is to connect professionals. LinkedIn markets itself on its About page as the largest professional network on the Internet with over 500 million users spanning 200 countries and territories. Like Facebook users, LinkedIn users create an individual profile; however, LinkedIn profiles present similar to résumés. Profiles may contain past and current employment, professional accomplishments, professional interests, etc. Like Facebook
profiles, LinkedIn profiles allow users to post status updates and allow other users to comment. These communications are available to whomever the user allows access (by using privacy settings). LinkedIn informs a user's network when the user updates his or her employment information by sending a message (either on LinkedIn or through email) soliciting congratulations from the user's network.

**Twitter.** Twitter is similar to Facebook and LinkedIn in that, to receive updates on another user, the users must be connected ("followed"). Users can "tweet" up to 140 characters per update and post them online. Other followers then have the ability to comment on the "tweet" and "retweet" (share) it to their own feed so that the tweet is available to their followers. Members who do not follow a user can nonetheless use the search function to find tweets.

**Instagram.** Instagram is an application used to share photos and videos. Like the other social media platforms discussed above, Instagram users have followers that may view a user’s shared photos and videos. Photos and videos are shared to followers' feeds and allow followers to comment and "like" them.

**Snapchat.** Unlike the other platforms discussed, Snapchat's main purpose, is to create an outlet for private communication. Users who are connected may share photos or videos that disappear shortly after viewing. That being said, Snapchat allows users to post photos and videos to a "story" that the user's friends can view. However, a user's "story" is available for only 24 hours. After a user posts a photo or video to his or her story or sends a photo or video directly to a friend, the friend has the ability to send a message to the user commenting on the content.

**The Courts' Responses and Implications on the Non-Solicitation Agreements**

Despite the burgeoning use of these major social media platforms throughout the past 10 years, case law discussing alleged breaches of non-solicitation clauses through social media interaction is sparse. So the question remains: How do the courts define solicitation in this context? In the few cases involving this issue, courts continually draw a distinction between direct solicitation and mere passive social media use, which, according to jurisprudence, does not amount to solicitation.

For example, on a ruling for a preliminary injunction, a Massachusetts superior court judge ruled that the plaintiff could not establish success on the merits because the plaintiff could not prove the defendant solicited the plaintiff's clients. *Invidia, LLC v. DiFonzo*, 30 Mass. L. Rep. 390 (2012). In *Invidia*, the defendant's new employer posted a "public announcement" of the defendant's new employment on the defendant's Facebook wall. *Id.* at 14. On the public
announcement, a former client of the plaintiff commented that she would "see [the defendant] tomorrow!" at her new place of employment. Id. The court held that to post a notice to the defendant's Facebook wall that the defendant would be working for the new employer did not constitute solicitation of the plaintiff's customers. The court went on to say that the situation would be a different matter if the defendant had contacted the former client directly to inform the client of the defendant's new place of employment. Id.

Courts have ruled similarly when it comes to communications via LinkedIn. In *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, the defendants entered into a subcontractor agreement with plaintiffs and agreed to not solicit any clients for a period of one year. 951 N.E.2d 265, 267 (Ind. Ct. App. 2011). During the time of the restricted period of the agreement, the defendant posted a job opportunity on its LinkedIn page, available only to members who "belonged to a certain public group on LinkedIn." Id. As a result of the post, one of the plaintiff's employees informed the defendant that he was interested and inquired about the job posting. The plaintiff's employee then applied and started working for the defendant within the restricted period.

Because there was no definition of "solicit" in the agreement, the court used the *Black's Law Dictionary* definition of "solicit" to determine the ordinary meaning of the term. *Enhanced Network Sols. Grp.*, 951 N.E.2d at 268. *Black Law's Dictionary* defines solicitation as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition." Id. The court explained that based on this definition, the facts did not support the contention that the defendant solicited the employee to terminate his employment with the plaintiff and accept the job opening the defendant posted. Id.

In *Pre-Paid Legal Services v. Cahill*, the defendant signed a non-solicitation agreement that provided that the defendant could not solicit any employees to work for him after leaving the company. 924 F. Supp. 2d 1281, 1292 (E.D. Okla. 2013). After the defendant left, he repeatedly made posts to his public Facebook page "touting both the benefits of [new employer's] products and his professional satisfaction with [new employer]" while connected on Facebook with his former colleagues. The court ruled that because the facts of *Pre-Paid* were analogous to the facts in *Invidia* and *Enhanced Network Solutions Group*, the Facebook posts did not constitute solicitation. Id.

Although courts have continuously held that social media posts do not amount to direct solicitation, an argument can be made that repeated posts violate non-solicitation agreements through indirect solicitation. In an Ohio case, *Arthur J. Gallagher & Co. v. Anthony*, the plaintiffs argued that the defendant's post on Twitter and LinkedIn should be considered bulk advertising under *Harris v. University Hospitals of Cleveland*, and therefore indirect solicitation. *Arthur J.*
Gallagher & Co., No. 16-CV-00284, 2016 U.S. Dist. LEXIS 116384, at *41 (N.D. Ohio Aug. 30, 2016). In Harris, the court found indirect solicitation where the defendant placed advertisements in newspapers for over 2 months and sent out about 35,000 postcards to residents around specific office locations. Arthur J. Gallagher & Co., 2016 U.S. Dist. LEXIS 116384, at *41. The court in Arthur J. Gallagher held that the facts were dissimilar because the defendant made one post on LinkedIn and Twitter. Id. The question of whether repeated posts on social media constitute indirect solicitation remains unanswered by case law. See Anderson, at 904.

Conclusion and Recommendations
Throughout the course of history, courts have recognized that restrictive covenants can serve a lawful purpose by protecting employers' legitimate business interests. But with the advent of social media, the balance has shifted against employers as employees move between companies at an increased rate. The effect of the recent litigation trend favor consumers and employees, while disfavoring employers.

Meanwhile, the entire discussion generates from what the parties agreed to when executing their employment agreements. As a safeguard, employers can hedge their losses with succinctly drafted agreements (focusing on artfully drafted non-solicitation clauses) to protect themselves from the impacts of solicitation through social media. Specifically, employers can protect themselves by succinctly defining solicitation in the agreement.

First, an agreement could contain the following:

As used herein, the term "soliciting" shall include, without limitation, publicizing, advertising, marketing, recommending, posting, "liking," "sharing," and similar activities on social media (including but not limited to Facebook, Instagram, and Twitter). . . .


With such a proviso, a court will be able to analyze the facts within a clearly stated definition of solicitation. By way of example (and in the tradition of 20/20 hindsight), if this clause had been used in Enhanced Network, the court may have come to a different conclusion.

Second, an employer could protect itself through a "no contact" provision in their non-solicitation agreement that covers direct and indirect contact. The following is an example:

Employee will not directly or indirectly: . . . knowingly contact or solicit, either directly or indirectly, any person, firm or entity connected with [plaintiff], including its customers,
clients, vendors, or suppliers for the purpose of diverting work or business from [plaintiff].


The law regarding this area is in its infancy; in the meantime, the answer for employers' protection lies in creating neatly drafted contracts that cover solicitation in the social media context. Whether these protections are enforceable remains to be seen, but they could operate as viable deterrents to unwanted social media activity.

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EEOC Trial Tactics Lead to Massive Sanctions Award

By Sidney O. Minter – November 16, 2017

After more than 10 years of protracted litigation brought by the Equal Employment Opportunity Commission (EEOC), including a stop at the U.S. Supreme Court, an Iowa federal district court recently upheld an award of nearly $2 million in attorney fees in favor of CRST Van Expedited. The court criticized the EEOC’s practice of presenting a moving target while prosecuting a Title VII class action, holding that most of the sexual harassment claims brought on behalf of nearly 78 claimants were "frivolous, groundless, or unreasonable." What can employers learn from this decision?

How Did We Get Here?
In December 2005, a former CRST driver named Monika Starke filed an EEOC charge of discrimination alleging that she was subjected to sexual harassment. After making a reasonable cause determination and failing to successfully conciliate Starke's matter, the EEOC brought suit against CRST on behalf of Ms. Starke and a class of other unnamed employees in an Iowa federal court. In the lawsuit, the EEOC alleged that CRST subjected numerous female employees to a hostile work environment based on sex in violation of Title VII.

After two years of litigation, the court ordered the EEOC to provide additional details regarding the women included in the class. The EEOC listed 270 names, but as the case wore on and discovery unfolded, many of these women were ultimately dismissed as plaintiffs. Over 200, in fact, had their claims dismissed based on defense motions, saw their claims voluntarily dropped by the EEOC, or lost out due to discovery sanctions. As for the remaining 67 women listed as plaintiffs, the EEOC was forced to concede that it had failed to investigate, provide a cause of determination, or attempt to conciliate their individual claims. The judge was not pleased with these pretrial tactics and awarded the employer $4.7 million in attorney fees, expenses, and costs incurred in defending the EEOC's defeated claims.

The EEOC appealed this decision to the Eighth Circuit Court of Appeals, which agreed with the agency and reversed the award of attorney fees. It held that the employer was not entitled to recover this amount because it had not technically prevailed "on the merits" of the case against the 67 women. Instead, the court ruled, the portion of the case brought on behalf of these plaintiffs was dismissed on jurisdictional grounds, which did not entitle CRST to a fee award.

CRST appealed the matter to the Supreme Court, and in May 2016, the Court gave the employer a lifeline. Although it did not reinstate the fee award, it did say that employers could be considered prevailing parties and therefore entitled to fees even if they do not win "on the merits." The Supreme Court sent the case back down to the Iowa district court for a
determination on whether the EEOC’s conduct in the litigation was "frivolous, unreasonable, or groundless" such to support the fee award.

Do Not Try These Tactics at Home
On remand, the court examined the EEOC’s litigation tactics and, in a September 22, 2017, ruling, concluded they were troubling enough to justify an award of $1,860,127.36 in attorney fees and costs to CRST. The following are among the more concerning maneuvers:

Bringing claims outside the statute of limitations. First, the court noted that a portion of the EEOC’s claims were premised on alleged harassment that, even if truthful, would have occurred outside the applicable statute of limitations. The court faulted the EEOC for proceeding with allegations that could not have formed the basis of a valid sexual harassment claim.

No pattern or practice. Next, the court pointed out that the EEOC failed to properly show a pattern-or-practice violation, which is a necessary component of any successful class action lawsuit premised on allegations of employment discrimination. It was especially troubling to the court because the EEOC originally launched its attack against CRST by contending that the employer engaged in a pattern or practice of committing and permitting sexual harassment at its workplace.

Not severe and pervasive. Another troubling aspect of the case involved the fact that the EEOC conceded that certain claimants were not victims of "severe or pervasive" behavior. Unfortunately for the federal agency, this is an essential element of a Title VII sexual harassment case, and failure to demonstrate this crucial factor doomed large portions of the class action.

No reporting of harassment. Moreover, many of the claimants conceded they were aware of CRST’s established procedures for reporting sexual harassment but failed to use them. The court reviewed Title VII case law and determined that courts routinely refuse to impute knowledge of harassment to an employer where the claimant fails to properly report the alleged behavior.

No evidence that employer knew of harassment. The court further pointed out that the EEOC did not provide evidence that the employer had alternative means of knowing about the alleged harassment.

Employer promptly remedied problems. Finally, the court determined that CRST took prompt action reasonably calculated to end harassment when it learned of offensive
behavior. In fact, the court walked through an exhaustive list of occasions where CRST learned of alleged discriminatory behavior and took swift action to correct it.

**What This Means for Employers**

This decision is important for all employers for a number of reasons. First, it provides a reminder of a solid blueprint for handling sexual harassment claims before litigation unfolds:

- maintain an effective reporting procedure;
- widely disseminate the reporting procedure among your workforce and encourage your employees to use it when necessary;
- promptly address any complaints of harassment or discrimination; and
- take prompt remedial action to ensure the offending behavior is put to a stop and does not reoccur.

Second, if you are in the midst of litigation against an aggressive plaintiffs' firm or government agency, this case provides examples of the kinds of tactics that may form the basis of a sanctions award. If you see similar behavior in your case, you should immediately warn the other side to stand down. Citing this case in hopes of resolving the issue and putting a stop to the conduct could go a long way toward building your sanctions case.

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Myra Bradwell: The First Woman Admitted to the Illinois Bar

By Leonard Wills – October 31, 2017

Myra Bradwell, born in Manchester, Vermont in 1831, became the first woman admitted to the bar in Illinois. During her life, she challenged the status quo of the legal profession and advocated for women's rights and suffrage.

In 1868, she launched the newspaper, the Chicago Legal News which became the first legal publication edited by a woman. The newspaper eventually "became the official medium for the publication of all court records in Illinois, and become the most widely circulated legal newspaper in the nation." She also used the newspaper as a platform to advocate for women's rights.

Less than a year later, in 1869, Bradwell sat for and passed the Illinois bar exam. The Illinois Supreme Court, however, denied her admission to the bar because as a woman she could not enter into contracts without her husband's consent. The Illinois Supreme Court ruled that "as a married woman" Bradwell "would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." The court reasoned that when the legislature enacted the laws of granting licenses to practice law, it did not intend to extend the privilege to women.

The court based its holding on the common law doctrine known as coverture. Coverture prohibited a married woman from making legal decisions or acting without the consent of her husband. Thus, as a married woman, Bradwell could not have a separate legal existence distinct from her husband. The Illinois Supreme Court ruling, however, did not answer the question on whether prohibiting women to practice law would promote the proper administration of justice, and the general well-being of society.

Myra appealed the decision to the U.S. Supreme Court on the basis of the Fourteenth Amendment's equal protection clause. The Court, unfortunately, upheld the decision of the Illinois State Court.

By 1869, however, several states began to abandon the doctrine of coverture and enacted statutes that allowed married women to enter contracts without the consent of their husbands. In 1872, for instance, the Illinois legislature passed a law that stated, "No person shall be
precluded or debarred from any occupation, profession, or employment (except military) on account of sex."

Toward the end of her life, in 1890, the Supreme Court of Illinois finally granted Bradwell her license to practice law, and in 1892 the U.S. Supreme Court granted her license as well. Both courts granted her license *munc pro tunc* ("now for then"). Her official documents were dated 1869, the original year Bradwell applied. These court actions made her the first woman lawyer in Illinois. Unfortunately, Bradwell died from cancer in 1894, only two years after both courts granted her license to practice law.

During her life, Myra Bradwell challenged the status quo and used her platform to advocate for women's rights. In 1994, Bradwell was inducted into the National Women's Hall of Fame in Seneca Falls, New York.

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Advantages of Mediation: Tips for Litigators

By Crystal Clopton – October 2, 2017

For many legal professionals, mediations and settlement conferences are interwoven into the litigation process. These forums greatly aid with the resolution of cases and assist courts with reducing heavy dockets. For a variety of civil matters in states such as Texas, Nevada, California, and New York, settlement conferences are mandatory. It is an opportunity to resolve the litigation without the expense and uncertainty of trial.

A common misnomer is that "there are no wins in settlement;" contrarily, the opposite of that statement is true. Everyone wins in settlement. Both parties can reach a mutual agreement to resolve the issues giving rise to the litigation. To achieve a win, it is very important to have a strategy when entering the mediation and have a plan for implementing the strategy during the mediation.

Mediators are experienced legal professionals. Often you will encounter many attorneys and judges, who are experienced with your area of law/industry. They are often able to give great insight regarding the weaknesses of your case and the direction the litigation may take. This is a very invaluable opportunity that both the plaintiff and the defendant should take full advantage. However, to get a grasp of your position and your case, it is important to provide the mediator with a mediation brief. Mediation briefs are not always required but are very helpful in reasserting your position going into the mediation. This gives the mediator your understanding of the facts and the law that supports your position. The mediator will help the opposing side see the case from your perspective and vice versa. The meeting of the minds is essential to settlement. When both sides can agree to the facts of a matter, it alleviates one of the primary hurdles of getting to settlement. Once the facts are understood, the next step is placing a value on that issue. This is when it is important to know your client and your adversary.

The plaintiff's passion often fuels the litigation. When a plaintiff has been wronged, or believed he/she has been wronged, he/she will often view the litigation process as a tool in pursuing his/her justice. He/she may be unwilling to give up because he/she prefers to "roll the dice" at trial. If the case has advances through discovery, both parties may have a firm grasp and understanding of the facts giving rise to the litigation. It is often difficult to get to the root cause of the plaintiff's issue through interrogatories and admissions. Depositions are very helpful, but you must ask the right questions to get the right answer. Due to mediations and settlement conferences being confidential, the information learned cannot be used in the litigation. The parties are more relaxed and willing to openly exchange information. It is vital to know your
client, otherwise you may receive surprise information during the mediation that may completely change your position in the litigation. Often important facts and motives illuminated in mediation aid in getting to settlement. It is much easier to resolve a case in mediation if you know what the other side wants.

It is essential to have a preliminary calculation of damages, fees, and costs associated with the litigation. It is important to understand how statutory damages are calculated by both sides and which pled causes of action allow for attorney fees. This gives the mediator and opposing counsel a window into the value that is placed on the case. Keep in mind that plaintiffs aim high and defendants aim low, but the mediator will bring both to a happy medium.

As attorneys, we take pride in our work, but at times a bit too much. Be careful of your ego. Remember that your role is to be an advocate for your client and get your client the best possible resolution. It is not uncommon for attorneys to roll the dice during mediation by representing to their clients that they can get more at trial. This is a dangerous representation because that guarantee cannot ethically be made. At times, clients walk away from ideal resolutions only to receive nothing. Clients either lose at summary judgment, or at trial. For attorneys, a wise saying goes a long way at mediation: "Sometimes you win cases that you should not have won and you lose cases you should not have lost." Surprisingly, many settlement deals fail due to attorney fee disputes. Mediation is a great way to obtain a win for your client without the uncertainty of the outcome.

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