The Kentucky Bar Association
Corporate House Counsel Section presents:

2024 Issues for Corporate House Counsel CLE Seminar

This program has been approved in Kentucky for 7 CLE credits including 1 Ethics credit.

Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education for
Kentucky Bar Association Corporate House Counsel Section

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2024 Issues for Corporate House Counsel CLE Seminar

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2024 Issues for Corporate House Counsel CLE Seminar
February 20, 2024
Louisville, Kentucky

AGENDA

8:30 a.m.	**Registration & Continental Breakfast**
8:55 a.m.	**Welcome** Holli Highfield Lewis KBA Corporate House Counsel Section Chair
9:00-10:00 a.m.	**Corporate Update & Corporate Transparency Act** (1 CLE credit) Bethany G. Beal Eric Miller Feldpausch Emily B. Irwin Jordan Philley Saylor Wyatt, Tarrant & Combs, LLP
10:00-10:30 a.m.	**State Government Update** (0.5 CLE credit) Trey Grayson Frost Brown Todd, LLP
10:30-10:45 a.m.	**Break**
10:45-11:15 a.m.	**Secure 2.0 for 401(K) and 403(B) Plans: What's New and When It's Effective** (0.5 CLE credit) Carl C. Lammers Frost Brown Todd, LLP
11:15 a.m.-12:00 p.m.	**Sweating the Details (the Ones that Matter, Anyway): Contracting and Contract Management** (0.75 CLE credit) Daniel E. Hancock Fultz Maddox Dickens PLC
12:00-12:30 p.m.	**Lunch (provided) & Annual Section Meeting**
12:30-1:30 p.m.	**General Counsel Panel Discussion** (1 CLE credit) Katherine E. McKune, Park Community Credit Union Jessica L. Pendergrass, Heaven Hill Distilleries Steven R. Wilson, Patoka Capital Holli Highfield Lewis, Packsize International, Moderator

1:30-2:15 p.m.	**Trends in Labor & Employment** (0.75 CLE credit) Matthew W. Barszcz Alina Klimkina Dinsmore & Shohl, LLP
2:15-2:30 p.m.	**Break**
2:30-3:15 p.m.	**Practical Negotiation Skills** (0.75 CLE credit) Benjamin C. Fultz Fultz Maddox Dickens PLC
3:15-4:00 p.m.	**Litigation Management Primer** (0.75 CLE credit) Christopher W. Brooker Wyatt, Tarrant & Combs, LLP
4:00-5:00 p.m.	**Legal Ethics for In-House Counsel** (1 Ethics credit) Matthew W. Breetz Stites & Harbison, PLLC

PRESENTER BIOGRAPHIES

Holli Highfield Lewis
Packsize International
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Holli Lewis is general counsel with Packsize International in Louisville. Prior to joining Packsize, Ms. Lewis served as vice president & associate general counsel for Brown-Forman and as general counsel for Spalding University. She received her bachelor's degree from Rollins College and her J.D. from the University of Louisville Louis D. Brandeis School of Law. Ms. Lewis is a member of the Board of Trustees for Olmstead Parks Conservancy and currently serves as Chair of the Kentucky Bar Association Corporate House Counsel Section.

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Bethany Beal is an associate in the Wyatt, Tarrant & Combs Louisville office, where she is a member of the firm's corporate & securities team. She assists clients regarding mergers, acquisitions, and dispositions by providing operational, regulatory, and transactional support. Her practice also includes real estate, international and immigration law. Ms. Beal received her B.A., *magna cum laude*, from Georgetown College and her J.D.*, magna cum laude*, from the University of Louisville Louis D. Brandeis School of Law, where she was articles editor for the *University of Louisville Law Review*, member of the Dean's List, and recipient of the Murray Klein Scholarship. She is a graduate of Focus Louisville and a member of the Louisville Black Lawyers Association, Inc. and the Kentucky and Louisville Bar Associations.

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Eric Feldpausch is an associate in the Wyatt, Tarrant & Combs Louisville office, where he is a member of the firm's corporate & securities team. He counsels clients regarding mergers, acquisitions, and dispositions. He also practices as a member of the firm's public finance team guiding clients through a variety of tax-exempt and taxable state and municipal bond issues. Mr. Feldpausch received his B.A.*, cum laude*, from Kentucky Wesleyan College, his M.B.A. from the University of Louisville, and his J.D. from the University of Kentucky J. David Rosenberg College of Law, where he was a staff writer for the *Kentucky Journal of Equine, Agricultural & Natural Resources Law*. Prior to law school, he was a member of the U.S. Peace Corps from 2014-2016. Mr. Feldpausch is a member of the National Association of Bond Lawyers and the Kentucky and Louisville Bar Associations.

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Emily Irwin is a partner in the Wyatt, Tarrant & Combs Louisville office, where she is a member of the firm's corporate & securities service team. She concentrates her practice in the areas of mergers & acquisitions, corporate governance, and general business matters. Ms. Irwin is also a certified public accountant. She received her B.S.B.A.*, summa cum laude*, from the University of Louisville, her M.B. from The Australian National University where she was a 2011 Fulbright

Scholar, and her J.D., *summa cum laude*, from the University of Louisville Louis D. Brandeis School of Law, where she was senior notes editor for the *University of Louisville Law Review*. Ms. Irwin is a member of the American, Kentucky, and Louisville Bar Associations and the Young Professionals Association of Louisville.

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Jordan Saylor is an associate in the Wyatt, Tarrant & Combs Louisville office, where she is a member of the firm's corporate & securities team. She assists with counseling clients regarding mergers, acquisitions, and dispositions by providing operational, regulatory, and transactional support. Her practice also includes appellate matters, commercial disputes, and employment law. Ms. Saylor received her B.S. from the University of Kentucky and her J.D.*, summa cum laude*, from the University of Louisville Louis D. Brandeis School of Law, where she was a member of the *University of Louisville Law Review* and the Brandeis Honor Society. Her previous professional experience includes serving as judicial extern for the Hon. McKay Chauvin, Jefferson Circuit Court and as an assistant chemist with Hexion Specialty Chemicals. Ms. Saylor is a member of the Kentucky Bar Association.

Trey Grayson
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As the Lobbying & Public Policy practice group leader, Trey Grayson is known as a problem solver and collaborative leader who works with his clients at the local, state, and national levels to successfully navigate their government, legal, political, and regulatory challenges. Trey served two terms as Kentucky's Secretary of State from 2004-11. The youngest secretary of state in the country at the time of his election in 2003, he served as President of the National Association of Secretaries of State and the Chair of the Republican Secretaries of State Association. After leaving the Secretary of State's office, Trey served as the Director of Harvard University's Institute of Politics from 2011-2014. While at Harvard, President Obama appointed him to serve on the Bipartisan Presidential Commission on Election Administration. Before joining FBT, Trey was president and CEO of the Northern Kentucky Chamber of Commerce for three years. At the Chamber, he was a recognized leader in workforce and regional collaboration. In Kentucky and nationally, Trey is well-regarded for his objective and informed political and policy acumen. He regularly appears on Kentucky Education Television, including serving as an in-studio analyst for KET's election night coverage. He also frequently authors opinion pieces for publication in Kentucky, as well as for national outlets such as the *Economist* and *New York Times*. Trey has strong ties to the Northern Kentucky/Greater Cincinnati region and is very active in civic and charitable organizations. He currently serves as the board chair of the Kentucky Governor's Scholars Program. He also serves on the boards of Aviatra Accelerators and Leadership Kentucky, as well as several national organizations. Trey and his wife, Nancy, reside in Boone County, Kentucky, and have two daughters, Alex and Kate.

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Carl Lammers is a partner in Frost Brown Todd's Louisville office, where he advises employers on a wide variety of employee benefits and executive compensation issues, including issues arising in the merger and acquisition context. He received his B.S. and J.D. from the University of Florida and his LL.M., *with distinction*, in Taxation, Employee Benefits Certificate, from Georgetown University Law Center. Mr. Lammers is a member of Greater Louisville Inc. Business Services Committee for JCPS Talent Development Academies, Louisville Employee Benefits Council, Louisville Deferred Compensation Practitioners, and the American, Kentucky, and Louisville Bar Associations.

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Dan Hancock practices with Fultz Maddox Dickens PLC in Louisville, where he focuses his practice on helping clients navigate the minefield that is the health care industry. He assists clients with complex regulatory issues, structural and compliance concerns, HIPAA issues, government investigations, contracting, and when all else fails, litigation. He also works in trademarks, intellectual property transactions, and related litigation for clients in all types of businesses who are looking to proactively protect their interests or who have to defend them. He also specializes in litigation technology, including e-discovery and electronic resource coordination. Mr. Hancock served as an Assistant United States Attorney for the Eastern District of Kentucky, where he primarily prosecuted civil health care fraud and assisted US Attorneys' Offices nationwide with updating their e-discovery platforms, policies, and practices. He is a 2011 graduate of the University of Kentucky J. David Rosenberg College of Law, and had the honor to serve as a law clerk for United States District Court Chief Judge Jennifer B. Coffman of the Eastern and Western Districts of Kentucky until 2013. Before law school, Mr. Hancock designed and developed websites in central Kentucky. He is a member of American Health Lawyers Association, International Legal Technology Association, and the Kentucky Bar Association.

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Kate McKune is general counsel and VP enterprise risk at Park Community Credit Union in Louisville. She received her B.A. from Wake Forest University and her J.D. from the University of Virginia School of Law. Ms. McKune is a member of the Kentucky and Louisville Bar Associations.

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Jessica Pendergrass is general counsel and chief compliance officer at Heaven Hill Distilleries. She is the third woman to chair the board of the Kentucky Distillers' Association in its 140 year history and the first woman to receive the KDA's Esprit de Corps award for camaraderie and leadership in the spirits industry. Ms. Pendergrass established KDA's first-ever Diversity, Equity & Inclusion Advisory Panel and co-chairs those efforts to execute a forward-looking strategic plan

for DEI. She is also the executive sponsor and founder of Heaven Hill's environmental sustainability program. Prior to joining Heaven Hill, Ms. Pendergrass served as senior corporate counsel – government contracts and export compliance for Siemens PLM Software. She received her B.A. from the University of Louisville, J.D. from Lewis & Clark Law School, and a certificate in international and comparative law from the University of San Diego School of Law. Ms. Pendergrass serves on the Board of Trustees for Bernheim Arboretum and Research Forest and is a past president of Jefferson County Master Gardener Association and former board chair and interim director of Louisville Grows, Inc. She is a member of the Kentucky Bar Association and its Business Law, Corporate House Counsel, Environment, Labor & Employment Law, Local Government Law, and Real Property Law Sections.

Steven R. Wilson
Patoka Capital
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Steve Wilson is chief legal officer and general counsel for Patoka Capital in New Albany, Indiana. Steve is an entrepreneurial and results-oriented general counsel and business executive with extensive experience analyzing, structuring, negotiating, and closing sophisticated commercial transactions. As in-house legal counsel to the company, he provides legal advice and guidance on a wide range of issues including corporate governance, deal evaluation and structuring, operations, HR, management, leasing, construction, land-use and zoning, title, contract review, litigation, drafting and negotiation. Prior to his role with Patoka, Steve spent over a decade in private practice including five years as partner with the law firm Bingham Greenebaum Doll, LLP (now known as Dentons). Steve received his B.A., *magna cum laude*, from Eastern Kentucky University and his J.D., *cum laude*, from the University of Louisville Brandeis School of Law where he served as executive editor on the *Law Review*. He is a board member of and serves as vice president for economic development for the Oldham Chamber and is president of a local non-profit he co-founded, Business Leaders of Oldham County. He also serves as a board member of Cabbage Patch Settlement House in Louisville, Kentucky.

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Matt Barszcz is a partner in Dinsmore & Shohl's Louisville office, where he focuses his practice in the areas of labor and employment. In addition to labor and employment, Matt also has experience in the areas of premises liability and insurance coverage litigation. He received his B.A. from the University of Kentucky and his J.D.*, magna cum laude and Order of the Coif*, from the University of Kentucky J. David Rosenberg College of Law, where he was a member of the *Kentucky Law Journal*. Matt is a member of the Kentucky Bar Association and its Labor & Employment Law Section.

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Alina Klimkina is a partner in Dinsmore & Shohl's Louisville office, where she represents a variety of clients in all areas of employment law, including pre-litigation investigations, litigation, and appeals. Prior to joining the firm, she served as a law clerk to Judge Edward B. Atkins, U.S. Magistrate for the Eastern District of Kentucky. Ms. Klimkina received her B.A. from Centre College and her J.D. from the University of Kentucky J. David Rosenberg College of Law, where

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Ben Fultz is the managing partner of Fultz Maddox Dickens PLC. He has a national practice and represents a wide range of clients, including publicly traded, private equity owned, private, and family-owned companies. Ben is a CPA and an attorney. Before joining his current firm, Ben worked for a publicly traded Fortune 500 healthcare company. He served a dual role as a lawyer for the entire company and Director of Finance for a multi-billion-dollar division of the company. Ben is a 1987 graduate of Bellarmine College and a 1992 graduate of the University of Virginia School of Law.

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Chris Brooker is a partner in the Wyatt, Tarrant & Combs Louisville office, where he is a member of the firm's litigation & dispute resolution service team. He is lead counsel on a wide array of cases at the trial level, including contract, fiduciary, health care, constitutional, construction, and trademark cases. He also has extensive experience as lead counsel in both state and federal appellate courts. Mr. Brooker received his B.A., *magna cum laude*, from the University of North Carolina at Asheville and his J.D., *with honors*, from the University of North Carolina School of Law, where he was a staff member of the *North Carolina Law Review*. He served as Vice-Chair of the Kentucky Executive Branch Ethics Commission from 2018-2020 and Chair of Junior Achievement of Kentuckiana Board of Directors, 2020-2022, and remains a member of that Board. Prior to joining Wyatt, Mr. Brooker clerked for the Hon. John C. Martin of the North Carolina Court of Appeals. He is a member of the Kentucky and Louisville Bar Associations.

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Matthew W. Breetz has a sophisticated trial practice and regularly appears in courtrooms across Kentucky, Tennessee, and upon occasion, Southern Indiana. He is co-leader of Stites & Harbison's Torts & Insurance Practice Service Group. He defends numerous professionals, including lawyers, in professional malpractice suits and ethics complaints throughout the region. Matt frequently lectures on legal malpractice and ethics issues involving lawyers.

I. CORPORATE UPDATE

A. Overview of Interesting Corporate/M&A Cases

1. *Menn v. ConMed Corporation,* No. CV 2017-0137-KSJM, 2022 WL 2387802 (Del. Ch. June 30, 2022) – "Commercially best efforts" vs. "best efforts."

a. Case summary.

i. This case highlights the evidence misalignment between practitioners' general understanding of the meaning or supposed hierarchy of efforts standards and the Delaware courts' interpretation of those standards.

ii. ConMed Corporation ("ConMed") acquired EndoDynamix, Inc. ("EndoDynamix") pursuant to a stock purchase agreement ("SPA").

iii. EndoDynamix was in the process of developing a clip applier to be used in laparoscopic surgeries at the time of the sale.

iv. The parties negotiated milestone payments based on the achievement of development objectives and an earn-out after the first sale of the product.

v. Pursuant to the SPA, ConMed was obligated to "work in good faith" and use "commercially best efforts" to maximize the payments.

vi. The SPA also gave ConMed the right to "freely run the Company's business in its discretion" and stated ConMed would have "full control and direction over the Company's business following the Closing, including decisions regarding the [product]."

vii. The previous shareholders of EndoDynamix could accelerate the payments if ConMed integrated EndoDynamix with any other company or discontinued the development of the product. However, ConMed was not obligated to accelerate such payments if its decision was based on ConMed's "commercially reasonable determination" that the product "poses a risk of injury to either patients or surgeons."

viii. After several issues during trials involving the product, ConMed acquired SurgiQuest, Inc. to assist in the development of the clip.

ix. SurgiQuest recommended the clip's development be stopped due to issues with it. ConMed subsequently discontinued development of the clip and the former shareholders of EndoDynamix demanded the payments be accelerated.

x. ConMed argued it was not required to accelerate the payments due to its "commercially reasonable determination" that the product posed a risk.

xi. The Court agreed with ConMed's position and held, among other points, that "[i]t cannot be that the Agreement permits ConMed to discontinue development of the SureClip upon a determination that it posed a risk of injury to patients, but simultaneously requires ConMed to continue to use commercial best efforts to develop the product after making that determination. Such an interpretation would run afoul of the principle of contract interpretation that requires this court to interpret the various provisions of a contract harmoniously." *Id.* at *38.

xii. Delaware courts have struggled to discern between the range of efforts standards, having interpreted "best efforts" clauses to be on par with "commercially reasonable efforts" and concluding that "commercially best efforts" provides the same meaning as "best efforts." *See id.* at *33-39.

b. Have Kentucky courts looked at this issue? Kentucky courts have not ruled on the hierarchy of efforts clauses.

c. Practice tips.

i. Deal practitioners may consider including contractual definitions or yardsticks by which to measure what efforts are required by a specific party going forward (*e.g.,* "the exercise of such efforts and commitment of such resources by a company with substantially the same resources and expertise as [promising party], with due regard to the nature of efforts and cost required for the undertaking at stake").

ii. Deal practitioners may consider including carve outs in the definition to describe the kind of efforts the promising party is *not* obligated to take (*e.g.*, (i) engage in conduct that would have a materially adverse effect on the promising party; (ii) take illegal actions; (iii) take any action that would subject the promising party to liabilities; or (iv) spend a

specified dollar amount that is not expressly included in the agreement).

iii. Deal practitioners should use "efforts" terms consistently throughout a contract.

iv. Deal practitioners should use objective criteria to provide standards against which the required efforts can be measured to determine if a party has met its efforts obligations (*e.g.,* (i) timeframe for performance; (ii) triggering events; or (iii) quantity of production, etc.).

2. *Arwood v. AW Site Services, LLC,* No. CV 2019-0904-JRS, 2022 WL 705841 (Del. Ch. Mar. 9, 2022), *reargument granted,* No. CV 2019-0904-JRS, 2022 WL 973441 (Del. Ch. Mar. 31, 2022). Strong and well-reasoned precedent in Delaware in favor of Delaware's continued reputation as a pro-sandbagging state.

a. Case summary.

i. On April 5, 2018, John Arwood ("Arwood") and Broadtree Partners, LLC ("Broadtree") executed a letter of intent to enter into an asset purchase agreement ("APA") whereby Arwood would sell his waste management brokerage businesses to AW Site Services, LLC ("AWS"), an affiliate of Broadtree.

ii. Arwood informed Broadtree that he did not maintain financial statements for the company, and he was not in a position to prepare such statements.

iii. Arwood agreed to give access to the company's billing, customer information, and the general ledger to Sean Mahon ("Mahon"), a principal and operating partner of Broadtree.

iv. Mahon prepared financial statements for the businesses based on his access to the bank accounts of the companies and the general ledgers.

v. Based on the financial statements prepared by Mahon, Broadtree issued a second letter of intent to purchase the companies for $20.9 million. The parties executed a third and final letter of intent on June 14, 2018 to purchase the businesses for $15.75 million.

vi. After the parties executed the APA, the profits of the companies were lower than anticipated.

vii. Mahon discovered discrepancies in billing pre- and post-acquisition that led him to believe the pre-acquisition financials were inflated.

viii. AWS sued Arwood for breach of representations and warranties contained in the APA – specifically the representations regarding financial statements.

ix. Section 3.7 of the APA stated, "Each of the foregoing financial statements is consistent with the books and records of each Company. The records provided by the Companies to the Buyer underlying the Financial Statements are complete and accurate in all respects, and the Financial Statements present fairly in all material respects the financial condition and results of operations and cash flows of each Company."

x. AWS argued the financial statements were not accurate because they were based on overbilling by employees.

xi. The Court addressed the parties' arguments and held (1) Delaware is a pro-sandbagging state; and (2) sandbagging is not implicated in this case.

xii. The Court reasoned Delaware is a pro-sandbagging state due to its public policy respecting the right to enter into good and bad contracts.

xiii. Parties can manage the risk of sandbagging by negotiating anti-sandbagging clauses in agreements.

xiv. Buyers may recover for a breach of warranty whether or not they believed the warranty to be true when made.

xv. Further, the Court found that sandbagging is only implicated when the buyer has actual knowledge of a false representation. The Court found Broadstreet to be reckless regarding the truthfulness of the representations in the APA. However, since recklessness does not equal actual knowledge, the Court found sandbagging was not implicated in this case.

xvi. This means that a buyer can rely on an indemnification regime to compensate for inaccurate express representations and warranties, without being concerned about questions being raised about what it knew or should have known about the accuracy of those bargained for promises.

xvii. Only the inclusion of an explicit anti-sandbagging clause implicates the possibility of a sandbagging defense.

b. Have Kentucky courts looked at this issue? Kentucky courts have not ruled on this issue in the civil context. However, Kentucky courts have frowned upon the practice of sandbagging in criminal cases. *See Muhammad v. Kentucky Parole Board*, 468 S.W.3d 331, 343 (Ky. 2015); *Jones v. Commonwealth*, 237 S.W.3d 153, 159 (Ky. 2007).

c. Practice tips.

i. Deal practitioners should consider including anti-sandbagging clauses in agreements to prevent indemnity claims from buyers with knowledge of an inaccuracy or breach.

ii. Although, according to the latest ABA "Deal Points Study," in the last year 76 percent of definitive purchase agreements were silent on the point of sandbagging, while a further 19 percent included pro-sandbagging provisions in the definitive purchase agreement.

iii. Examples:

a) Benefit of the bargain/pro-sandbagging: "The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, or obligation will not be affected by investigation conducted or any Knowledge acquired at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation."

b) Anti-sandbagging: "No party shall be liable under this Article for any Losses resulting from or relating to any inaccuracy in or breach of any representation or warranty in this Agreement if the party seeking indemnification for such Losses had Knowledge of such breach before the Closing."

3. *In re Tesla Motors, Inc. Stockholder Litigation*, No. CV 12711-VCS, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022).

a. Case summary.

i. In 2016, Tesla Motors, Inc. ("Tesla") acquired SolarCity Corporation ("SolarCity") for approximately $2.6 billion.

ii. Elon Musk ("Musk") was the largest stockholder of Tesla and the chairman of the SolarCity board of directors at the time of the acquisition.

iii. The Tesla board conducted discussions both with and without Musk.

iv. Musk also met privately with SolarCity and Tesla's financial advisor regarding the acquisition.

v. Prior to the Tesla board approving the acquisition, a majority of the minority Tesla stockholders approved the acquisition.

vi. The basis of the fiduciary duty claim was that Musk breached the duty of loyalty both as a controlling stockholder and director of Tesla by "orchestrat[ing] Board approval of the Acquisition, which unfairly provides SolarCity's stockholders ... with excessive value." *In re Tesla Motors, Inc. S'holder Litig.*, No. CV 12711-VCS, 2022 WL 1237185, at *27 (Del. Ch. Apr. 27, 2022), *judgment entered sub nom*, *In re Tesla Motors, Inc.* (Del. Ch. 2022), *aff'd sub nom*, *In re Tesla Motors, Inc. Stockholder Litigation*, 298 A.3d 667 (Del. 2023).

vii. The Court summarized this complaint as "Plaintiffs seek[ing] to prove that '[Elon] Musk harmed Tesla' by causing Tesla to bail out an insolvent SolarCity." *Id.* at *27.

viii. The Court found that Musk was involved in the process more than he should have been. The Court found the Tesla board failed to follow Delaware guidance regarding arm's length bargaining.

ix. Notwithstanding the Court's finding that Musk was improperly involved in the deal process, the Court found the Tesla board incorporated other safeguards to ensure the acquisition was properly evaluated.

b. Does not establish any new or groundbreaking law, but analysis provides helpful guidance for practitioners to refer to when advising on potentially conflicted transactions. *See id.* at *27-49.

c. Practice tip.

i. Kentucky courts have longstanding precedent that "[w]henever a reasonably prudent fiduciary is aware of a conflict between his private interest and the corporate interest, he owes the duty of good faith and full disclosure of the circumstances to the corporation. If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all of its stark significance." *Aero Drapery of Kentucky, Inc. v. Engdahl*, 507 S.W.2d 166, 169 (Ky. 1974).

ii. KRS 271B.8-310 codifies the corporate conflict of interest for directors of a corporation, while KRS 275.170 codifies the approval of conflict of interest transactions in the LLC context.

iii. Practitioners should ensure any potential deals go through independent analysis if there is a conflict with a decisionmaker.

B. All three cases are out of Delaware – how closely do Kentucky courts follow Delaware corporate decisions?

"Kentucky courts have long recognized that Delaware is 'a bastion for corporate law and its development' and its cases are often 'the leading cases in this subject area,' and therefore have consistently looked to Delaware cases when there is a dearth of corporate case law on a particular issue in Kentucky." *C-Ville Fabricating, Inc. v. Tarter,* No. CV 5:18-379-KKC, 2022 WL 896104 at *8 (E.D. Ky. Mar. 25, 2022), *amended in part,* No. CV 5:18-379-KKC, 2023 WL 2172185 (E.D. Ky. Feb. 22, 2023) (*citing Bacigalupo v. Kohlhepp,* 240 S.W.3d 155, 157 (Ky. App. 2007); *Allied Ready Mix Co., Inc. ex rel. Mattingly v. Allen,* 994 S.W.2d 4, 8 (Ky. App. 1998); and *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 721 (Ky. 2012)).

II. CORPORATE TRANSPARENCY ACT SUMMARY

A. Introduction

1. What is the CTA?

a. In 2021, Congress enacted the Corporate Transparency Act, which created a beneficial ownership information reporting requirement.

b. Intent of the Act is to make it more difficult for bad actors to hide or benefit through shell companies or other opaque ownership structures and facilitate illicit activities, including money laundering, the financing of terrorism, human and drug trafficking, and securities fraud.

2. What are the requirements?

Beginning January 1, 2024 many companies in the United States will be required to report information about their beneficial owners to the Financial Crimes Enforcement Network, which is a bureau of the Department of Treasury.

B. Who Has to Report?

1. Entities deemed reporting companies have to report. A company is a reporting company if it is:

a. A corporation, LLC, or was otherwise created in the United States by filing a document with a SOS or similar office under the law of a state, U.S. territory or Indian tribe; or

b. A foreign company and was registered to do business in any state, U.S. territory or Indian tribe by such a filing.

2. Twenty-three types of entities are exempt from the beneficial ownership information reporting requirements. Major exemptions:

a. Publicly traded companies.

b. Nonprofits.

c. Certain large operating companies.

C. Who Are Beneficial Owners?

Beneficial owners: any individual who, directly or indirectly, exercises substantial control over a reporting company OR owns at least 25 percent of the ownership interests of a reporting company.

1. Substantial control – can be through:

a. Being a senior officer (Pres., CEO, CFO, COO, or GC).

b. Having authority to appoint or remove any senior officer or a majority of the board of directors.

c. Being an important decision maker (directs, determines, or has substantial influence over important decisions re: company's business, finances, or structure).

d. Having any other form of substantial control over the company (catch all).

2. Ownership interest.

a. An ownership interest is generally an arrangement that establishes ownership rights in the reporting company.

i. Shares of equity/stock.

ii. Capital or profit interest/units of an LLC.

iii. Any instrument convertible into equity/stock/profit interests.

iv. Any option or privilege of buying/selling any of the above.

v. Etc.

b. Trusts

The following individuals may hold ownership interest in a reporting company through a trust or similar arrangement:

i. Trustee or other individual with the authority to dispose of trust assets.

ii. A beneficiary who is the sole permissible recipient of trust income and principal or who has the right to demand a distribution of or withdraw substantially all of the trust assets.

iii. A grantor or settlor who has the right to revoke or otherwise withdraw trust assets.

c. Calculating ownership interest.

i. Assume all options, privileges, and convertible instruments have been exercised or converted when calculating.

ii. If the company issues stock, is a corporation, or is treated as a corporation for tax purposes, calculate each individual's ownership as a percentage of the total shares of stock issued.

If the company issues voting and non-voting shares, an individual's ownership interest is either their voting power percentage or ownership interest value percentage, whichever is greater.

a) **Voting power %** = total combined voting power of all classes of the individual's ownership interest ÷ total outstanding voting power of all classes of ownership interest entitled to vote.

b) **Ownership interest value %** = total combined value of the individual's ownership interests ÷ total outstanding value of all classes of ownership interests.

iii. If the company issues capital or profit interests, or is treated as a partnership for tax purposes, an individual's ownership interest percentage = the individual's capital and profit interest ÷ total outstanding capital and profit interests.

D. Who Are Company Applicants?

1. Only reporting companies created or registered on or after January 1, 2024 are required to report their company applicants.

2. Company applicants are individuals who either:

   a. Directly file the document that created or registered the reporting company; or

   b. Are primarily responsible for directing or controlling the filing of the creation or registration document.

E. What to Report?

1. Reporting company:

   a. Full legal name.

   b. Any trade names or DBAs.

   c. Complete current U.S. address.

   d. Jurisdiction of formation.

   e. For foreign entities, jurisdiction of first registration.

   f. IRS Tax ID Number.

2. Beneficial owners (and company applicants).

   a. Full legal name.

   b. Date of birth.

   c. Complete current address; company applicants need only report business address.

   d. Unique identifying number and issuing jurisdiction, and image from:

      i. U.S. passport.

      ii. State driver's license.

      iii. Identification issued by a state, local government, or tribe.

      iv. Foreign passport (if none of the above exist).

F. How to Report?

1. Beneficial ownership information can be reported through FinCEN's website at https://fincen.gov/boi, through an online portal or by preparing and uploading a provided PDF form.

2. A system-to-system BOI report transmission via secure Application Programming Interface (API) is also available for those who are interested in automating the BOIR filing process.

3. Reported information will not be public.

4. The system will provide the filer with a confirmation of receipt once a completed report is filed with FinCEN.

G. When to Report?

1. Reports will be accepted starting on January 1, 2024.

2. Reports must be filed by:

a. January 1, 2025, if the company was created or registered prior to January 1, 2024.

b. Within 90 days of creation or registration if the company was created or registered between January 1, 2024 and January 1, 2025.

c. Within 30 days of creation or registration if the company was created or registered after January 1, 2025.

H. FinCEN Identifiers

1. A unique identifying number issued by FinCEN to an individual or a reporting company upon request after the individual or reporting company provides certain information to FinCEN.

2. FinCEN identifiers are not required but can expedite reporting as a company may report the identifier instead of all of the information required.

I. Correcting and Updating Reported Information

1. If any information was inaccurately reported, it should be corrected within 30 days of becoming aware of the inaccuracy. There are no penalties for correcting a report within 90 days of it being filed.

2. If any information has changed since being reported, an updated report must be filed within 30 days of the change. Examples of changes that require an updated report:

a. New DBAs or a name change of the company.

b. Any change in beneficial owners, such as new CEO, sale of ownership interest, or death of beneficial owner.

c. Any change to a beneficial owner's name, address, or identifying document.

3. FinCEN identifiers must also be updated if any of the information reported has changed.

4. If a company becomes exempt after already filing a report, it can file a new report indicating its newly exempt status.

J. Things to Consider Going Forward

1. Who will file the report?

2. Who is tasked with updating the report when there are changes?

3. How to keep track of changes?

Four more years! Incumbent Governor Andy Beshear became the second member of his family to be re-elected to the Commonwealth's top office, defeating Attorney General Daniel Cameron by five points.

Despite the growth of the Republican Party in Kentucky over the past four years, Beshear actually improved upon his performance four years ago. He won 30 counties – up from 23 in 2019 – and increased his margin of victory to approximately 70,000 votes – up from 5,000 in 2023.

Fewer votes were cast in 2023 than in 2019, as turnout declined from 42 percent to 38 percent. Given the margins of victory, the state's new automatic recount law was not triggered, much to the relief of Kentucky's county clerks.

Beshear ran up large margins with 70 percent of the vote in Jefferson (103,000 vote margin) and Fayette counties (45,000 vote margin) and won several of the so-called bellwether counties – Kenton (2,700 vote margin), Campbell (2,600 margin), Warren (1,500 vote margin), and Madison (1,000 vote margin) by larger margins than in 2019.

These margins were more than enough to overcome Cameron's strength in rural Kentucky, particularly in Western and Southern Kentucky.

In addition, Beshear returned to the Democratic column several counties in Eastern Kentucky that were once reliably Democratic until recent elections, many of which were impacted by the deadly flooding in 2022. (In contrast, Cameron comfortably won Graves and Hopkins counties in Western Kentucky, both of which were heavily impacted by tornadoes in late 2021.)

Incumbency Has Its Advantages. In our election preview, we discussed the advantages of incumbency (no meaningful primary, fundraising, time to build a strong field organization, check presentations, and other "official" acts as Governor). Beshear deftly utilized those to his benefit. His campaign was well funded, well organized, and benefitted from the four years that Kentucky voters had to get to know Beshear. In particular, the goodwill that Beshear built during those daily briefings at the height of the Covid pandemic proved much more durable (and politically potent) than many Republicans hoped.

Beshear arguably needed his last name to be elected Attorney General in 2015 and Governor in 2019, but by 2023, to many Kentuckians, he was simply Andy.

To combat this, Cameron attempted to use the Trump endorsement, Biden's lack of popularity, and a focus on social issues (which he called Kentucky values) to persuade Republicans who liked Beshear to vote for Cameron anyway, as well as to convince Republicans who usually sit out off-year elections to come to the polls. That strategy didn't work, despite Cameron's strength as a campaigner.

There will be a lot of Monday morning quarterbacking about that strategy among Republicans. Some may argue that it would have been more effective to focus on those voters in the suburbs who continue to send Republicans to the State House and State Senate.

Such a strategy would have meant less Trump, a more nuanced abortion position (embracing exceptions to a blanket abortion ban for rape, incest, and health of the mother), and a greater focus on learning loss and economic issues.

Of course, it's not clear that such a strategy would have been more effective given Beshear's continued popularity and advantages of incumbency. After all, no popular incumbent Governor has lost re-election in any state this century. Perhaps there was nothing that realistically could have been done to prevail.

In hindsight, the momentum that many felt that Cameron had built in the days leading-up to the election may have simply been a tightening of the race from 7-8 points to the final 5-point victory margin, as some undecided Republican voters ultimately chose Cameron.

Beshear, and his Lieutenant Governor Jacqueline Coleman, who introduced him on the victory party stage, will be sworn into their second terms on December 12, 2023.

What Does Beshear's Victory Mean? Despite campaign rhetoric, Beshear has had minimal influence when it comes to legislation. He played a key role in the passage of the legalization of medical marijuana and sports gaming, but the General Assembly's large Republican majorities have set the public policy agenda, especially after returning from the Covid pandemic in 2021.

Those legislators were particularly frustrated that Beshear took credit for their policies, including income tax cuts and the surpluses in the most recent state budget, which for the first time was approved by the State House before the Governor had even introduced his own budget. In fact, after this campaign, Beshear's relationship with Republican legislators may actually be worse, if that's possible.

Kentucky's Constitution gives legislators the upper hand when it comes to lawmaking. Look for Republican lawmakers to continue to pass their own policies and override Beshear's vetoes. That means that proposals like large teacher salary increases are DOA.

However, one area in which Beshear will continue to have a large impact is through his appointments to boards and commissions, particularly in the education space. For example, the Kentucky Board of Education needs to hire a new Commissioner after Jason Glass's departure; its members are all Beshear appointees and will remain that way for the next four years. The same is true for university boards, the public service commission that regulates utilities, and dozens of other boards.

In addition, Beshear will appoint the leaders of Kentucky's cabinets and other state agencies that will be tasked with implementing the legislation passed by the General Assembly. As we saw with the implementation of Senate Bill 150, the executive branch doesn't always implement laws the way that the General Assembly intended, especially when language isn't clear or contains typos.

For example, this might cause the General Assembly to delay pushing for a school choice amendment until after the 2027 election, when they hope to be working with a new Republican Governor, as Beshear will be term limited.

Republicans Cruise to Down Ticket Victories. Despite Beshear's win, Republicans comfortably won the rest of the statewide races by a roughly 60-40 margin. Incumbent Secretary of State Michael Adams received the most votes – nearly 784,000 – followed closely by current State Treasurer Allison Ball, who received 781,000 votes in her race for State Auditor.

Frost Brown Todd's own Russell Coleman garnered 58 percent of the vote to defeat State Representative Pamela Stevenson in the race to become Kentucky's next attorney general. Stevenson benefitted from some last-minute money from the Democratic Attorneys General Association but Coleman, a former U.S. Attorney and FBI agent, rode the strength of his resume and strong backing from prosecutors and law enforcement to an easy victory. We will miss our colleague and wish him well.

Former House Majority Leader Jonathan Shell completed his political comeback by winning the Commissioner of Agriculture race. Shell lost re-election to the State House in a 2018 primary, after helping the Republicans win the State House for the first time in decades in 2016 as the caucus's first-ever campaign committee chair. He plans to focus on economic development issues.

Finally, in the State Treasurer's race, Garrard County Attorney Mark Metcalf defeated Michael Bowman, who was also the Democrat's nominee for Treasurer in 2019. In 2022, the General Assembly gave the Treasurer's office additional powers to develop a list of companies engaging in an "energy company boycott." Those institutions are prohibited from managing the state's pension funds. Metcalf has discussed creating a similar list for those who discriminate against gun manufacturers.

House District 93 Special Election. As expected, Democrats retained the open House District 93 seat vacated upon the death of Lamin Swann earlier in the year. Adrielle Camuel defeated Kyle Whalen, with 58 percent of the vote. Camuel, a Democratic activist who works for Fayette County Schools, will serve the remainder of Swann's term.

The General Assembly will return on Tuesday, January 2, 2024, for its 60-day budget session. The filing deadline for all State House districts and odd-numbered State Senate districts is Friday, January 5. We expect a number of incumbents to face primary challenges.

January 2nd will be a busy day in the Kentucky State Capitol.

At 10 a.m., five Constitutional officers – Secretary of State Mike Adams, Attorney General Russell Coleman, Auditor Allison Ball, Treasurer Mark Metcalf, and Commissioner of Agriculture Jonathan Shell – will take their oaths of office in the Capitol Rotunda. The five Republicans easily won their races, overcoming Andy Beshear's five-point win at the top of the ticket.

Then at noon, the 2024 Kentucky General Assembly will gavel in for the first of its 60 days.

Filing Deadline is Highlight of First Week. Dozens of bills will be introduced on Tuesday, giving us the first glimpse of legislation now that prefiled bills are a thing of the past. However, we expect little legislative activity other than bill introductions during the first week, especially with the looming filing deadline on Friday. The number of contested primaries – especially on the GOP side – could impact the session. (There are so few districts that are competitive in the general election; almost all action is in the primary.)

We already know of three primaries in the state senate. Senator Adrienne Southworth, whose 7th district shifted during redistricting to become more of a Shelby County seat, will face at least two meaningful primary opponents, both from Shelby County – Aaron Reed and Ed Gallrein. (However, it must be noted that Southworth has not filed for re-election and raised less than $1,000 last year.)

In the east, first-term state senator Johnnie Turner will face Prestonsburg Mayor Les Stapleton in the 29th district, while in Jefferson County, Gerald Neal has drawn a primary from Michael Churchill.

In the House, seven members have drawn primaries: Kim Moser (R-64, Kenton), Beverly Chester-Burton (D-44, Jefferson), Killian Timoney (R-45, Fayette), Candy Massaroni (R-50, Nelson), Steve Doan (R-69, Kenton), George Brown (D-77, Fayette), and Timmy Truett (R-89, Jackson).

To date, four senators have announced their retirements: Denise Harper Angel (D-Jefferson), John Schickel (R-Boone), Damon Thayer (R-Scott), and Whitney Westerfield (R-Christian). Thayer's retirement was a surprise; however, the Senate Majority Leader may not be done with politics, as he has already talked about his interest in the 2027 statewide races, including Governor.

On the House side, eleven members are not running for re-election:

Republicans: Danny Bentley (Greenup), Kevin Bratcher (running for Louisville Metro Council), Jonathan Dixon (Henderson), Phillip Pratt (Scott), Steve Rawlings (running for Schickel's senate seat), and Russell Webber (resigning early to become Deputy Treasurer, which will trigger a special election in this Bullitt County seat).

Democrats: Derrick Graham (Franklin), Keturah Herron (running for Harper Angel's senate seat), Ruth Ann Palumbo (her son Jamie filed to succeed her in this Lexington seat), Josie Raymond (like Bratcher, running for Louisville Metro Council), and Rachel Roberts (Campbell).

It wouldn't be a surprise if another incumbent legislator or two were to announce a retirement after spending the holidays with family. In addition, there is buzz that Republican Thomas Massie in the 4th Congressional District could draw a primary opponent.

Beshear Influence? One question that looms over this session is whether Kentucky voters returning Beshear to the Governor's Mansion by a comfortable five-point margin will influence Republican legislators to support more of Beshear's policy proposals, such as universal pre-K.

At least publicly, there hasn't been much to indicate that will be the case. While legislators haven't been as publicly critical of the Governor since election day, they certainly haven't been singing his praises and talking about an improved working relationship. In fact, many are still annoyed with how Beshear spent the past year bragging about the state's economy and passing out checks that they believed were the result of the policies that they enacted over the past few years. Meanwhile, Beshear talked about bipartisanship during his inaugural address but hasn't followed up with any deeds, such as inviting legislative leaders to the Governor's Mansion.

Budget. The state's biennial budget always dominates the 60-day legislative sessions. The state finds itself in a pretty good financial position. A surplus is expected, albeit not as large as in the last biennium.

This year, the budget conversation started early as Governor Andy Beshear unveiled his budget proposal the week before Christmas. You may recall that in 2022, House Republicans surprised everyone by introducing their budget proposal in the first week of the session, ending the tradition of the Governor making the first budget proposal. Now, the Governor's budget proposal is more like a President's budget proposal – politically relevant, but not literally the first draft and certainly not as influential as in the past.

Beshear's budget proposal tracked the themes of his re-election campaign and contained large salary increases for teachers and state employees, funding for universal pre-K, and a host of capital investments. Beshear's policy proposals are likely non-starters with the Republicans given their stated policy preferences of reducing income taxes and assisting public schools by increasing SEEK funding and letting the districts decide how to handle raises. However, the inclusion of a capital project in Beshear's budget is likely to give those projects a boost, as legislators will face pressure from their constituents to "keep" those projects in the budget. The budget bill can be found here.

School Choice and Public Safety Likely to See Plenty of Discussion. In addition to the budget, two other topics appear certain to be front and center over the next few months – public safety and school choice. Louisville area Republicans have been vocal about their interest passing legislation to address concerns about crime in their community. They held a press conference in the fall, and then followed up with a more detailed series of policy proposals during a December interim committee meeting.

Republican legislators have been frustrated with recent judicial rulings that have struck down a number of their education reforms. In late 2022, the Kentucky Supreme Court ruled that the education opportunity account program violated section 184 of the state's constitution ("No sum shall be raised or collected for education other than in common schools..."), while last month Franklin County Judge Philip Shepherd ruled that charter schools also violate the same section. While the charter school ruling is working its way through the appellate process, legislators are discussing sending an amendment to voters to authorize school choice options. Such an

amendment would require a super-majority of each chamber (23 in the Senate and 60 in the House).

The 2024 Kentucky General Assembly began last Tuesday. As is typically the case in the first week, little legislative activity took place. Hundreds of bills were introduced but still need to be reviewed and assigned to committee. In addition, ethics and sexual harassment training occupied the time normally set aside for committee meetings on Wednesday and Thursday.

The Senate did advance one piece of legislation, SB 5, which would exempt all landowners from sport hunting and fishing licensing requirements, not just those owners of farmland greater than five acres. This corrects a mistake contained in a 2023 reform of fish and wildlife laws. Look for the House to quickly pass the bill next week, and the Governor to just as quickly attach his signature.

The House also started moving HB 161, which clarifies that if a candidate were to use an incorrect precinct number on filing papers, the papers are still valid. Counties are changing some precinct numbers as they reorganize magistrate and commissioner districts. This law should discourage any lawsuits (which would fail) challenging a candidate's bona fides in the case of an incorrect precinct number. That bill should become law by week's end.

A handful of House Republicans attempted to object to leadership's proposed rules that govern the chamber. But even with the support of Democrats, the effort fizzled as the vote to lay the rules on the table (a parliamentary procedure to postpone the approval) failed overwhelmingly.

2024 Candidate Lineup is Set. The big story of the week took place on Friday – the deadline to file for Congress and the General Assembly in 2024.

In the only Congressional filing of note, suspended attorney and failed gubernatorial candidate Eric Deters filed to run in the primary against Republican Thomas Massie for the 4th Congressional District. To run in the Republican primary against Massie, Deters, who has switched parties several times through the past few decades, had to switch his party affiliation back to Republican after becoming an Independent last year after losing in the GOP primary for Governor. Massie should easily dispatch Deters, but he will be a feisty opponent.

In the State Senate, five incumbent senators drew primary opposition. Former State Representative Lynn Bechler, who lost re-election in 2022, filed at the last minute against Senate Agriculture Committee Chair Jason Howell in District 1. Senate Health Services Committee Chair Steve Meredith drew both a primary and general election opponent for his District 5.

Senator Adrienne Southworth, from Anderson County, drew two primary opponents after her 7th district was changed in redistricting to become more of a Shelby County seat. Senator Johnnie L. Turner also faces two primary opponents in District 29, after a third primary opponent Prestonsburg Mayor Les Stapleton withdrew Friday.

On the Democratic side, Gerald Neal, the longest serving state senator, drew two primary opponents in his District 33, including former Representative Attica Scott, who gave up her seat to run unsuccessfully for Congress in 2022.

Eight candidates for the state Senate did not draw opposition. Five are Republicans, and three are Democrats. When looking at districts which had only members of one-party file, we know with certainty that 25 seats will be held by Republicans, with six held by Democrats.

Perhaps the best pickup opportunity for Democrats is the 23rd District held by Senate A&R Chair Chris McDaniel. The district was won by Beshear in 2023, and newcomer Jennifer Sierra hopes to do the same. However, she will still be a decided underdog, as McDaniel easily dispatched a better-known candidate in his re-election campaign four years ago.

On the House side of the Capitol, 40 out of 100 seats are not being contested in 2024. Of those, 34 seats are held by Republicans, and six are held by Democrats. Another 15 seats will be determined in May – nine on the Republican side and six for the Democrats. This means that heading into the November election, Republicans hold 43 seats, and Democrats own 12.

In addition to the retirements that we mentioned last week, Representative Brandon Reed (R-Hodgenville) withdrew his candidacy papers in the 24th District and announced that he is planning to become Executive Director of the Kentucky Office of Agricultural Policy in Commissioner of Agriculture Jonathan Shell's administration. Jacob Justice, a first term Republican from Pike County, also did not file for re-election.

Democrats recruited a number of candidates in Republican-held House districts in Northern Kentucky and elsewhere that Beshear won in 2023. Like with the 23rd Senate District, however, the candidates are relatively unknown. It remains to be seen how much assistance Governor Beshear will provide to those candidates when it comes to fundraising and campaigning, let alone how effective that help will be.

The full list of candidate filings can be found on the Secretary of State's website.

State of the Commonwealth. On Wednesday January 3rd, Governor Beshear delivered his State of the Commonwealth, which echoed many of the themes of his inaugural and budget addresses. Beshear claimed that the state of the Commonwealth has never been better, and like a Presidential State of the Union address, recognized Kentuckians in the Gallery who were doing their parts to make it so.

Prior to the address, Senate President Robert Stivers and House Speaker David Osborne held a media briefing, during which they poured cold water on many of the policy proposals (such as universal pre-K) by noting the lack support in the GOP caucus.

Early Glimpse of Priorities. As noted in prior emails, bills numbered 1-10, as well as some other round numbers in the Senate, are reserved for top priorities.

In addition to the above mentioned SB 5, two other Senate priorities worth noting were (1) restrictions on DEI activity at universities (SB 6); and (2) an amendment moving Kentucky's state elections to the presidential year (SB 10).

The House is yet to introduce any of its low number bills but the Budget and the Safer Kentucky Act, the omnibus criminal justice package, are likely to receive such priority numbers.

Another Slow Week. This will likely be another slow legislative week with a number of committees already cancelling their meetings but expect many to start consideration of legislation.

KENTUCKY GENERAL ASSEMBLY ANALYSIS – SUPER BOWL EDITION

Trey Grayson, Frost Brown Todd

February 10, 2024

As the nation's eyes turn to the Super Bowl – the game itself, the commercials, the possibility of a Travis Kelce-Taylor Swift proposal – the 2024 Kentucky General Assembly is nearing its halfway point.

Slow Start? To date the pace has been slow, if you were to measure it by output to date.

While roughly 100 bills have passed one chamber, only one bill has been signed into law by the Governor, HB 161, which was designed to discourage any lawsuits (which would fail) challenging a candidate's bona fides in the case of an incorrect precinct number.

In addition, a few committees have only met once or twice during the first seven weeks of session, while no committee has held all of its regularly scheduled meetings.

That's not to say that legislators aren't busy. On the contrary, much of the work during the first half of the 60-day session takes place in meetings with constituents, stakeholders, lobbyists, and colleagues, as bills are developed and modified. This work allows legislators to pass scores of bills in the second half of the session.

No Real Surprises to Date. To date, the session has gone pretty much as expected. The House sent its budget to the Senate, and its priorities were what they had signaled in comments in the media in the weeks leading up to the session. The budget is structured to generate enough surplus to lead to another cut in the individual income tax rate next year. House members used excess funds in the rainy-day fund for some one-time investments and increased the SEEK formula and fully funded school transportation to assist school districts. They also generously funded pension obligations and ensured that, even after the transfer of some one-time investments, the rainy-day fund was sufficiently funded to help Kentucky through an economic slowdown.

The Senate is likely to take several weeks to finalize its budget, with the final version sent to the Governor at the end of March right before the veto period. One outstanding question is whether the final budget will include any projects for local communities. The House budget didn't contain any such investments, and it is unlikely that the Senate budget will either. Those local projects would likely be added, if at all, during the final free conference committee budget negotiations.

Like the budget, high priority legislation (as indicated by having a bill number between 1 and 10) is consistent with what Republicans indicated in the lead up to the session. Among those priorities are anti-DEI legislation aimed at universities (SB 6 and HB 9), public safety (HB 5), school choice constitutional amendment (HB 2), and maternal health (HB 10).

Leadership in both chambers seems to have a good handle on their respective memberships. After easily defeating a rules challenge in the first week, House leadership saw only a few defections on HB 5, the Safer Kentucky Act, a criminal justice bill, that is the most high-profile legislation to clear its chamber. There is still plenty of time for some of the dissidents in each chamber to create mischief. The Senate, as has been the case for the past decade or so under the leadership of President Robert Stivers, remains a very collegial body – even across party lines.

No Thaw in the Beshear-Republican General Assembly Relationship. After Governor Beshear's comfortable five-point re-election win, observers wondered whether the beginning of his second term would offer a chance for a reset of the relationship between the Democratic Governor and the Republican legislative leaders. The answer is a resounding no.

Republican legislative leaders don't often criticize Beshear; they generally act as if he is not part of the legislative process. Certainly, some Beshear administration figures, such as Budget Director and Secretary of the Governor's Cabinet John Hicks, Senior Advisor Rocky Adkins, and Transportation Cabinet Secretary Jim Gray are well regarded by some legislators and are often seen in the Capitol Annex.

But when it comes to legislation, Republicans continue to ignore the administration's priorities. Look no further than the House budget which did not include the top Beshear budget priorities, such as fully funding early childhood education and large increases in teacher and state employee salaries.

The Governor meanwhile continues to use his weekly Team Kentucky briefings and his social media accounts to talk about his priorities, but his efforts have done little to move the needle.

In addition, few Republicans are worried about their general election opponents, even those in districts won by Beshear.

As with the past three legislative sessions, we appear to be headed for dozens of veto overrides as Republicans use their overwhelming majorities to secure passage of their priorities.

Looking Ahead. We expect legislative activity to pick up over the next few weeks as it becomes clearer which bills have the necessary support to make it across the finish line. The end of February brings the bill filing deadline, but legislation can always be amended if the changes are germane.

On March 19, two special elections for vacant State House seats will take place. Both seats were held by Republicans and are expected to stay that way after the elections. In fact, Republican Peyton Griffee was the only candidate to file in the race to succeed Russell Webber in the 26th House District, while both parties are fielding candidates for the 24th District previously held by Brandon Reed. Those two new members will be sworn in for the final days of the session.

Legislators will continue meeting until late March when they will break for about two weeks to give the governor time to veto or sign any legislation. The current calendar calls for Day 58 to take place on Maundy Thursday, March 28, before returning on April 12 and 15 to override the expected gubernatorial vetoes.

Congress passed (on December 23, 2022) and President Biden signed into law (on December 29, 2022) the Consolidations Appropriations Act, 2023 to fund the federal government through the end of 2023. The Act is a $1.7 trillion omnibus spending bill that does everything from funding Ukraine to restricting the use of TikTok for government employees. Most important for everyone reading this is Division T of the spending bill, which is conveniently titled "The SECURE 2.0 Act of 2022" (SECURE 2.0) due to its building upon the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE 1.0).

Like SECURE 1.0, SECURE 2.0 aims to help employees be better prepared for retirement by making it easier for employees to participate in retirement plans and employers to sponsor such plans. SECURE 2.0 has numerous effective dates for its various provisions, some of which are effective immediately and others which are not effective until 2027. This article is focused on the most important SECURE 2.0 provisions that relate to 401(k) and 403(b) plans and is organized by effective date, with provisions immediately effective discussed first. Plan amendments to implement SECURE 2.0 must be adopted (like SECURE 1.0) by the end of the 2025 plan year (or the 2027 plan year for governmental and collectively bargained plans). In the meantime, plan sponsors should keep track of any optional provisions they adopt prior to the required amendment date for SECURE 2.0 so the amendment process is easier.

I. PROVISIONS EFFECTIVE IMMEDIATELY

A. Required Minimum Distributions (Section 107)

Section 107 increases the age when terminated participants must begin required minimum distributions (RMDs), in two steps over the next decade, and generally applies to all employer sponsored retirement plans. Previously, the age that would trigger an RMD was age 70½. SECURE 1.0 increased the age to 72. SECURE 2.0 increases the age to 73 for individuals who reach age 72 after December 31, 2022 and before January 1, 2033, and to age 75 for individuals who reach age 74 after December 31, 2032. This is a required change and applies to required distributions after December 31, 2022 for individuals who reach age 72. Even though this is a required change to the RMD rules, plans are not required to allow participants to defer their benefit until their required beginning date.

B. Recovery of Plan Overpayments (Section 301)

Participants who mistakenly receive more than they are owed under their retirement plans can face unintended hardships when employers eventually seek recoupment of these overpayments with interest, which can be substantial. Section 301 allows plan sponsors to not recoup certain mistaken overpayments to participants and still qualify as a tax-favored plan under the Code. If plan sponsors decide to recoup overpayments, they must follow new limitations and protections that safeguard the financial well-being of the participant, such as not seeking interest on the overpayment, not sending the participant to collections (except for limited circumstances), and a three-year recovery limit. This provision is effective

now, with certain retroactive relief for prior good-faith interpretations of existing guidance.

C. Reduction in Excise Tax for RMDs (Section 302)

Section 302 reduces the excise tax on participants for failure to timely take RMDs from a qualified retirement plan from 50 percent to 25 percent. The excise tax is further reduced to 10 percent for taxpayers who receive a distribution during a "correction window" of the required amount (which triggered the excise tax) and submit a return reflecting such tax. The correction window begins on the date the tax is imposed and ends on the earlier of the date a notice of deficiency is mailed, the date the tax is assessed, or the last day of the second taxable year after the end of the year when the tax was imposed.

D. EPCRS Expansion (Section 305)

Section 305 expands the Employee Plans Compliance Resolution System (EPCRS) to allow any "eligible inadvertent error" to be corrected through its self-correction procedures at any time regardless of whether the error is significant or insignificant. Errors not eligible include those where the IRS has identified the failure before self-correction begins and those that are not corrected within a "reasonable period" after discovered. A loan error that qualifies as an "eligible inadvertent failure" under this section can be self-corrected under EPCRS, and the DOL is required to treat this self-corrected failure as satisfying the DOL's Voluntary Fiduciary Correction Program requirements, although the DOL can impose reporting or other procedural requirements. Moreover, Section 305 directs the Treasury Department to update existing guidance (*e.g.,* under IRS Revenue Procedure 2021-30) or any other guidance within two years after enactment of SECURE 2.0.

E. Repayment of QBADs (Section 311)

SECURE 1.0 added a new in-service distribution opportunity for qualified birth and adoption distributions (QBADs) for eligible retirement plans with respect to which the 10 percent early distribution penalty did not apply. The amount of a QBAD could be repaid to a plan at any time and qualify as a rollover distribution. Section 311 limits the period of repayment of a qualified birth or adoption distribution to a three-year period in order for the distribution to qualify as a rollover contribution from an eligible retirement plan. This change is intended to true up the repayment period with the other tax rules so that a taxpayer who repays a QBAD can amend his or her tax return to obtain a refund. This change applies to distributions made after December 29, 2022, and also has some retroactive application.

F. Employee Certification of Hardships (Section 312)

Section 312 allows a plan administrator to rely on an employee's self-certification of both (i) a safe harbor hardship event; and (ii) that the distribution is not in excess of the amount required to satisfy the financial need and that the employee has no alternative means of satisfying the need, when approving a hardship distribution from a 401(k) or 403(b) plan.

G. Distribution Penalty Exception for Terminal Illness (Section 326)

Section 326 provides an exception to the 10 percent penalty on early distributions from a qualified retirement plan for individuals with a terminal illness. The terminal illness must be substantiated by a physician with death expected within seven years. The amount distributed may be repaid within three years, in which case the distribution will be treated as an eligible rollover distribution.

H. Federal Disaster Distributions (Section 331)

Section 331 creates another exception from the 10 percent early withdrawal tax penalty for any "qualified disaster recovery distribution," which is a distribution to an individual whose principal place of abode is in the qualified disaster area and who has sustained an economic loss due to the qualified disaster within 180 days of the first incident period of the qualified disaster, as specified by the Federal Emergency Management Agency.

An individual may not receive more than $22,000 in all taxable years with respect to any qualified disaster. A qualified disaster recovery distribution may be repaid at any time during the three-year period after the distribution was received. The amount may be included in the individual's gross income ratably over the three-year period. This exception applies to qualified disasters that occurred on or after January 26, 2021.

I. Roth Employer Contributions (Section 604)

Section 604 allows certain qualified retirement plans to permit participants to designate employer matching or nonelective contributions as Roth contributions. Furthermore, employer matching contributions for student loan payments may also be designated as Roth contributions. These contributions are includible in employee income and must be 100 percent vested when made.

II. EFFECTIVE JANUARY 1, 2024

A. Student Loan Payments as Deferrals (Section 110)

Section 110 expands the definition of employer matching contribution to include those made by employers on behalf of employees making "qualified student loan payments," so long as certain requirements are met. Employers can rely on employee certification that student loan payments were made. Significantly, plans utilizing this feature are permitted to perform ADP testing separately for employees that receive matching contributions due to qualified student loan payments, thereby allaying employer concerns that allowing these matching contributions could skew the results of nondiscrimination testing. Moreover, for safe harbor 401(k) plans, automatic enrollment safe harbor 401(k) plans, or Section 401(m) safe harbor plans, these qualified student loan payments can be treated as elective deferrals or elective contributions, as applicable.

B. Emergency Withdrawals (Section 115)

Section 115 permits emergency personal expense distributions that are not subject to the 10 percent penalty for early distribution. Participants are entitled to take one distribution per calendar year up to the lesser of $1,000 or the individual's total vested benefit under the plan. In this context, "emergency personal expense distribution" refers to a distribution for the purposes of meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses. Fortunately, plan administrators can rely on a participant's written certification that the distribution constitutes an emergency personal expense distribution. If a participant takes a penalty-free emergency personal expense distribution, the participant cannot take another one for the next three calendar years unless the participant fully repays the distribution or his or her total employee contributions equal or exceed the amount of the distribution.

C. Emergency Savings Accounts (Section 127)

Section 127 allows plans to offer emergency savings accounts (ESAs) for non-highly compensated employees. An ESA is a short-term savings account established and maintained as part of an individual account plan that accepts designated Roth contributions. An ESA can be designed to be elective or to use automatic enrollment and requires 30 to 90 days' explanatory notice prior to the first contribution. An automatic contribution ESA may have a contribution rate of up to 3 percent of the eligible participant's compensation, unless the participant affirmatively elects to make contributions at a different rate or opts out.

ESAs cannot have a minimum contribution account balance but are subject to a maximum account balance of $2,500 (adjusted for inflation) or such lesser amount determined by the plan sponsor. Monthly withdrawals by participants of all or a part of their ESA account balance must be permitted. The first four withdrawals per year must be free (*i.e.,* not be subject to fees solely on account of the withdrawal) but any additional withdrawals may be subject to reasonable fees. If a plan that includes an ESA has matching contributions, amounts contributed under the ESA must be eligible for matching contributions.

D. Increase of Involuntary Cash-Out Limit (Section 304)

Section 304 increases the involuntary cash out limit and the related limit for the automatic rollover rules from $5,000 to $7,000. Previously, plans could automatically distribute accounts with $5,000 or less without participant consent so long as any such amounts distributed in excess of $1,000 were automatically rolled over to an IRA unless the participant elected otherwise.

E. Pre-Death RMD Exception for Roth Accounts (Section 325)

Under Section 325, designated Roth accounts are excluded from the RMD rules prior to the participant's death. Previously, only Roth IRA accounts were excluded from the RMD rules prior to death. This change applies to taxable years beginning after December 31, 2023. It does not apply to distributions required prior to January 1, 2024 that are permitted to be paid on or after such date.

F. Surviving Spouse Treated as Employee for RMDs (Section 327)

Section 327 allows a designated beneficiary who is the surviving spouse of an employee to elect to be treated as if they were the employee for RMD purposes. If the surviving spouse elects to be treated as the employee, RMDs will begin no earlier than when the employee would have attained the applicable age. If the surviving spouse dies before distributions begin, the surviving spouse is treated as the employee. This election requires timely notice to the plan administrator and generally cannot be revoked once made.

G. Safe Harbor Elective Deferral Correction (Section 350)

Under current law, employers that adopt retirement plans with automatic enrollment or automatic escalation features can be subject to penalties for failing to properly implement those provisions, even if inadvertent. The IRS has previously issued guidance on correcting these failures, which is set to expire on December 31, 2023. Section 350 establishes a grace period to correct reasonable errors in administering the automatic enrollment and automatic escalation features. To correct failures under this new safe harbor, (i) the error must be corrected within 9.5 months of the end of the plan year in which the error occurred (or the date on which the employee notified the plan sponsor of the error, if earlier); (ii) the error must be resolved favorably toward the participant and without discriminating against other similarly situated participants; and (iii) notice of the error must be provided to the affected participant(s) within 45 days of the date on which corrective deferrals commence. Although this new safe harbor does not require plan sponsors to make corrective contributions for missed deferrals, the plan sponsor is still responsible for contributing any missed matching contributions, plus earnings.

H. 403(b) Hardships (Section 602)

Section 602 conforms the hardship distribution rules for Section 403(b) plans to those currently in place for Section 401(k) plans. So, 403(b) plans can distribute qualified nonelective contributions (QNECs), qualified matching contributions, as well as earnings, on any of these contributions.

I. Roth Catch-Up Contributions (Section 603)

Section 603 provides generally that all catch-up contributions to qualified retirement plans are subject to Roth tax treatment. An exception to this general rule is carved out for participants with compensation of $145,000 or less, indexed for inflation, must be made as Roth contributions. This provision is a revenue generating provision and may present implementation challenges for payroll arrangements which are not currently set up for Roth contributions.

III. EFFECTIVE JANUARY 1, 2025

A. Expansion of Automatic Enrollment (Section 101)

Section 101 requires automatic enrollment and automatic escalation in new retirement plans. For new 401(k) and 403(b) plans established after December 31, 2024, these plans must satisfy the "eligible automatic contribution arrangement" (EACA) requirements. Among these requirements are automatic enrollment at a default rate of between 3-10 percent with the ability to withdraw contributions within the first 30-90 days, as well as an automatic escalation of 1 percent per year up to a maximum of at least 10 percent (but capped at 15 percent). Certain exemptions apply, including for governmental, church, new, and small employers.

B. Increased Catch-Up Limit (Section 109)

Section 109 boosts the catch-up contributions limit for individuals aged 60 through 63 to the greater of (i) $10,000; or (ii) 150 percent of the regular catch-up amount for 2024, indexed for inflation. Implementation of this new requirement will be challenging given that recordkeepers will now need to track three separate age groups for catch-up contributions alone: participants ages 55-59, 60-63, and 64 and older.

C. Long-Term Part-Time Employees (Section 125)

SECURE 1.0 required plans to allow "long-term part-time" employees to participate for purposes of making elective deferrals, starting January 1, 2024. A long-term part-time employee was defined as an employee who worked 500 hours of service for three consecutive years. SECURE 2.0 changes the definition of long-term part-time employee so that an employee is only required to work 500 hours of service for two consecutive years. Section 125 clarifies that only service during and after 2023 is counted for eligibility and vesting of any employer contributions. Furthermore, Section 125 clarifies that pre-2021 service is disregarded for vesting purposes for purposes of the SECURE 1.0 rules. Section 125 also extends this rule to 403(b) plans.

D. Consolidation of Defined Contribution Plan Notices (Section 341)

Within two years, the Secretaries of Treasury and Labor are directed to amend regulations to permit consolidation of required notices for defined contribution plans. The regulations will allow, but not require, consolidation of two or more notices which are required under ERISA and the Internal Revenue Code into a single notice as long as the combined notice: (1) includes the required content; (2) clearly identifies the issues addressed therein; (3) is furnished at the time and with the frequency required for each such notices; and (4) is presented in a manner that is reasonably calculated to be understood by the average plan participant and that does not obscure or fail to highlight the primary information required for each notice.

IV. EFFECTIVE JANUARY 1, 2026

A. Long-Term Care Contracts (Section 334)

Under Section 334, qualified retirement plans can allow qualified long-term care distributions for participants to purchase long-term care insurance with such distributions exempt from the 10 percent tax on early withdrawals. The distribution must be for a qualified long-term care insurance contract covering long-term care services. The distribution for the taxable year cannot exceed the lesser of (i) the amount paid by an employee for long-term care insurance for the employee, spouse, or other qualifying family members; (ii) an amount equal to 10 percent of the participant's vested accrued benefit; or (iii) $2,500. The participant must file a long-term care premium statement with the plan, which includes a statement provided by the issuer of the long-term care coverage.

B. Requirement to Provide Paper Statements (Section 338)

Under the new rules for defined contribution plans, a paper benefit statement must be provided to participants at least once annually unless a participant elects otherwise. Participants can opt out of the paper statements under procedures that follow the 2002 safe harbor for opting into electronic delivery.

V. MISCELLANEOUS

A. Performance Benchmarks for Asset Allocation Funds (Section 318)

The participant disclosure regulations of the Department of Labor require that each designated investment alternative's historical performance be compared to an appropriate broad-based securities market index. Section 318 of the Secure 2.0 Act directs the Secretary of Labor to update those regulations within two years so that an investment that uses a mix of asset classes, like a target date fund, ***may*** be benchmarked against a blend of broad-based securities market indices. Although the plan administrator is not required to use a blend of broad-based securities for its comparison, three rules must be met if it chooses to do so: (1) the index blend must reasonably match the fund's asset allocation over time; (2) the index blend is reset at least once a year; and (3) the underlying indices must be appropriate for the investment's component asset classes and otherwise meet the rule's conditions for index benchmarks.

B. Reporting and Disclosure Report to Congress (Section 319)

Section 319 directs the Treasury Department, Department of Labor, and Pension Benefit Guaranty Corporation to review and make recommendations on the reporting and disclosure requirements for retirement plans. The recommendations made to Congress should consolidate, simplify, standardize, and improve these requirements no later than three years after the date of enactment.

C. Treasury Guidance on Rollovers (Section 324)

In an effort to simplify and standardize the rollover process to and from retirement plans and IRAs, section 324 tasks the Treasury Secretary with creating sample

forms for rollovers of eligible rollover distributions which may be used by both the incoming and outgoing retirement plan or IRA. These sample forms must be completed no later than January 1, 2025.

D. Report to Congress on Section 402(f) Notices (Section 336)

Section 402(f) notices are given by employer retirement plans when a distribution to a participant is eligible for rollover. The notice also describes distribution options and tax consequences. The Secure 2.0 Act directs the Government Accountability Office with analyzing the effectiveness of these notices and making recommendations that would allow for a better understanding by recipients of different distribution options and corresponding tax consequences, including spousal rights. The Government Accountability Office must issue this report within 18 months after the date of enactment.

E. Fee Disclosure Improvements (Section 340)

The Secretary of Labor is tasked with reviewing regulations relating to fiduciary requirements for disclosure in participant-directed individual account plans and exploring how to improve the design of the disclosures described so that participants' understanding of fees and expenses related to defined contribution plans may be enhanced. A report must be given to Congress within three years on the findings, including recommendations for legislative changes.

Provisions Effective Immediately

- **Required Minimum Distributions**
  - SECURE 1.0 increased age to 72
  - SECURE 2.0 increases age to 73 for those turning 72 in 2023 and later
    - Jumps to 75 for those turning 74 in 2033 and later
- **Reduction in RMD Excise Tax**
  - Reduces excise tax for missed RMDs from 50% to 25%
  - Further reduced to 10% if corrected during "correction window"
    - Between date tax is imposed and ends on earlier of date a notice of deficiency is mailed, date tax is assessed, or last day of second taxable year after end of year when tax imposed

Provisions Effective Immediately

- **EPCRS Expansion**
  - Allows any "eligible inadvertent error" to be corrected via self-correction at any time, regardless of whether "significant" or "insignificant"
  - Not eligible: those where IRS ID'd failure before correction begins and those not corrected within "reasonable period" after discovered
  - Loan errors that can be self corrected treated as satisfying DOL's VFCP
  - EPCRS program to be updated
  - IRS Notice 2023-43 – initial clarifications
- **Recovery of Overpayments**
  - Allows plan sponsors to not recoup certain mistaken overpayments w/o affecting plan's qualified status
  - Must follow new limitations and protections that safeguard financial well-being of P

Provisions Effective Immediately

- **Employee Certification of Hardships**
  - Plan administrator can now rely on EE's self-certification (i) of safe harbor hardship event, and (ii) that distribution is not in excess of amount required to satisfy the financial need and that EE has no alternative means of satisfying need
- **Roth Employer Contributions**
  - Permits Ps to designate ER-matching or nonelective contributions as Roth, including ER-match on student loans

Provisions Effective Immediately

- **Distributions for Terminal Illness/Federal Disaster**
  - Provides for exemption from 10% early w/d penalty for (i) individuals with a terminal illness, and (ii) any "qualified disaster recovery distribution"
  - Terminal illness: must be substantiated by a physician with death expected w/in 7 years; amount may be repaid within 3 years
  - Disaster: distribution must be to individual whose principal place of abode is in qualified disaster area and who has sustained economic loss within 180 days of first incidence of disaster; maximum amount $22,000; can be repaid within 3 years and can be taxed ratably over 3-year period
- **Elimination of Notices to Non-Ps**
  - ERISA and tax code amended to eliminate required notices to employees not enrolled in plan
  - Non-Ps only required to get one annual notice of eligibility to participate

Provisions Effective in 2024

- **Student Loan Payments as Deferrals**
  - Expands def of ER-matching contribution to include those made by ERs on behalf of EEs making “qualified student loan payments”
  - ERs can rely on EE self-certification of student loan payments made
  - ERs permitted to ADP test separately
  - Student loan payments can be treated as deferrals under safe harbor plans
- **Domestic Abuse Distributions**
  - Distributions permitted (and penalty free) in the case of domestic abuse, up to lesser of $10,000 (indexed) or 50% of vested balance
  - May be repaid to the plan

Provisions Effective in 2024

- **Emergency Withdrawals**
  - Permits emergency personal expense distributions exempt from 10% early w/d penalty
  - One distribution per calendar year up to the lesser of $1,000 or total vested balance
  - For meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses (self-certified)
  - Cannot take for 3 years unless repaid or deferrals have exceeded amount
- **Emergency Savings Accounts**
  - For NHCEs only, plan can offer short-term savings account that accepts Roth contributions, up to $2,500 (adjusted)
  - Monthly w/d must be permitted, first 4 at no cost
  - Treated as deferrals for matching contribution purposes
  - Can be elective or an automatic contribution of up to 3%

Provisions Effective in 2024

- **Increase of Involuntary Cash-Out Limit**
  - From $5,000 to $7,000
- **Safe Harbor Elective Deferral Correction**
  - Makes permanent self-correction of automatic enrollment errors
  - No missed deferral corrective contribution if corrected w/in 9.5 months of end of PY in which error occurs (or date EE notifies ER of error, if earlier)
  - Notice given to Ps w/in 45 days of corrective deferrals commencing
- **Roth Catch-Up Contributions**
  - Catch-up contributions must be Roth for those making (in preceding year) more than $145,000 (indexed)

Provisions Effective in 2025

- **Increased Catch-Up Limit**
  - Catch-up limit for Ps 60-63 is greater of (i) $10,000, or (ii) 150% of regular catch-up amount (indexed)
  - Now 3 groups: 50-59; 60-63; 64+
- **Expansion of Automatic Enrollment**
  - NEW PLANS must have auto enroll and escalation @ 3-10%, increasing 1% per year up to at least 10% (capped at 15%)
  - Applies to new plans (those started any time after 12/29/22)
  - Exempt: governmental/church plans, plans of ERs w/ <10 EEs; new ERs that have been in existence for < 3 years

Provisions Effective in 2025

- **Long-Term Part-Time Employees**
  - SECURE 1.0: 500 hours of service in 3 consecutive years, starting 1/1/24
  - SECURE 2.0: 500 hours of service in 2 consecutive years, staring 1/1/25
  - Only service during and after 2023 is counted for eligibility and vesting of any ER contributions and pre-2021 service disregarded for SECURE 1.0 vesting rules
- **Consolidation of Notices**
  - Within 2 years, Secretaries of Treasury and Labor directed to amend regs to permit consolidation of notices.
  - IRS/DOL notices can be combined into 1, if combined notice (i) includes required content, (ii) clearly identifies issues addressed therein, (iii) is furnished at the time and frequency required, and (iv) is presented in a manner reasonably calculated to be understood by average plan P and that does not obscure or fail to highlight primary info required for each

Provisions Effective in 2025

- **Lost & Found**
  - DOL directed to create an online searchable lost and found database to collect information on benefits owed to missing, lost, or nonresponsive Ps

Provisions Effective in 2026

- **Long-Term Care Contracts**
  - Qualified long-term care distributions allowed to purchase long-term care insurance, exempt from 10% early distribution penalty
  - Distribution cannot exceed lesser of (i) amount paid be EE for LTC insurance for EE, spouse, or other qualifying family members, (ii) 10% of vested benefit, or (iii) $2,500
- **Annual Paper Notices**
  - Paper benefit statements must be provided annually unless participant opts-out

thank you

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I. SUPPLIER CODES OF CONDUCT

A. Purpose

1. Sets expectations for suppliers and objective measures for compliance.

2. Protects the company's reputation through a public statement of what the company considers unacceptable conduct.

B. Concerns

1. While a business's code of conduct has evidentiary value in determining the degree of care a reasonable person should exercise while performing a duty, it does not ***create*** any duty owed by the company to any third party independent of a contract. *Atmos Energy Corp. v. Honeycutt*, 2011-CA-000601-MR, 2013 WL 285397, at *10 (Ky. App. Jan. 25, 2013).

2. A code of conduct does not, of itself, create a binding obligation on the company's suppliers. If the company desires to enforce its code of conduct, it must add specific binding language to vendor contracts.

C. Supplier Code of Conduct Examples

1. Google.

   https://about.google/supplier-code-of-conduct/

2. Hershey.

   https://www.thehersheycompany.com/content/dam/corporate-us/documents/partners-and-suppliers/supplier-code-of-conduct.pdf

3. Microsoft.

   https://www.microsoft.com/en-us/procurement/supplier-conduct.aspx

4. Texas Roadhouse.

   https://s22.q4cdn.com/200744459/files/doc_downloads/2022/03/Texas-Roadhouse-Vendor-Partner-Expectations-(FINAL).pdf

5. Ventas.

   https://ventasreit.com/sites/default/files/company_policies/Ventas_Vendor_Code_of_Conduct_vA.pdf

II. ALTERNATIVE DISPUTE RESOLUTION CLAUSES

A. KRS 336.700(3)(a)

1. Employers may condition future or continued employment on an employee's agreement to arbitrate or mediate claims.

2. 2019 statute applies retroactively.

B. KRS 417.200

1. An agreement to arbitrate which fails to include a specific reference to the arbitration occurring within Kentucky is unenforceable under the Kentucky Arbitration Act in Kentucky courts. *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 455 (Ky. 2009).

2. However, when an agreement to arbitration explicitly requires that disputes are governed by the Federal Arbitration Act, the Kentucky Arbitration Act and *Ally Cat* have no applicability, so no explicit Kentucky venue statement is required for enforceability. *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (Ky. 2013).

C. Key Considerations

1. Cost, speed, and efficiency.

2. Prevention of class or collective action.

3. Discovery.

4. Arbitrator selection.

5. Appellate rights.

6. Confidentiality.

III. TECHNOLOGY – DATA SECURITY

A. Informal Framework: Analyzing Data Security Requirements in Vendor Contracts

1. Tier 1: Contracts under which either party would be providing the other with personal information ("PI") or protected health information ("PHI") of individuals.

a. PI (generally): personal information that includes "sensitive" information of an individual (*e.g.,* SSN, financial account information + access code).

b. PHI: any information from a patient's medical record or information that links an individual to a medical record.

2. Tier 2: Contracts under which either party would be providing proprietary or particularly sensitive information to the other.

3. Tier 3: Contracts under which information exchanged is not particularly sensitive or already available to the public.

B. Federal Data Privacy Laws

1. Health Insurance Portability and Accountability Act (HIPAA; 45 CFR Parts 160, 162, 164): applies to health care providers, health plans, health care clearinghouses.

2. Gramm-Leach-Bliley Act (primarily 15 U.S.C. §§6801-6809, 6821-6827): applies to financial institutions (not just banks).

3. Family Educational Rights and Privacy Act (FERPA; 20 U.S.C. §1232g; 34 CFR Part 99): applies to schools receiving government funding.

C. Comprehensive State Data Privacy Laws

1. California Consumer Privacy Act (Cal. Civ. Code §§1798.100-1798.199.100) as modified by the California Privacy Rights Act: establishes individual data privacy rights and business requirements for collecting and selling Californians' personal information.

2. Colorado Privacy Act (Colo. Rev. Stat. §§6-1-1301-6-1-1313): establishes specific data privacy rights (opt-out; access; correction; deletion; data portability) for Colorado consumers.

3. Connecticut Data Privacy Act (Conn. Gen. Stat. §§42-515-42-525): establishes data privacy rights for Connecticut consumers; stronger data protections for children than similar statutes in other states.

4. Delaware Personal Data Privacy Act (eff. 1/1/2025; 6 Del. C. §12D): establishes data privacy rights for Delaware consumers.

5. Indiana Consumer Data Protection Act (eff. 1/1/2026; IC 24-15): applies only to businesses that process personal data of at least 100,000 Indiana residents or that process information of at least 25,000 Indiana residents but derive at least 50 percent of revenue from selling data.

6. Iowa Consumer Data Protection Act (eff. 1/1/2025; I.C.A. §715D): weaker individual protections than other states.

7. Montana Consumer Data Privacy Act (eff. 10/1/2024; MCA 30-14-28): limits collection of personal data to only "adequate, relevant, and reasonably necessary" information; residents have rights to opt-out or decline sale of personal data.

8. Oregon Consumer Privacy Act (eff. 7/1/2024: SB 619 (not yet codified)): includes provisions on biometric data, sensitive and personal data, and

children's data protections, and it doesn't have the same exemptions found in other state privacy laws.

9. Tennessee Information Protection Act (eff. 7/1/2025; T.C.A. §47-18-33): enables consumers to confirm that a business has collected their personal data, obtain a copy of the information, and request that inaccuracies be corrected.

10. Texas Data Privacy and Security Act (eff. 7/1/2024; TX BUS & COM §541.001 *et seq.*): applies to large companies that do business in Texas or sell, collect, or process personal data.

11. Utah Consumer Privacy Act (Utah Code §13-61).

12. Virginia Consumer Data Protection Act (Va. Code §59.1-575-59.1.584): gives Virginians the right to access their data and request that their personal information be deleted by businesses; also requires companies to conduct data protection assessments to process personal data for targeted advertising and sales purposes.

13. ***Additionally, every state has laws requiring data breach notification in certain instances.***

D. Proposed Kentucky Legislation – Senate Bill 15 (currently in committee)

Summary: Create new sections of KRS Chapter 367 to define terms; set the parameters for applicability of this Act; define various consumer rights related to data collection; require a data controller to comply with a consumer request to exercise those rights; require controllers to establish a process for consumers to appeal a controller's refusal to act on a consumer's request to exercise a right; set forth requirements for persons or entities that control or process personal data; require persons who control data to conduct data protection impact assessments; establish that the Attorney General has exclusive authority to enforce this Act and shall provide a controller or processor 30 days' written notice identifying the specific provisions that were violated; provide that if a controller or processor does not cure a violation within 30 days, the Attorney General may initiate an action and seek damages for up to $7,500 for each violation; create a consumer privacy fund in the State Treasury to be administered by the Office of the Attorney General and direct that all civil penalties collected with regard to enforcement actions be deposited in the fund; amend KRS 367.240 to conform; provide that the Act may be cited as the Kentucky Consumer Data Protection Act; EFFECTIVE January 1, 2026.

E. Considerations for Effective Data Security Language

1. What level of concern does the nature of the contract require?

   a. Types of data exchanged/stored – more sensitive data requires more robust language.

   b. Value of contract.

2. Beware of acronyms: ISO/IEC 27001; COBIT; NIST – these mean specific standards to which you should not commit if you don't know the company's capabilities to comply.

3. If the contract lacks breach notification language (which many do), add it. All the safeguards in the world do not matter if the contract does not require timely notification of a security breach.

4. Indemnification – strict liability for breach may be appropriate in some circumstances, but is not something to which another party is often likely to agree. Is the appropriate standard negligence (*e.g.,* failure to follow a security policy), gross negligence (*e.g.,* failure to implement a security policy), or just for a breach of the specific agreed terms? If insurance is required, is an appropriate cybersecurity policy also required?

F. Resources

The Sedona Conference Commentary on a Reasonable Security Test (https://thesedonaconference.org/sites/default/files/publications/5_Reasonable_Security_Test_0.pdf)

IV. CONTRACT MANAGEMENT

A. Goals of a Contract Management System

1. Contracts are structured properly and appropriately reviewed.

2. The organization is aware of its contractual obligations.

3. The objectives of the contract are realized.

4. Contract weaknesses are recognized and corrected.

B. General Implementation Steps

1. Identify key stakeholders.

a. Legal.

b. Business sponsors & implementation team (*i.e.,* who wants it, and who is going to have to deal with it).

c. Senior leadership.

2. Initiation: Implement a contract review and preparation policy.

3. Drafting and negotiation:

a. Build a template and snippet library.

b. Prepare contract playbooks.

4. Approval and execution:

    a. Design a contract workflow.

    b. Prepare an authority matrix.

5. Retention:

    a. Create a contract repository.

    b. Maintain a contract register.

6. Administration: Designate an owner and track important dates/events of performance.

7. Amendment: Implement a change control process.

8. Renewal/termination:

    a. Set alerts.

    b. Prepare sample evaluation/considerations for renewal.

I. SPEAKERS

A. Kate McKune, General Counsel and VP Enterprise Risk, Park Community Credit Union

B. Jessica Pendergrass, General Counsel and Chief Compliance Officer, Heaven Hill Distilleries

C. Steven Wilson, Chief Legal Officer and General Counsel, Patoka Capital

II. TOPICS OF DISCUSSION

A. Role of General Counsel – Transitioning into the Role and Lessons Learned

1. Discuss personal experiences of the panel becomming in-house counsel.

2. Moving into a newly created position (being the first in-house attorney).

3. Transitioning from private practice to in-house; what's the same, what's different?

4. Creating an atmosphere of comfort, trust, and partnership.

5. Balancing compliance role with partnership.

B. Knowing What You Don't Know

1. Value of learning the business.

2. Understanding the organizations' leadership dynamics.

C. Determining the Most Pressing Need

1. CEO direction.

2. Organic observation.

D. Entering the Decision-making Process

1. Assuring all the i's are dotted and the t's are crossed.

2. The importance of consistency across agreements.

3. Can you have too much coming across your desk?

4. Developing decision-trees for items requiring approval.

E. Once We Bring a Lawyer In-house, All (or Nearly All) of Our Outside Counsel Fees Will Go Away, Right?

1. Re-setting expectations.

2. Advocating for when outside counsel is necessary.

F. I'm Adding Value; and not only that, I Need Help!

1. Keeping track of wins/accomplishments.

2. The importance of not being a bottleneck.

3. When adding to the department, do you add a lawyer or a paralegal?

G. AI – How Are You Using It in Your Job, and Do You Trust Its Use by Outside Counsel?

1. Can it be a time-saver for you as a GC?

2. To what extent do you expect your outside counsel to use/rely on it?

H. Data Privacy & Security – Protecting Your Organization

1. What are the biggest threats?

2. Where do they come from, and how are they trying to get in?

3. What are you doing about it?

4. Are your vendors just as vigilant?

III. RESOURCES

A. Leslie King O'Neal, Susan Fisher Stevens, and Christopher D. Meyer, "How to Excel as In-House Counsel, Looking from the Inside Out," presented at the 2015 Annual Meeting of the American Bar Association Forum on Construction Law, April 15-18, 2015, *available online at* https://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/meetings/2015-annual/an15-wd-paper.pdf.

B. Sian Simpson, "Being an Agile General Counsel in Times of Constant Change," InView, *available online at* https://inview.lawvu.com/blog/being-an-agile-general-counsel-in-times-of-constant-change.

C. Sterling Miller, "Ten Things: ChatGPT and Generative AI (What In-House Counsel Need to Know)," Ten Things You Need to Know as In-House Counsel®, May 31, 2023, *available online at* https://tenthings.blog/2023/05/31/ten-things-chatgpt-and-generative-ai-what-in-house-counsel-need-to-know/.

D. David M. Love III, Mark Roelling, and Tom Spelt, “So You Want to Be a General Counsel? How to Maximize Your Chances,” Spencer Stuart, May 2023, *available online at* https://www.spencerstuart.com/research-and-insight/so-you-want-to-be-a-general-counsel-how-to-maximize-your-chances.

I. 2023: YEAR IN REVIEW

A. *McLaren Macomb*[1] Decision

B. FTC Ban on Non-competes

C. Pregnant Workers Fairness Act

D. Pay Transparency Laws

E. Paid and Expanded Leave Protections

II. RETURN TO WORK

A. Recent studies suggest 90 percent of employers are asking workforce to return to work, and only 2 percent are allowing employees to remain fully remote.

B. Hybrid arrangements will continue, with increased emphasis on RTO.

C. Possible rise in ADA and other accommodation claims.

III. ARTIFICIAL INTELLIGENCE

A. Biden's Framework for an "AI Bill of Rights"

1. Safe and effective.

2. Safeguards to prevent, test for, and identify unintended discrimination in the system's algorithms.

3. Confidentiality of personal data.

4. Disclosure.

B. Some states are considering laws related to use of AI in hiring decisions.

IV. NON-COMPETE AGREEMENTS

A. FTC's proposed rule awaiting the final vote. Could cause a comprehensive nationwide ban on non-compete agreements, with minor exceptions.

B. The final vote is scheduled to occur in April 2024, at the earliest. Expect additional activity challenging the decision.

[1] *McLaren Macomb*, 372 NLRB 58 (February 21, 2023).

V. JOINT EMPLOYER RULE

A. Two or more entities may be considered joint employers of a group of employees if each entity:

1. Has an employment relationship with the employees; and

2. Has the authority to control one or more of the employees' essential terms and conditions of employment.

B. NLRB's definition of "essential terms and conditions of employment."

C. Can be based on indirect control, which is a huge departure from prior rule.

D. The new standard will take effect on February 26, 2024.

VI. OSHA RECORDKEEPING

A. New rule effective January 1, 2024.

B. Amends recordkeeping and reporting requirements for certain employers for electronic submission of illness and injury information to OSHA.

VII. EXEMPT SALARY THRESHOLD

A. Proposal to increase the salary threshold for overtime exemptions to $1,059 per week (or $55,068 annually) from $684 per week.

B. If an employee in an executive, administrative or professional position makes less than $1,059 per week and the rule takes effect, as expected, the employee can earn overtime.

C. The DOL has also proposed to increase the salary threshold for highly compensated employees to $143,988 from $107,432 annually and automatically update these salary changes every three years using contemporaneous wage data.

VIII. EEOC STRATEGIC PLANS

A. Greater Enforcement for Vulnerable and Underserved Workers, such as Those with Disabilities, Criminal Records, and LGBTQI+.

B. Enhanced Interest in On-the-job Training

C. Greater Attention to Employers' Use of AI and Other Emerging Technology

D. Priority to Pregnancy, Long-Covid and Technology-related Employment Discrimination.

See https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace.

IX. EXPANDED LEAVE & OTHER LAWS

A. Illinois: sick and paid leave for essentially all employees.

B. Colorado: redefine the standard for sexual harassment, add marital status as a protected employment category, and set stringent requirements for non-solicitation agreements.

C. Ohio: legalized recreational use of marijuana.

X. OTHER TRENDS & THINGS

A. Nuclear Verdicts & Social Inflation

B. Increase in Verdicts Favorable to Plaintiffs

C. Popularity of Mediation

I. PRE-NEGOTIATION

A. Know the Situation

1. Contract.
2. Settlement.
3. Transaction.
4. One size does not fit all.

B. Know the Other Side

1. Research, research, research.
2. Previous relationship or dealings?
3. Who is negotiating for the other side?

C. Planning

1. Plan negotiation strategy.
2. Prepare for each interaction.
3. Do your research.
4. Know your priorities.

D. Know the Respective Strengths and Weaknesses

1. Can you walk away?
2. Is this critical to your company's success?

II. NEGOTIATION TACTICS

A. Know When to Show Your Cards and Share Objectives

1. What are you trying to accomplish?
2. What is the risk you're trying to address?

B. Listen to Other Side

C. Use Emotional Intelligence

1. Ongoing relationship?

2. Good cop/bad cop.

3. Walk away, and how to project that?

D. Persuasion

1. What drives the other side?

2. Risks that fall outside of the issue at hand.

E. Build a Rapport – Can Always Go from Tough to Nice

NEGOTIATION SKILLS, TIPS AND TRICKS[1]

Sarah M. McKenna

I. NEGOTIATIONS GENERALLY

A. Negotiations can be about Managing Knowledge, Expectations, and Timing

1. Understanding your case and having a strong position is the best starting point for negotiations. If you do not understand your case, permit your client to become too entrenched in a certain position, or miss an opportunity, you lose the ability to provide effective and competent representation and to negotiate from a reasonable position of strength.

2. Knowledge.

   Know the facts of the case, understand the law, and have fully synthesized all possible outcomes and the risks of litigating the case to its conclusion.

3. Tools for handling expectations:

   a. Separate the people from the problem by attempting to focus on the issue at hand. To do this, you need to be aware of how your client perceives the other party, the type of emotional reaction your client has to the other party and to the situation, and you should find a way to communicate effectively given those dynamics.

   b. Focus on interests not positions.

   c. Use objective criteria.

      Identify which factors impact your client and the opposing party's ability to listen, and offer and work to overcome those issues.

4. Timing.

   a. Do you have enough information (factual and legal) to provide a meaningful assessment of the case and to value the party's positions?

   b. Are there avenues of discovery you would like to avoid and can do so by engaging in negotiations sooner rather than later?

   c. Do you think additional discovery will strengthen your client's position?

   d. Is it a good time to negotiate a resolution before fees and costs become excessively prohibitive of a possible resolution?

[1] These materials were originally created for a presentation at the 2018 KBA Annual Convention.

B. Role of Communication in Negotiations

1. Effective and precise communication, with your client and opposing counsel, is critical to an effective negotiation.

2. Effective communication is of prime importance in both settlement negotiations and business deals. Terms and conditions should be mentioned clearly for better transparency, and do not try to hide anything from the second party. Written modes of communication like emails, letters, documents, or agreements offer more reliability, and corporate terminologies and professional jargon should be employed. When speaking, irrelevant statements should be avoided as they are considered highly unprofessional. You should also be very careful with your pitch and tone. Always remember, battles can be won just by being decent and polite. Do not be rude and harsh. Speak slowly and convincingly in an audible tone. Do not speak too fast or too slow. The other person must understand your speech. Never be loud or shout at anyone. It is unethical to speak ill or insult anyone just for a deal. Relationships are more important and must be valued.

3. Clearly understand your client's positions and expectations.

    a. Which matters are critical to your client?

    b. How reasonable are their requests/demands?

    c. Can you temper those expectations prior to entering into negotiations?

4. Prior to engaging in settlement negotiations, know:

    a. What is your range of authority?

    b. Have you obtained authority to negotiate a global settlement?

5. Be sure to include all material terms when you communicate an offer to opposing counsel and stay within your authority.

    a. Negotiation is about trust in that opposing counsel is trusting that you in fact have authority to make the offer being conveyed and you have expressly and clearly communicated any contingencies to your authority or the items you are conveying.

    b. While you can always concede a negotiating point, it is much more difficult to add something.

    c. Opposing counsel will not know your thoughts and ideas unless you share them. Sharing thoughts and ideas along with how these are conveyed is part of the art of negotiating.

6. Non-verbal communication is also very important. Walking out of negotiations can send a clear message when appropriate.

7. Communication (verbal or non-verbal) should always be well thought-out and intentional.

II. STEPS FOR IMPROVING NEGOTIATION SKILLS

A. Be prepared. In fact, be better prepared than your opponent. Have an opening, middle game, and end game.

1. Know your substantive facts.

a. Substantive facts include the who, what, when, and where of the dispute and motivational factors include the motives, fears, concerns, and interests of the parties to the negotiation.

Substantive facts are contained in the documents, witness accounts, investigation, correspondence, emails, and computer generated material related to the dispute. Review the documents produced in discovery; know what they reveal.

b. Understand the objectives and interests of all parties and their representatives.

c. Ask yourself, do you have all of the information needed to be fully informed about the issues in the dispute/litigation, the evidence to date, and the case law or lack thereof on the issue?

2. Recognize the issues.

Defining and prioritizing:

a. Development of strategies or themes will often arise from the issues involved in the dispute.

b. Identifying issues involves anticipating the other party's needs, demands, strengths and weaknesses, positions, and version of the facts.

c. Prioritize the issues based on your client's needs.

3. Establish a strategy and determine an objective.

a. Ask your client:

i. What do they want?

ii. Where do they want to start?

iii. When do they want to move (because they will have to move)?

iv. How do they want to close (what is the bare minimum they are willing to accept)?

v. How much will it cost not to resolve the matter?

You should provide your client with a proposed budget for the remainder of the case so they can value and properly consider the cost in not resolving the matter during negotiations:

a) To finish discovery.

b) To prepare dispositive motions.

c) To prepare for trial.

d) To attend trial.

e) To prepare any post-trial motions.

f) Appeal. (Is it likely? What are the associated costs, and timeframe?)

b. Based on that information, evaluate your leverage and the other party's leverage at the outset.

i. What can be done to enhance your leverage or protect your weak areas?

a) Develop your leverage and use it to your maximum advantage.

b) Know when to use it.

c) Avoid losing it altogether.

d) Typical leverage points:

i) Necessity.

ii) Desire.

iii) Competition.

iv) Time.

v) Cost.

ii. Which items would your client be willing to negotiate?

iii. Summary: Every negotiation has its costs. Lawyers will avoid conflicts with their clients by discussing budgets sooner rather than later. Many times there are a number of choices for enhancing leverage. For example, you may enhance your leverage by taking several depositions, by adding parties to a lawsuit, by serving subpoenas on witnesses, or by hiring experts. Unless your client has unlimited resources, you will have to make some hard choices which should be designed to give you the "most bang for your buck."

c. Take away: have a plan.

i. Break the problem into issues so you can know what your client will and will not compromise on and so those compromises are clear to the opposing party during negotiations.

ii. Make sure your client understands the plan and is comfortable and agreeable with the plan.

B. Persuasion Phase

1. Involves the strategic sharing of information to persuade the other side to settle and resolve the dispute in a way most favorable to your client.

2. May be accomplished through argument, appeal (a request for concessions), threat (which can be especially effective or ineffective depending on an opponent's interests and concerns), or a promise to do something in the future in exchange for a bargained-for outcome.

3. In order to persuade, you must be prepared with a detailed argument with exhibits and convincing proof.

a. However, you must understand what information to disclose and what information to avoid disclosing. Even in litigation, this can be done in an ethical manner that complies with the rules of procedure. In the litigation discovery process, information is disclosed over time. If information will eventually be revealed which is damaging, it may be favorable to do the persuading and bargaining phase prior to that disclosure, when possible.

b. Consider whether opposing counsel seems knowledgeable about the information disclosed in discovery or is attempting to negotiate without sufficient information. Use opposing counsel's lack of preparedness to your advantage.

c. If the parties have agreed to mediate, consider whether to provide the mediator with a mediation statement. A mediation statement

allows you to inform the mediator prior to the mediation regarding your view of the case and your supporting evidence. It also gives you an opportunity to identify for the mediator what you believe are holes in the opposing party's case.

C. Bargaining Phase

1. Involves the actual exchange of offers in the negotiation process.

2. When, where, and how. This can be very important in multiparty cases.

3. Negotiate when your leverage is high.

4. Questions to consider:

a. Who will make the opening offer?

i. Initial offers define the parameters of the negotiating zone. The initial offer defines where one end of the zone is located, and your opponent, in their response, decides the other end.

ii. Appreciate that the first offer will be artificially high; otherwise there is no need to negotiate.

b. How will it be communicated?

i. Verbal.

ii. Written.

iii. Through a third party.

c. What should be my counteroffer?

Having a reason for every element of the offer greatly enhances its chances of success.

d. How should you adjust your negotiating plan when responding to unanticipated moves by your opponent?

e. What concession(s) will you make?

i. How will you make them/how will you present them?

ii. Are you really giving something away that is important to your client or is the perception that you are giving something away important to the opponent?

5. The offer – factors to consider in assessing whether it is a legitimate offer:

    a. Is the offer defensible?

    b. Does this offer take into account the positive facts for your client?

    c. Does this offer take into account the negative facts for the opposing party?

    d. What remedies did the party seek at the outset?

    e. How were the remedies quantified?

    f. Does this offer seek remedies that exceed the value of the harm claimed?

6. Realize the negotiations are about compromise. Always be on the lookout for acceptable compromises.

    a. The goal is not to convince the other side that you are right and they are wrong.

    b. If you enter a negotiation hoping to convince your opponent to give up on his or her case, the negotiation is doomed from the start.

    c. The goal is for the parties, sometimes with the assistance of a skilled independent third party such as a mediator, to settle on a figure they both can live with and which outweighs the time, expense, financial risk, and emotional toll inherent in the litigation and trial processes.

    d. Many times, neither side is happy when they leave a successful negotiation. One party might think that he or she accepted too little, while the other party may think that he or she paid too much.

7. Goals are more important than bottom lines.

8. Consider negotiating before your client gets too invested in their position.

    a. Need enough information to bargain intelligently.

    b. Do not wait until the parties have invested too much money and are too invested in their position.

9. Tactics to employ.

    a. Be on the lookout for favorable middle ground. Identify any areas of common interest between the parties:

        i. To successfully resolve the issues that brought the parties to litigation in the first place;

ii. To maintain and improve upon existing business or any other relationship the parties may have had before the dispute; and

iii. Highlight the common interests throughout the negotiation process to reach a mutually agreeable resolution.

b. Be cooperative, but do not let your guard down.

c. Listen.

Do not assume the other party responded as anticipated. Listen to their response and consider what message they may be trying to convey and how to respond.

d. Pare down large groups.

This usually means negotiations within negotiations, as the members of each committee or group have to negotiate an intra-consensus before responding to the other side. If every member of every group has to put in his two cents before you can respond to a proposal, the process is slow and tedious. This problem can often be remedied if each group will appoint a representative.

e. Have a theme.

f. Be creative.

i. Consider creative resolutions as opposed to merely monetary exchange for release.

ii. For example, in an employment case, the employer might offer a neutral letter of reference or pay a portion of a recruiter fee to find a new job.

g. Avoid puffing or grandstanding, baseless claims or unreasonable allegations.

i. Focus on being honest and reasonable about the strengths and weaknesses of your case.

ii. You are negotiating a reasonable settlement amount, not arguing about responsibility for the loss or injury.

10. Leaving the negotiation or mediation without a deal does not mean your work is over, that a compromise is not possible, or that the mediator cannot bring additional value toward a potential resolution between the parties.

Consider/be on the lookout for additional opportunities to negotiate with opposing counsel.

11. Consider engaging a meditator. *See* below.

III. CLOSING THE DEAL

A. Just because the parties reach an agreement (formal or informal), your work as counsel is not complete. Next, you have to delicately craft the final written agreement making sure to accurately include all material terms and considering all additional actions that will need to be taken by the parties to fulfill those material terms, time frames, and remedies in the event one of the parties breaches the settlement agreement.

B. Steps

1. Confirm the material terms in a short and clear email or correspondence.

2. Draft the agreement and review with your client. Sometimes less is more.

3. Circulate a draft with opposing counsel.

4. Notify the court in the event of pending deadlines.

5. Dismiss the case only after:

a. You have a fully executed copy of the settlement agreement;

b. All pre-conditions to the settlement have been fulfilled; and

c. Any settlement funds have cleared the bank.

C. Questions to Consider

1. How and when will you close?

2. Who will prepare the final agreement?

It is ok to want to prepare the final agreement as it permits you to carefully consider each term and clause and to make sure it says exactly what you want it to say.

3. Is a closing checklist appropriate?

4. Pay attention to the details.

D. Potential Settlement Terms

1. Amount of settlement;

2. Deadline to pay the amount of settlement;

3. To whom the payment should be made and method of payment;

4. Dismissal not to occur until settlement funds have cleared;

5. Release (Mutual?);

6. Non-disclosure provision;

7. Non-disparagement agreement;

8. Is the settlement confidential; and

9. Are there any bankruptcy concerns?

IV. USING A MEDIATOR

A. Mediation – Generally

1. Mediation is a process where an independent third person assists the parties in reaching a mutually agreeable resolution.

2. The mediator is not responsible for deciding the issues but for bringing the parties to a mutually agreeable solution.

3. Mediation is often much less costly and time-consuming than litigating disputes.

4. The success of mediation ultimately depends on the cooperation of the parties.

5. We encounter mediation frequently in the litigation context; however, many contracts are now requiring mediation before a suit is filed. Also, many courts require the parties to mediate prior to setting a trial date.

   a. *E.g.*, standard contracts in the construction industry require disputing parties to attempt mediation prior to demanding arbitration or filing a legal action.

   b. In fact, the American Arbitration Association has adopted a set of Construction Industry Mediation Rules that apply in these situations.

6. Choose a knowledgeable and effective mediator.

   a. You want a mediator who will understand the facts and law.

   b. It is helpful to have a mediator who is familiar with the court where the case is pending.

7. Mediator works for the parties.

   a. The mediator usually has little or no independent power with the exception of reporting to the court whether everyone attended. The remainder of the power that a meditator exercises is conceded by the parties.

   b. Value in a mediator:

      i. Independent third party;

      ii. Can help set the stage for negotiations;

      iii. The consummate host;

      iv. Practicing patient persistence;

      v. Ability to help explain things about the case to your client that you may have attempted to convey on a number of different occasions; and

      vi. Resourcefulness.

B. Mediation in the Litigation Context

1. In 2000, the Kentucky Supreme Court adopted the Model Mediation Rules ("Model Rules") which apply to parties in litigation.[2]

2. Rule 3 of the Model Rules provides, "[a]t any time on its own motion or on motion of any party, the Court may refer a case or portion of a case for mediation."

3. In the spirit of this policy, many Kentucky courts have begun entering orders requiring parties to mediate their disputes before trial. Some judges even require mediation to occur before they will set a trial date.

4. In *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004), the Kentucky Supreme Court held that trial courts have the inherent power to refer cases to mediation.

C. Benefits of Mediation

In addition to decreasing expenses by resolving litigation, mediation also has other benefits.

1. More informal and less intimidating than a trial, arbitration, or administrative hearing.

[2] Editor's Note: Since the publication of these materials, the Supreme Court of Kentucky has adopted CR 99 Mediation and CR 100 Code of Conduct for Mediators.

2. Allows the parties an opportunity to present their case to the other party.

    a. In some instances, the client really values the opportunity to face the opposition face to face, which is more personal than arguing through attorneys or pleadings.

    b. Is your message/story being conveyed to the opposing party as intended or is it being filtered through opposing counsel and conveyed differently?

        A presentation at mediation can be helpful because it allows you to speak directly to the opposing party without your message being filtered through their counsel. You should feel comfortable that your mediator understands your position and is effectively communicating between the parties.

3. Allows the parties an opportunity to present their case to a neutral third party.

4. Opportunity for "free discovery" which helps both sides better assess their case.

5. Helps both parties assess their cases because it provides an opportunity to evaluate the potential primary witnesses for the matter and helps both parties understand the claims better for the litigation going forward.

D. When to Mediate

1. Can you mediate too early?

    a. Maybe, if both sides are not ready to meaningfully participate.

    b. But even "unsuccessful" mediation can be useful in expediting the dispute resolution process.

2. Because of the benefits, consider early mediation to help flesh out issues in the case and obtain information to help advance the case.

3. If the first mediation was not successful, the second may still be.

E. What Information Should You Arm the Mediator With and When?

1. A shell naming all parties and identifying counsel for each party.

2. Provide a confidential summary of facts, issues, your client's position, and the status of court process and any negotiations.

3. Advise the mediator of the status of liens and any subrogation issues.

4. Put the mediator on notice of any special needs your client might have, any unreasonable expectations your client might have (or the opposition), any

personality issues that might affect the mediation process, or concerns that might exist regarding issues of competency.

Any attorney may choose to share this information separate from the mediation summary.

F. Put the Mediator to Work for You

G. What You Should Bring with You to a Mediation:

1. Critical pleadings, evidence, or legal support;

2. Calculator;

3. Payment for mediator;

4. Draft release;

5. Draft settlement agreement; and

6. Your client.

While this may seem obvious in some respects, it has become routine in some situations for an insurance company defendant to appear by phone.

a. Some courts are now ordering in-person attendance by a person with full authority to settle the matter (without having to call someone else for additional authority) and have issued sanctions for failure to do so.

b. If mediation is court ordered, be sure to read the mediation order thoroughly and have a client present who has full authority to settle the case, even if new information comes to light at mediation.

c. *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004), upheld a provision in a trial court order requiring the parties and their insurance adjustors to attend the mediation in person.

V. SETTLEMENT AGREEMENT CHECKLIST

Settlement Agreement Provisions:

A. Recitals;

B. Statement of Consideration;

C. Payment Terms;

1. Amount.

2. Payee.

D. Whether a W-9 or 1099 will be issued?

E. Release;

F. Confidentiality;

G. Timing of Execution.

THE BASICS OF LITIGATION MANAGEMENT DISTILLED INTO 30 MINUTES

Christopher W. Brooker

WHEN LITIGATION IS ANTICIPATED (OR AN UNANTICIPATED COMPLAINT IS RECEIVED):

I. COMMUNICATE WITH MANAGEMENT

A. Educate management on the basics of the litigation process at the outset.

1. Many executives are unfamiliar with the litigation process.

2. Providing a basic primer on "how it works" to the uninformed will pay dividends.

B. Set realistic expectations regarding the speed and pace of litigation. Litigation is generally a lengthy process; it can take years to finish a case.

C. Set realistic expectations regarding the cost of litigation. Litigation can be *very costly*. Ensure your management and company's budgets are prepared for the associated costs.

D. Set realistic expectations regarding the potential outcome of litigation. Outcomes can often be predicted, and cases can be valued, but no outcome is guaranteed. Juries (and judges) can be unpredictable.

II. HIRE GOOD OUTSIDE COUNSEL

Your working relationship with your outside counsel is critical to your company's success in a case. Outside counsel should not only be a good lawyer; ***outside counsel should also be someone you communicate with well***. You will have to get along and work together in stressful situations throughout a case, and effective communication is key.

III. DOCUMENT AND EVIDENCE PRESERVATION

A. Know where your company's documents located.

1. This is something you will preferably know prior to the onset of litigation.

2. Learning where your documents are, and how they are kept, is time well spent in advance of litigation, and will pay dividends when litigation arises.

3. You do not need to know (and cannot know) everything, especially at a large company. Paralegals can be a tremendous help in this respect.

B. Understand the basics of your IT systems and electronic repositories.

1. Most modern discovery involves electronic records.

2. It is equally important for you to understand ***how*** documents are generally stored at your company, and the timelines for backups, locations of backups, etc.

3. This is another area where a paralegal can be of tremendous help.

C. Consider document preservation letters as soon as you get a whiff of litigation.

1. Avoiding spoliation allegations is important.

2. Work with outside counsel to identify potentially relevant documents, their custodians, and what steps to take to protect discoverable material from destruction or deletion.

3. Keep good records of who received preservation letters, and when they were received. Receipt confirmations can be helpful.

4. Document preservation is an ongoing responsibility. It is not a one-time exercise. If you become aware of a custodian who may have responsive records as litigation progresses, take preservation steps quickly.

IV. INSURANCE

A. Understand your company's policies; study them prior to litigation. Many policies have deadlines and/or requirements of reasonable notice of a claim.

B. If your company is sued, determine whether there is (or might be) coverage. You can work with your company's insurance agent and outside counsel if you are unsure.

1. Obtaining coverage of a claim can make a tremendous difference for your company's bottom line.

2. If there is insurance coverage, the insurance company will often choose the outside counsel who will represent your company on a covered claim. That said, the insurance company will often listen to your input if you have preferred counsel or a recommendation.

3. Do not ignore lawsuits because they are "covered." The attorney hired by the insurance company still needs your help and assistance, and at minimum, your company's reputation is likely on the line, even if the claim is fully insured.

V. INVESTIGATING FACTS

A. Conduct appropriate interviews and document reviews.

B. With interviews, be sure employees fully understand that you represent the company, not the employee being interviewed, and that the company controls the attorney-client privilege.

C. Do not provide individual legal advice to the interviewee. If a situation arises where there is a potential conflict between a company's interests and an employee's interests, consider retaining separate counsel for the employee.

VI. PROTECTING THE PRIVILEGE

A. Make sure key individuals understand the attorney/client privilege and its importance.

B. Advise key individuals about the discoverability of communications, and which communications qualify as privileged.

1. Management personnel sometimes assume that communications about a lawsuit, or potential lawsuit, are confidential and/or privileged so long as they happen in the "C Suite" or behind closed doors. Others assume communications between family members who work at a company are confidential and/or privileged. Advise management that is not the case, and that for a communication to be privileged, it must generally (a) be with an attorney, and (b) for the primary purpose of obtaining or providing legal advice.

2. Make sure that management understands that discoverable communications include non-privileged conversations, letters, emails, ***and text messages.***

3. Requests for business advice are generally not privileged. *See Lexington Public Library v. Clark*, 90 S.W.3d 53 (Ky. 2002) ("When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.").

   As in-house counsel, whether a communication with you is privileged will often come down to a determination of what hat you are wearing when you engage in the communication.

VII. WRITTEN DISCOVERY

A. **Responding to written discovery often presents the best opportunity for in-house counsel to realize cost savings during litigation.**

B. Outside counsel is duty-bound to ensure a complete production of documents.

1. It is very expensive to pay outside counsel to learn your systems, how to use them, and then oversee the retrieval and review process.

2. **But the work must be done. Every hour an in-house team spends on these tasks is generally an hour the company will not be billed by outside counsel.**

3. Do a thorough job. Keep detailed records of what you did, such as where you looked, what search terms you used, what you found, who did the work,

and when the work was done. Litigation can last years, and it is very helpful to have a record so that (a) you can rebut any challenge to the adequacy of a search, which may come months or years later, and (b) you will not have to repeat work because you forgot what you previously did.

VIII. DEPOSITIONS

A. Detailed and thorough preparation is the key to a witness giving a great deposition.

B. When your client is being deposed:

1. Afford outside counsel plenty of time to prepare witnesses. Adequate preparation often takes two non-consecutive days.

2. Get the witnesses to understand the importance of deposition preparation and process and to buy into it. Explain to them the importance of working with outside counsel. Your assistance in getting the witness in the right mindset is extremely helpful to outside counsel.

C. Attend depositions whenever possible and practical.

1. Doing so allows you to better assess case strengths and weaknesses.

2. You can be a tremendous help to outside counsel taking the deposition as an extra set of eyes and ears, and you will save expenses and fees when having a second attorney attend and observe is advisable.

IX. DISPOSITIVE MOTIONS AND BRIEFING

A. Thoroughly read and edit outside counsel's work product.

B. Ensure consistency with the company's positions and goals. You have the 10,000-foot view of the company's positions in other matters, and business strategies, that outside counsel will not have. It is possible that a draft brief will make an argument, or take a position, which is inconsistent with the company's position in another lawsuit or proceeding, and/or the company's business concerns, and outside counsel will not know.

X. SETTLEMENT DISCUSSIONS

A. In-house counsel is in a unique and powerful position.

1. You will understand the case better than anyone at your company.

2. You will likely understand the company's risk tolerances and goals better than outside counsel.

B. Always advocate what is best for the company; management will often do what you recommend.

C. In mediation, you might be the best person to deliver the company's messages to the other side. Opposing parties often do not trust statements made by opposing outside counsel. They may, however, give more credibility and respect to messages coming from you, which they view as coming straight from the company.

D. If taking a risk is in the company's best interests, advise management to take the risk! Not all risk is bad risk, and you will likely understand the case, and the related risks and rewards, better than anyone at your company.

XI. TRIAL

A. Attend if possible!

B. Listen and assist. Your input is extremely valuable.

C. Even if you are not testifying, remember the jury will watch you, and how you react and handle yourself, if it knows that you are a company representative.

D. It is extremely helpful when in-house counsel attends trial and handles the important task of keeping management informed of what is happening at trial. This permits outside counsel to focus entirely on trying the case and preparing for the next challenge.

2024 ETHICS ISSUES FOR CORPORATE HOUSE COUNSEL

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I. INTRODUCTION

II. USE OF GENERATIVE ARTIFICIAL INTELLIGENCE

A. Definitions

1. Traditional AI: Refers to systems designed to respond to a particular set of inputs. These systems have the capability to learn from data and make decisions or predictions based on that data.

   a. Traditional AI models have been trained to follow specific rules and do a particular job; these models are prediction-based and **do not** create anything new.

   b. Examples: Voice assistants like Siri or Alexa; recommendation engines on Netflix or Amazon; Google's search algorithm.

2. Generative AI: Refers to "deep-learning models" that compile data to generate statistically probable outputs when prompted.

   a. This is the form of AI that can create something new. Generative AI systems train on a set of data and then create a new data set that is similar to the training data.

   b. Generative AI models are capable of analyzing documents and drafting entire briefs.

   c. Examples: ChatGPT, DALL-E, Bard, DeepMind.

B. Ethical Pitfalls When Using Generative AI

Four specific ethical pitfalls when using generative AI:

1. Confidentiality.

   a. Rule: SCR 3.130(1.6) – Absent the client's informed consent or some applicable exception, "a lawyer shall not reveal information relating to the representation of a client."

   b. Considerations:

      i. Lawyer's duty to prevent the inadvertent or unauthorized disclosure of confidential information.

      ii. Privacy considerations: *Dinerstein v. Google, LLC*, 73 F.4th 502 (7th Cir. 2023).

2. Oversight – considerations:

a. Generative AI use by a non-lawyer (*see* SCR 3.130(5.3)).

b. The "Blackbox" issue: *Park v. Kim*, 2024 WL 332478, at *2-4 (2d Cir. Jan. 30, 2024).

c. Delegating tasks to AI functions – Tasks that require a lawyer's personal judgment and participation constitute the practice of law and should not be delegated.

d. Using AI to conduct interviews with prospective clients (*see* SCR 3.130(1.18)).

3. Legal fees and costs.

a. Rule: SCR 3.130(1.5) – "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

b. Considerations: Increased efficiency resulting in duplicate charges or falsely inflated billable hours.

4. Advertising – considerations:

a. Using generative AI chatbots for advertising and client intake.

b. AI chatbots providing misleading/inappropriate information to prospective clients.

C. Florida Advisory Opinion

The Florida Bar issued advisory opinion 24-1 on January 19, 2024, addressing the four ethical pitfalls discussed above.

1. Confidentiality.

a. The advisory opinion recommends a lawyer should:

i. Obtain the affected client's informed consent prior to utilizing a third-party generative AI tool if the utilization would involve the disclosure of confidential information.

ii. Ensure AI provider is required to preserve confidentiality, that this obligation is enforceable, and that the provider will notify the lawyer in the event of a breach.

iii. Investigate the AI provider's security measures and policies.

iv. Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services.

b. Using an in-house AI program may mitigate this concern as confidential information would not be disclosed to a third party.

2. Oversight.

The advisory opinion recommends:

a. Lawyer must review the work product of generative AI.

b. Lawyer must ensure that firm has policies to ensure the conduct of nonlawyer assistant is compatible with lawyer's own professional obligations.

c. Ensure that the AI program: 1) clearly identifies nonlawyer status; 2) limits its questions to obtaining factual information; and 3) refers legal questions back to the lawyer.

3. Legal fees and costs.

The advisory opinion recommends:

a. Lawyers should inform a client of the lawyer's intent to charge the client the actual cost of using generative AI.

b. If such costs can't be determined, account for those charges as overhead.

c. Lawyers should not charge for time spent developing competence in the use of generative AI.

4. Advertising.

Advisory opinion recommends:

a. Lawyers must inform prospective clients that they are communicating with an AI program.

b. Lawyers using AI chatbots should consider including screening questions that limit the chatbot's communications if another lawyer already represents that person.

III. REPRESENTATION ISSUES

A. Representing Related Companies: Considerations

1. Privilege issues: *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007).

2. Although the attorney-client privilege generally applies to communications between clients and their attorneys, where an in-house attorney is acting in their capacity as a businessperson or principal of the organization (and not an attorney), such communications may not be privileged.

3. When a parent company and subsidiary rely on the same in-house legal department:

a. *GSI Commerce Solutions, Inc v. BabyCenter, LLC*, 618 F.3d 204 (2d Cir. 2010).

b. *Yanez v. Plummer*, 221 Cal. App. 4th 180 (2013).

c. Rule: SCR 3.130(1.7(a)): A lawyer shall not represent a client if "the representation of one client will be directly adverse to another client."

B. Remembering Who Your Client Is

1. Rule: SCR 3.130(1.13): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

2. The client is the organization itself, not the officers or management; often, executives or owners treat in-house counsel as their own personal counsel.

IV. EVIDENCE PRESERVATION

A. Triggering the Duty to Preserve

1. Duty to preserve arises when a company learns that information in its possession may be relevant to an investigation or judicial process. Arises when a company is aware of an investigation or civil/criminal complaint that is in the works.

2. Considerations: What, if any, duty to preserve arises when the "notice" is an unverified, internal complaint?

B. Reach of Subpoenas

1. General rule is that if the party has the legal right to obtain the document requested (from an affiliate or agent), then that party controls the document for discovery purposes and must produce it if subpoenaed.

2. Considerations:

a. Strict foreign data privacy laws may be a hurdle to collection and production of electronically stored information that is held abroad.

b. Balancing the demands of data privacy and document production.

C. Best Practices for Preserving Information

1. In-house litigators essentially have the duties of both lawyer and client.

Harkabi v. SanDisk Corp., 275 F.R.D. 414 (S.D.N.Y. 2010):

> …while SanDisk's in-house counsel was involved at several steps of the document preservation and collection process, it was notably absent at critical junctures. In particular, SanDisk offers no direct evidence that in-house counsel supervised – or even approved – the copying and wiping of the laptop hard drives."

2. Considerations:

a. Drafting a legal hold – explaining to recipients that ESI and hard copy documents subject to the hold must be preserved regardless of company policies.

b. Communicating the hold to necessary employees (should include IT and those responsible for maintaining electronic files).

c. Suspending regularly-scheduled document destruction.

d. Recording preservation efforts.

V. CLOSING