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THE LITIGATION LEADER

FOS's Litigation Newsletter

When push comes to shove. . .

Volume 2, Issue 1

Spring 2015

Editor: Diane Slomowitz

WAIT—*WHO* ARE *YOU*?

By Laurna A. Kinnel

The FRCP 30(b)(6) deposition is a powerful tool in commercial litigation. It allows a litigator to obtain the testimony of an entity, by requiring that entity to designate one or more witnesses to provide testimony on particular topics.

Rule 30(b)(6) provides:

> ". . . In its notice of subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe ***with reasonable particularity*** the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons ***who consent to testify on its behalf***...."

(Emphasis added).

The Rule may have been intended to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." (*Notes of Advisory Committee on Rules - 1970)*.

Unfortunately that is not how the Rule often works in practice.

Many litigators have had the frustrating experience of showing up to a deposition with a witness who is ill-prepared, lacks knowledge, or is otherwise an unfit deposition designee.

To make sure that your next Rule 30(b)(6) deposition is effective, keep the following tips in mind:

1. *Keep up your obligations under the rule*. Designate in the deposition notice the areas that you would like to cover with particularity. Avoid the urge to use "including but not limited to" language – that language does not provide clear parameters for the testimony about which you expect your deponent to be knowledgeable.

2. *Cover your bases*. Although the rule requires the party taking the deposition to state with particularity the topics to be covered, it does not require brevity. There are no limitations on the number of topics that you can list (within reason, of course).

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RETALIATION CLAIMS RISE

By Michael J. Hanrahan

Under Title VII of the 1964 Civil Rights Act, it is illegal for an employer to take material adverse action against an employee for opposing discrimination in the workplace.

Almost anything that communicates an employee's concern that unlawful discrimination has occurred is arguably protected opposition under the statute. *See Crawford v. Nashville*, 55 U.S. 271, 276 (2009).

The communication is protected, whether it comes from a discrimination claimant or a co-worker who perceives discrimination in the workplace.

Also, even if the underlying discrimination claim is legally insufficient, a retaliation claim arising from the same alleged discrimination can succeed. *See Hertz v. Luzenac America*, 370 F.3d 1014 (10th Cir. 2004).

Retaliation claims are not some hypothetical risk. Retaliation claims have been increasing rapidly, having almost doubled between 1997 and 2012. *Medical Center v. Nassar*, 133 S.Ct. at 2531. What can an employer do to eliminate or minimize the risk of retaliation claims?

First, employers must be aware of the parameters of the law.

Second, when presented with a complaint involving discrimination, a prompt and thorough workplace investigation should be conducted, with the investigator advising the witnesses that the employer prohibits retaliation for good faith participation in the investi-

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WHY CAN'T WE BE FRIENDS? LAW ENFORCEMENT TACTICS AND SOCIAL MEDIA EVIDENCE

By Jacob A. Manian

Under the United States Supreme Court's decision in *Katz v. United States*, 389 U.S. 347, 357 (1967), a private citizen arguing that law enforcement violated the Fourth Amendment, in gathering evidence without a warrant, must first establish that there existed a reasonable expectation of privacy in the place searched.

Justice Harlan's concurring opinion, that the Court's holding applies to "electronic as well as physical intrusion into a [private] place," suggests that a citizen may have a reasonable expectation of privacy with regard to social media.

If a citizen has his or her Facebook account set to "private," does that person have a reasonable expectation of privacy with regard to all of its content?

Does that same citizen forfeit any reasonable expectation of privacy by sharing pictures or posts with "friends?"

Government agents lacking probable cause for a search warrant or subpoena will often gain access to a suspect's private Facebook page through a third-party informant who is "friends" with the suspect.

In other cases, law enforcement agents have created a fake Facebook account in order to "friend" a suspect to gain access to otherwise private information.

Ethical rules likely prohibit private attorneys from accessing the social media account of a party or witness by deception or trickery.

This prohibition not only pertains to attorneys in civil litigation, but also the private criminal defense attorney defending a client against the very evidence that law enforcement obtained by deception or trickery.

Litigators challenging such tactics must be able to articulate a client's reasonable expectation of privacy with regard to the location of information seized.

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3. *Enforce your rights*. Deponents who fail to produce a knowledgeable 30(b)(6) designee are potentially subject to a variety of sanctions – from being treated as a failure to appear, to a finding that the responsive party is in contempt, to a dismissal or default judgment.

Forethought and effective enforcement are the keys to a successful Rule 30(b)(6) deposition.

FOS's attorneys have extensive experience noticing and conducting effective Rule 30(b)(6) depositions, and can help you do the same.

LITIGATORS ON THE MOVE

FOS congratulates two of its litigation shareholders for being honored as the top in their field.

The Litigation Council of America appointed **Shannon Allen** as a Fellow.

The Council is an invitation-only, peer-selected honor society of trial lawyers.

The National Association of Distinguished Counsel named **Mike Hanrahan** to the Nation's Top One Percent.

Mike received his honor after being vetted by panels of attorneys, judges and researchers.

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The Litigation Leader—*When push comes to shove. . .*

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CONFIDENTIALITY AGREEMENTS ARE NOT AUTOMATICALLY ENFORCEABLE

By Shannon A. Allen

Businesses routinely enter into confidentiality agreements to maintain their confidential and proprietary information.

The Seventh Circuit, in *nClosures Inc. v. Block and Co., Inc.*, 770 F.3d 998 (7th Cir. 2014), recently defined and narrowed the scope of enforceable confidentiality agreements.

In that case, manufacturer and designer nClosures designed metal casings for electronics tablets; Block and Co. agreed to manufacture the casings.

Early in their business relationship, the parties entered into a confidentiality agreement.

A few months later, Block and Co. created its own metal casing design and began manufacturing a competing product to nClosures' casings.

nClosures responded by suing Block and Co. for breach of the confidentiality agreement and breach of fiduciary duty.

In granting summary judgment to Block and Co. on both claims, the district court refused to enforce the confidentiality agreement.

The court reasoned that nClosures did not take reasonable steps to keep its proprietary information confidential.

The Seventh Circuit affirmed the district court ruling.

The Seventh Circuit held that confidentiality agreements will only be enforced "when the information sought to be protected is truly confidential and reasonable efforts were made to keep it confidential." *Id.* at 602 (*quoting Tax Track Sys. Corp. v. New Investor World, Inc.*, 478 F.3d 783, 787 (7th Cir. 2007)).

Because nClosures did not comply with these requirements, the confidentiality agreement could not be enforced.

nClosures applied Illinois, and not Wisconsin law. Even so, the states' laws are more alike than unalike.

There is one clear take-away from *nClosures.*

Parties to a confidentiality agreement must implement and enforce an actual plan to protect all proprietary information subject to the agreement.

Without reasonable efforts to keep the propriety information confidential, a party will have a difficult time enforcing the confidentiality agreement in light of *nClosures*.

Why Can't We Be Friends, Continued from page 2

Further, even when information is seized pursuant to a warrant or subpoena, litigators must scrutinize the scope of such authority.

For example, probable cause may exist for a user's basic account information, but not for precise location information or private messages or chat logs.

Additionally, litigators can look to various federal statutes governing whether law enforcement may compel service providers such as Facebook or Twitter to produce content and records.

The Stored Communications Act and the Computer Fraud and Abuse Act require law enforcement to obtain a warrant for certain content information.

Finally, not all lawfully obtained evidence is admissible. Making a proper record that such evidence lacks proper authentication, that it constitutes inadmissible hearsay, or that the evidence is unduly prejudicial may keep such evidence out, and is vital for later appeal.

Social media's impact on law enforcement is serious. For help, contact FOS.

Rise of the Retaliation Claim, Continued from page 1

gation. Third, as with almost all human resource situations, the employer must (1) be consistent and (2) document all activity.

While retaliation claims must be kept in mind, not all changes in employment status are retaliation. To be unlawful retaliation, the employer must take action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern v. White*, 548 U.S. 53 (2006).

Personality conflicts, small insults and snubbing are not "material adverse actions." Likewise, a reassignment of duties within the same job description does not constitute retaliatory discrimination. *EEOC, 1991 Manual*, §614.7 at 614-31.

In 2013, the U.S. Supreme Court in *Nassar* provided some additional comfort to employers by holding that retaliation claims under Title VII require proof of "but for" causation. Under a status-based discrimination claim (race, sex, ethnicity, etc.), the claimant must prove that the material adverse action of the employer was a "motivating," though not a determinative, factor in the action.

In contrast, the "but for" causation standard from *Nassar* requires that retaliation be the "determinative" factor in the employer's adverse action.

While the causation standard from *Nassar* raises the bar on retaliation claims, it will not eliminate such claims. Employers must remain keenly aware of the risk of retaliation claims in all contexts in which a legally protected employment right is allegedly abridged (e.g. ADA, FMLA, OSHA, etc.).

FOS has extensive experience dealing with the investigation and defense of discrimination and retaliation claims, and is ready to help when such a claim is alleged.

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IN THIS ISSUE

KEEPING THE HOME FIELD ADVANTAGE—THE IMPORTANCE OF VENUE

By Matthew W. O'Neill

In sports, the home field advantage is critical.

You think that loss in Buffalo didn't hurt? Without it, Seattle is at Lambeau, there is no lucky comeback, and the Pack crushes the Patriots in the Superbowl.

(And, I digress, Pete Carroll would not have made the worst play call in NFL history).

For many reasons, the same home field advantage applies in litigation. We are most familiar with our local courts and rules; we know the judges and their personalities; we carry our own reputations into court; and litigation is less expensive for the home team.

That's why out-of-state defendants remove to federal court and, if possible, seek a change of venue.

It is critical to advise clients to always, always include choice of law and venue provisions in their contracts, purchase orders, waiver forms, and other legal documents.

Periodically review clients' existing forms to ensure their interests are fully protected against potential litigation.

In contract negotiations, don't accept an inconvenient venue – negotiate for your own.

Do so in arbitration clauses too. AAA and JAMS will honor a written agreement for an arbitration's locale.

Otherwise, AAA/JAMS will decide locale by considering factors such as the dispute's subject matter, the parties'/witnesses' convenience, a site visit's importance, and the applicable law.

The absence of a venue clause may yield a race to the courthouse. All else being equal, federal courts recognize a "strong presumption in favor of the plaintiff's choice of forum," giving even "greater deference when the plaintiff has chosen the home forum." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255 (1981).

Winning the venue battle can go a long way toward winning the case, or settling on your terms.

Had the Packers negotiated the NFC Championship home field advantage, we would have another Lombardi Trophy.

Please, don't let your clients litigate in Seattle.