CORPORATE COUNSEL 2024 SEMINAR

PRESENTED BY McAFEE & TAFT

OKLAHOMA CITY DECEMBER 10

TULSA DECEMBER 11

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AGENDA

CORPORATE COUNSEL 2024 SEMINAR

PRESENTED BY McAFEE & TAFT

MORNING SESSION

8:15am – 9:00am	Seminar check-in and breakfast buffet
9:00am – 9:05am	Welcome
9:05am – 9:35am	**Employment Law Roundup: What's Hot, What's Trending, and What's on the Horizon** *Presenters: Paige Good and Kristin Simpsen (OKC); Kirk Turner and Grace DeJohn (Tulsa)*
9:35am – 10:05am	**Protecting Customers and Confidentiality in an Era of Restricting Restrictive Covenants** *Presenters: Phil Bruce (OKC); Courtney Bru and Jake Crawford (Tulsa)*
10:05am – 10:20am	Break
10:20am – 11:05am	**Dealing with Your Bank: Fraud, Loans, and Guaranties** *Presenters: Matt Brown, Kaitlyn Chaney and Bob Luttrell*
11:05am – 12:05pm	**Ethics Traps for In-House Counsel** *Presenters: Spencer Smith (OKC); Craig Buchan (Tulsa)*
12:05pm – 12:55pm	Buffet lunch

AFTERNOON SESSION

12:55pm – 1:25pm	***Loper Bright* is the New *Chevron*: Why the End of *Chevron* Deference Could Be Good for Your Business** *Presenters: Rick Mullins (OKC); Katie Crane (Tulsa)*
1:25pm – 1:50pm	**IP Dispute Pitfalls** *Presenters: Zach Oubre (OKC); Rachel Blue (Tulsa)*
1:50pm – 2:05pm	Break
2:05pm – 2:35pm	**Advising Your Board Regarding Fiduciary Duties** *Presenters: Justin Jackson (OKC); Josh Smith (Tulsa)*
2:35pm – 3:00pm	**Commercial Leasing Issues** *Presenter: Cole Marshall*
3:00pm – 3:15pm	Break
3:15pm – 4:15pm	**Ethical Considerations of Using AI and New Technology** *Presenter: Josh Snavely*

Employment Law Roundup: What's Hot, What's Trending, and What's on the Horizon

presented by

Paige Good and Kristin Simpsen (OKC)
Kirk Turner and Grace DeJohn (Tulsa)

Update on DOL Final Rule

- November 15, 2024 – A Texas federal court **struck down** the U.S. Department of Labor's Final Rule that raised salary thresholds for overtime-exempt employees
  - Rule increased the applicable salary threshold to $43,888 annually/$844 weekly in July 2024
  - Rule included planned jump to $58,656 annually/ $1,128 weekly in January 2025
- **Both increases** were deemed to exceed the DOL's authority

Update on DOL Final Rule *(cont'd)*

- The DOL may appeal the decision; but for now, the January 1, 2025, salary increases will **not** go into effect, allowing employers to forego planned salary adjustments
- However, employers who raised their salaries in anticipation of the July 2024 increase should carefully consider the potential impact on morale before rolling any changes back

Notable EEOC lawsuits

- Work restrictions
- Pregnant Workers Fairness Act
- Harassment

EEOC v. FedEx

- EEOC alleges FedEx maintained and enforced a 100%-healed policy against ramp transport drivers
- They drive tractor-trailers, operate mechanical equipment, and load/unload freight
- FedEx put drivers with medical restrictions on a 90-day temporary light-duty assignment
- At end of light-duty, if driver still had medical restrictions, FedEx would place driver on unpaid medical leave that expired after one year, unless the driver qualified for short- or long-term disability benefits

EEOC v. FedEx *(cont'd)*

- Alleged FedEx would not discuss reasonable accommodations that may have allowed them to keep working
- Instead, FedEx kept them on unpaid leave until the drivers could prove they could work without any restrictions or their leave expired, at which time they were terminated

EEOC v. FedEx *(cont'd)*

- What's the takeaway?
  - Medical – ADA, FMLA, workers' compensation
  - ADA interactive process
  - Reasonable accommodation(s)
  - Undue hardship

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EEOC PWFA lawsuits

- EEOC filed lawsuits against three companies to enforce the Pregnant Workers Fairness Act (PWFA)
- In the Northern District of Alabama:
  - EEOC sued a manufacturing company alleging the company refused to excuse an employee's absences for pregnancy-related conditions and medical appointments; required mandatory overtime even though the employee was restricted from working over 40 hours per week
  - Company assessed attendance points, threatened termination; employee resigned to avoid termination and protect her pregnancy

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EEOC PWFA lawsuits *(cont'd)*

- In the Northern District of Oklahoma:
  - EEOC alleged a specialty medical practice did not allow a pregnant medical assistant at its Tulsa facility to sit, take breaks, or work part-time as directed by her doctor to protect her health and safety during the final trimester of her high-risk pregnancy
  - Employee alleged she was forced to take unpaid leave
  - When she would not return to work without breaks, the medical practice terminated her

EEOC PWFA lawsuits *(cont'd)*

- In the Southern District of Florida:
  - EEOC filed a lawsuit against a resort after failing to reach a settlement through its administrative process
  - According to the lawsuit, the resort terminated an employee shortly after requesting leave to **recover and grieve** following a stillbirth during the fifth month of her pregnancy
  - Resort agreed to pay $100,000 in damages to the former employee, appoint an EEO coordinator, revise its employment policies to ensure employees are provided reasonable accommodation under the PWFA, and provide training to all of its employees

EEOC PWFA lawsuits *(cont'd)*

- What's the takeaway?
  - Interactive process
  - Reasonable accommodation(s)
  - Employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
  - Can't require employee to take leave if another reasonable accommodation can be provided that would allow the employee to keep working
  - Undue hardship

EEOC harassment lawsuits

- Three harassment lawsuits filed recently by the EEOC based on ethnicity, race, sex
- Three additional lawsuits filed by the EEOC based on sexual harassment and retaliation
- Last year, the EEOC received more than 7,700 charges of sexual harassment in the nation's workplaces, the highest number in 12 years and up nearly 25% from the previous year

EEOC harassment lawsuits *(cont'd)*

- Another from the Northern District of Oklahoma:
  - EEOC alleged a paper products manufacturer fired a woman from its Inola, Oklahoma, paper mill for obtaining a protective order against a male co-worker
  - Employee sought a protective order after reporting the co-worker's harassment, which included lewd comments, sexual innuendo, and forcibly trying to kiss her
  - Lawsuit alleges the company did nothing to safeguard the employee from continued harassment; instead, it fired her when she notified human resources of the protective order

EEOC harassment lawsuits *(cont'd)*

- A case in the Western District of Oklahoma alleges:
  - One of the owners of a home improvement and design company harassed female employees on a near-daily basis
  - Owner openly made sexually charged comments and touched female employees without their consent
  - Unwelcome conduct was reported to another owner, but the company took no action to address the complaints, and instead withheld one female employee's bonuses, leading to her constructive discharge

EEOC harassment lawsuits *(cont'd)*

- What's the takeaway?
  - Anti-harassment policy
  - Routine, interactive training
  - Reporting mechanism
  - Prompt investigation
  - Remedial action
  - Anti-retaliation

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EEOC's agenda

- EEOC Strategic Enforcement Plan for 2024-2028
  - Vulnerable/underserved worker priority
  - Recruitment/hiring priority
  - Increasing use of AI
  - Emerging/developing issues priority
  - Preserving access to the legal system

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EEOC's agenda *(cont'd)*

- **Vulnerable workers** – Immigrants, migrants, developmental/intellectual disabilities, mental health, Native Americans/Alaskan Natives
- **Recruitment/hiring** – Use of AI, ads that exclude accommodations in application process
- **Emerging issues** – Disabilities, pregnancy, religious minorities/global events
- **Equal pay**
- **Legal** – Overbroad waivers, NDAs, retaliation

SCOTUS watch

- SCOTUS to decide whether it should be more difficult for employees from "majority backgrounds" (white, heterosexual) to prove workplace discrimination claims
- Title VII – reverse discrimination standard
  - Marlean Ames, Ohio heterosexual woman, claims she was passed over for a promotion in favor of a gay man, and demoted in favor of lesbian woman
  - 6th Circuit: As a heterosexual, she is a member of a "majority" group and therefore must prove her employer was the "unusual employer who discriminates against the majority"

Protecting Customers and Confidentiality in an Era of Restricting Restrictive Covenants

presented by

Phil Bruce (OKC)

Courtney Bru and Jake Crawford (Tulsa)

GOAL: Recruit and retain talent

- Recruit and hire the best candidates
- Train, provide experience, provide access to trade secrets, confidential and proprietary information, provide access to clients and prospective clients, etc.

GOAL: Protect information

- Positive inducements like competitive pay and benefits, bonuses, equity interests, etc.
- **Restrictive inducements like confidentiality, non-competition, and non-solicitation agreements**

Restrictive covenants, defined

- Confidentiality/non-disclosure
- Non-competition
- Non-solicitation (clients, employees, vendors)

Historical regulation

- State laws:
  - State where work occurs
  - State of the employee's residence
  - State of the employer's main operations
  - State law adopted by the agreement itself
- State laws vary, often significantly
- Ex: Oklahoma is hostile to these covenants
  - Oklahoma courts will not enforce a covenant under the law of another state if that law violates the "public policy" of Oklahoma
  - And may not "blue pencil" or judicially modify

Oklahoma law – General rule

- 15 Okla. Stat. §217
- Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind … is to that extent, void

Oklahoma law - Exceptions

- 15 Okla. Stat. § 218
- One who sells the "goodwill" of a business or partners in a dissolving partnership may agree to refrain from carrying on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof

Oklahoma law – Exceptions *(cont'd)*

- 15 Okla. Stat. § 219A
  - A (former) employee may not **directly** solicit the **"established customers"** of the former employer
- 15 Okla. Stat. § 219B
  - A (former) employee cannot solicit, **directly or indirectly, the employees or independent contractors** of that business to work for another employer

Oklahoma law – potential changes

- Oklahoma legislature passed SB 1543 which would have amended 15 Okla. Stat. § 219A
  - Removed language about "established" customer
  - Allowed prohibitions on indirect and active and inactive solicitations
- Vetoed by Governor Stitt
  - SB 1543 would "significantly expand employers' power to impede employees' ability to compete with their employer, post-employment and worse, it would allow employers to restrict individuals' ability to earn a living, especially while using a learned trade or skillset."
- Future legislative action possible
  - Only five "no" votes

Federal government involvement

- January 5, 2023 – Federal Trade Commission proposes a new rule effectively prohibiting the use of non-competition clauses or agreements against employees
- **September 4, 2024** – FTC rule effective

FTC Final Rule

Definition

- **"Non-compete clause"** – any contract term that prevents the worker from seeking or accepting employment after the conclusion of the worker's employment with the employer
- **Including (broad) non-disclosure agreements**

New agreements

- "Comprehensive ban on **new** non-competes with all workers"
  - Cannot enter into or attempt to enter into a new non-compete with a worker

Existing agreements

- "Existing non-competes are no longer enforceable after the final rule's effective date."
  - Non-enforceable as of compliance date
  - Must give notice (model exists) they are no longer enforceable within 45 days
  - Cannot represent they are subject to enforceable non-compete without "good faith basis"
- "Existing non-competes with senior executives [may] remain in force."
  - Employees who were in a policy-making position and earning at least $151,164 annually
  - Estimated by FTC as 0.75% of the workforce

Exception

- Not applicable to a non-compete clause that is entered into by a person who:
  - sells a business entity; or
  - disposes of all of the person's ownership interest in a business entity; or
  - sells all or substantially all of a business entity's operating assets.

Preemption

- Purports to supersede any state law to the extent that such statute, regulation, order, or interpretation is inconsistent with the rule, unless it provides greater protection to employees

Current status

- *Ryan LLC v. FTC* (N.D. Tex. August 20, 2024): issued MSJ prohibiting FTC from enforcing final rule nationwide
  - *Properties of the Villages, Inc. v. FTC* (M.D. Fla. Aug. 15, 2024) – granted limited preliminary injunction prohibiting enforcement against the plaintiff
    - Appeal taken
  - *ATS Tree Services, LLC v. FTC* (E.D. Pa. July 23, 2024) – FTC acted within authority promulgating rule
    - Motion to stay denied; October 4 voluntary dismissal

National Labor Relations Board Rulings

- The National Labor Relations Board and its General Counsel have attempted to limit non-compete, non-solicitation, and confidentiality provisions
  - *McLaren Macomb*, 372 NLRB No. 58 (2023) held that overly broad confidentiality provision and non-disparagement provision in settlement agreement violated NLRA because it chilled employees' Section 7 rights
  - NRLB General Counsel has applied this decision to confidentiality provisions outside of the settlement agreement context

NLRB enforcement *(cont'd)*

- **May 30, 2023:** GC memo declared that overly broad non-compete agreements (including anti-raiding restrictions) violate employees' Section 7 rights
- **June 13, 2024:** *J.O. Mory, Inc.,* 25-CA-309577, ALJ held that anti-raiding restriction and non-compete prohibiting employee from working for competitor for 12 months in area where employee worked violated NLRA
- **October 7, 2024:** GC memo urges NLRB to seek "make whole" remedies for overly broad non-competes, and that "stay or pay" agreements (e.g. pay for training costs if employee leaves) violate NLRA

Enforcement under Trump administration

- Expect the Trump administration to roll back FTC and NLRB rules and guidance
  - Republican FTC will likely drop Texas appeal
  - Trump likely to immediately replace current NLRB GC Jennifer Abruzzo
  - NLRB likely to reverse *McLaren Macomb* after retaining a Republican majority, likely starting in 2026
- How far will the Trump administration roll back restrictive covenant rules is an open question
  - VP-elect J.D. Vance has spoken favorably about current FTC Commissioner
  - Trump allies have previously supported FTC (e.g., Matt Gaetz filed amicus brief in support of FTC final rule)
  - Populist agenda and messaging may limit changes

Going forward

- ✓ Be aware of your existing covenants
- ✓ Be prepared to respond
- ✓ Follow McAfee & Taft commentary on the status of the FTC Final Rule and NLRB updates (employerlinc.com)

Dealing with Your Bank:
Fraud, Loans and Guaranties

presented by

Bob Luttrell, Kaitlyn Chaney and Matt Brown

Bank Fraud – Mitigating Loss

Bob Luttrell

It won't happen to us

- 2023 – 80% of organizations fell victim to fraud attempts or actual fraud

Check fraud

- We don't need to worry about this. Nobody uses checks anymore.
  - 3,146,000,000 checks processed, down 6.7% from prior year; 12,600,000 per day
  - $8,449,000,000,000 – $33,800,000,000 per day

How often does check fraud happen?

- Mailed check fraud linked to nearly $700 million in suspicious activity
  - Mail theft-related check fraud includes both completed and attempted transactions
  - Average activity amount per BSA report for mail theft-related check fraud was $44,774
  - USPS reported 38,500 high-volume mail theft incidents from October 2021 to October 2022

Fraudulent negotiation of stolen checks

- Once checks are stolen, criminals may:
  - alter payees and/or amounts (check washing) (44%)
  - use the stolen checks to create counterfeit checks (26%)
  - fraudulently indorse the check (20%)
  - sell the check or its identifying information on dark web marketplaces or encrypted social media platforms

How do we tell what we have?

- It is hard
- Most checks are cleared as a digital image, making it hard to tell if a particular check is altered, counterfeit, or forged
- Cleared on MICR line encoding
  - Bank routing number
  - Account number
  - Amount
- Banks are not required by law to manually review checks
- Banks are generally relieved of liability by contract for not manually reviewing checks

How does check fraud happen?

From the Court's opinion:

"In May of 2021, Brazos Electric Power Cooperative (Brazos) issued a check in excess of $2mil from its BofA account to the Lower Colorado River Authority (LCRA) in Texas and attempted to deliver the check via US Mail as it always had. However, the check never reached LCRA and instead an altered, forged or counterfeited check was presented to a Wells Fargo bank branch in California. Wells Fargo then presented the check for payment to BofA and BofA honored and paid the altered/forged/counterfeit check. When Brazos notified BofA that an altered/forged/counterfeit check had been wrongfully honored, BofA initially directed Brazos to execute a fraud statement/affidavit of claimant for an altered check, which Brazos did. The very next day, BofA informed Brazos it had determined the check was actually counterfeit (instead of altered) and then BofA directed Brazos execute a similar fraud statement/affidavit of claimant for a counterfeit check, which Brazos did."

Where does the loss fall?

- It depends on a number of factors:
  - What was it:
    - Altered check?
    - Forged drawer's signature?
    - Counterfeit check?
    - Forged indorsement?
  - Whose fault was it?
    - Drawer's or indorser's negligence?
    - Depositary bank's breach of warranty?
    - Payor bank's failure to exercise ordinary care?

Where does the loss fall *(cont'd)*

- Is there an allocation of loss based on degree of fault?
- Was there employee dishonesty?
- Is there contractual risk shifting?

Electronic funds transfer (EFT) fraud

- 83% of organizations with annual revenues over $1 billion faced actual or attempted payments fraud

Business Email Compromise (BEC)

- BEC is the primary method of obtaining the information necessary for EFT fraud. In a BEC scam – also known as email account compromise (EAC) – fraudsters send an email message that appears to come from a known source making a legitimate request:
  - A vendor your company regularly deals with sends an invoice with an updated mailing address or requests a change in electronic payment instructions
  - A company CEO asks her assistant to transfer money to an external account immediately

BEC *(cont'd)*

- An insurance carrier receives a message from its insured with instructions on where to wire its claims payment
- Real property purchaser receives an email from the title company with instructions on where to wire the purchase money for closing

How BEC scams work

- A scammer might:
  - Spoof an email account or website. Slight variations on legitimate addresses (john.kelly@examplecompany.com vs. john.kelley@examplecompany.com) fool victims into thinking fake accounts are authentic. Most common tactic.
  - Send spearphishing emails. These messages look like they're from a trusted sender to trick victims into revealing confidential information. Fraudsters can then access company accounts, calendars, and data, including passwords and financial account information, that gives them the details they need to carry out the BEC schemes.

How BEC scams work *(cont'd)*

- A scammer might:
  - Use malware to gain access to legitimate email threads about billing and invoices. That information is used to time requests or send messages so accountants or financial officers don't question payment requests. Malware also lets fraudsters gain undetected access to a victim's data, including passwords and financial account information.

BEC scam example

- Buyer purchases goods
- Seller sends email with correct wire instructions
- Buyer receives email with wire instructions different than seller sent and which are different from prior dealings
- Buyer gives buyer's bank the erroneous wire instructions (account name and number identify different parties)
- Buyer's bank sends wire to fraudster's bank account
- Buyer's bank credits wire to fraudster's account by number

Where does the loss fall?

- It depends on a number of factors:
  - Where did the intrusion occur?
    - Buyer's system?
    - Seller's system?
  - Who had the "last clear chance" to avoid the fraud?
    - Should buyer or seller have had better systems?
    - Should buyer have done something more to check on change in instructions?
    - Should banks have noticed the discrepancy between name and number?

How do the claims unfold?

- Vendor who has not gotten paid makes a claim against bank customer
- Customer make a clam against depositary bank
- Payor bank makes a claim against presenting bank
- Presenting bank makes a claim against collecting banks(s)
- Collecting bank(s) make a claim against depositary bank

It's a mess

- Customer is fighting payor bank (maybe its lender)
  - Probably does not have use of funds during the fight
  - Maybe liable for payor bank's fees and expenses
- Payor bank is fighting customer (probably a good customer)
- Payor bank, collecting banks, and depositary banks are fighting each other
  - Not an attorney's fee case
- Nobody wins except the lawyers, and the outcome is never assured

Mitigation

- Insure against the fraud losses
  - Make sure the coverage appears to be adequate
  - Often policies require certain preventive measures
    - Check the policy and implement them

Mitigation *(cont'd)*

- Take advantage of positive pay services
  - Debits processed by bank electronically
  - Permits depositor to provide information about what checks or
  - ACHs to pay (wires are instantaneous and depend on security of access credentials)
    - For checks, usually by check number and amount (both are MICR encoded)
      - But check amount can be inaccurate, miscoding by depositary bank
    - For ACH, usually by company identification and amount
- Better, permits depositor online access before transaction pays to review and approve or reject

Key Issues in Commercial Lending

Kaitlyn Chaney

Complex lending transactions

- Construction and large CRE loans
- Asset-based lending
- Acquisition finance
- Subordinated, mezzanine, and structured financing
- Receivable sale agreements and securitizations

What about the small stuff?

- Could it be paid off with 30 days notice?
- Are the business terms correct?
- Is it permitted by the senior credit facility?
- Does it prohibit fundamental transactions?
  - Change in control
  - Additional indebtedness
  - Additional liens

What kind of transaction?

- Single lender loan
- Participated loan
- Syndicated loan
- Debt offering

Term sheets

- Is it a term sheet or a commitment letter?
- Involve legal counsel to identify legal terms that should be negotiated prior to commencement of definitive loan documentation
- Key commitment letter issues:
  - Lead bank commitment vs. syndicate bank commitments
  - "Market flex"
  - Conditions to commitment
  - Expiration of commitment
  - Confidentiality and fee provisions

Term sheets *(cont'd)*

- Key term sheet issues
  - Business terms
  - Miscellaneous items: governing law, legal opinions, assignability, payment of fees
  - Borrower and transaction-specific items
    - Conditions to closing
    - Negative covenants
    - Financial covenants
    - Financial disclosures
  - Loan structure
    - Special considerations in acquisition finance
    - Who is the borrower? Who are guarantors?
    - Business terms

Loan documents

- Bank forms
  - Lack customary materiality qualifiers and standards of reasonableness
  - Are not tailored to the borrower
  - Leave the bank wide discretion
  - Borrowers should treat these as demand promissory notes, with the bank's discretion cabined only by lender liability law and reputational risk

Loan documents *(cont'd)*

- Attorney-prepared loan documents
  - Introduce significant cost and time delay
  - May be tailored to the borrower's needs
  - Use materiality qualifiers, thresholds, exceptions, cure periods, and other rights to provide the borrower more certainty and flexibility
  - Quality and utility vary widely with the expertise of counsel retained by the lender and borrower

Loan agreements

- Fiduciary duties
- Lender liability
- The dynamics of the lending relationship
  - Borrowers believe the lender holds the power because they hold the power to fund or not fund the loan or to enforce defaults
  - Lenders believe the borrower holds the power because they will hold the money after closing

Loan agreements *(cont'd)*

- How are loan agreements different?
  - Loan agreements reflect a long-term relationship between borrower and bank that will govern daily functions
  - Banks are subject to significant regulatory oversight that requires sometimes complex provisions
  - A set of standard (or "market") devices exist for solving common problems that are highly specific to lending relationships

Loan agreement key issues

- Lending mechanics (revolving loans): What do we do to get the money?
- Conditions precedent: What do we do to close?
- Representations and warranties:
  - Representations and warranties will be made over and over again for the life of the loan
  - "As of the Closing Date, . . ."
  - Knowledge, materiality, etc.
  - Disclosure schedules

Loan agreement key issues *(cont'd)*

- Affirmative covenants: Mostly boring
- Negative covenants: Where the action is
  - Restrictions on debt
  - Restrictions on liens
  - Restrictions on dividends, investments, and other "restricted payments"
- Financial disclosures
  - Audited or unaudited? Consolidated? Consolidating?
  - Time frames

Loan agreements

- Events of default
  - Notice and cure
  - Cross-default
  - Guarantors
- Lender issues
  - Assignability
  - "Required lenders"
  - Participations

Getting to closing

- Ancillary documents
- Due diligence
  - Disclosure schedules
  - Insurance
  - Environmental reports, title reports, surveys
- Third party items
  - Consents
  - SNDAs
  - Landlord lien waivers
  - Subordination and intercreditor agreements
  - Payoff letters

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Guaranty Issues

Matt Brown

McAfee & Taft

Scenario

- Entity enters into a joint venture
- JV borrows money
- Joint venturers guaranty
- JV defaults
- Lender wants to be paid

Obligation of guarantor

- Answer for the debt of the principal

Rights of guarantor

- Not to have the obligation changed
  - No change in interest rate (up or down)
  - No change in obligors (add or release)
  - No change in principal (up or down)
  - No change in payments
  - No waivers of default
  - No additional promises
  - No extensions

Rights of guarantor after default

- Subrogation to the rights of the creditor (step into the shoes of the creditor)
- Exoneration: compel the principal debtor to fulfill its obligations
- Indemnity: recover from the principal that which was paid
- Contribution: recover from co-guarantors the amount paid above the proportional share

Can these rights be waived?

- Yes
- These rights are waived under almost all bank guaranties
- Does a waiver of these rights with respect to the bank constitute a waiver with respect to the principal debtor? Co-guarantors?

Purchase of the debt by a co-guarantor or affiliate of a co-guarantor

- Do the waivers transfer?
- Can the purchaser release its affiliates?

Contribution

- Amount paid above proportional share
  - JV owes $1,000,000
  - 4 unlimited guarantors
    - One guarantor pays $500,000
    - Has a claim against the other 3 for $83,333 each
- Compromise of the debt
  - How does it change contribution?

Mitigators

- Attempt to limit liability to proportional (or super proportional) share of obligation
- Inter guarantor agreement
  - Separate agreement
  - Incorporated into membership agreement

Ethics Traps for In-House Counsel

presented by

Spencer Smith (OKC)
Craig Buchan (Tulsa)

Introduction

- In-house counsel face ethical challenges that differ from those faced by outside counsel
- This presentation:
  - Highlights some of these challenges under the Oklahoma Rules of Professional Conduct
  - Provides practical guidance for addressing them

Identifying the corporate client

- Who does an in-house attorney represent?
  - Rule 1.13 Organization as Client
  - A lawyer employed or retained by an organization represents the organization acting through its **duly authorized constituents**

Identifying the corporate client

(cont'd)

- Under Comment [1] of Rule 1.13(a), "duly authorized constituents" include:
  - Officers
  - Directors
  - Employees
  - Shareholders
  - Other Constituents (positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not companies)

Identifying the corporate client
(cont'd)

- When a constituent with interests adverse to the organization seeks advice on a legal matter, an in-house attorney must advise the constituent that the in-house attorney:
  - Only represents the Company
  - Does not represent the constituent
  - Constituent should be encouraged to seek independent representation
  - Make clear any discussion between the in-house attorney and the constituent may not be privileged

Identifying the corporate client
(cont'd)

- Examples:
  - An employee approaches you for help with a divorce proceeding
    - You need to explain that your legal services are for company-related issues and recommend they find a family law attorney. Any discussions about the proceeding may not be privileged.
  - The CFO asks for advice on a personal investment and related tax issues
    - You should remind them that your role is to advise on corporate matters and suggest they seek outside financial counsel

Identifying the corporate client
(cont'd)

- Examples:
  - A Board member asks about how a Company decision might affect the share price of its stock and whether or not he should buy or sell
    - You can discuss the implications of company decisions but not provide any advice on buying or selling company stock

Concurrent conflicts of interest

- Under Rule 1.7, an attorney may not represent a client if the representation involves a concurrent conflict of interest which may arise from either:
  - Being directly adverse to another client
  - A significant risk that representing one client materially limits the representation to another client

Concurrent conflicts of interest – Direct conflict

- A direct conflict exists when a constituent's interests are directly adverse to the organization
- Examples:
  - An employee seeks advice from in-house counsel about a potential discrimination claim after being passed over for a promotion
  - An employee is being investigated for embezzlement. The employee asks for your help.
    - You must decline, explaining that you represent the Company and a conflict of interest exists. Advise the employee to seek independent counsel.

Concurrent conflicts of interest – Material limitation

- A material limitation conflict exists when there is a significant risk that the representation of the organization's constituents limits in-house counsel's ability to act on the organization's behalf
- Example:
  - An in-house attorney represents the organization and other parties in forming a joint venture, which reduces that attorney's ability to advocate the best position for the organization
    - In-house counsel should represent only the organization
    - All other joint venture parties should retain separate counsel

Concurrent conflicts of interest – Company and constituents

- Concurrent conflicts also arise when the organization is sued together with its constituents (e.g., an officer, a director, or an employee)
- Although the organization and its constituents may appear to have the same interests at the case's outset, they may diverge later as facts emerge
- To avoid this potential conflict, in-house counsel should consider recommending that each constituent retain separate counsel

Examples and practice tips

- Trucking company and driver are both named in lawsuit arising from a fatality accident. Both are represented by same law firm. Driver later tells lawyer that Company routinely required him to exceed driving window limitations.
- Company and employee are named in civil case alleging securities violations. Both are represented by the same firm. Lawyer later discovers employee emails making misrepresentations regarding the company's financial status

Examples and practice tips *(cont'd)*

- Carefully examine the allegations at the outset
- Where are the potential conflicts?
- Err on the side of separate counsel
- If a conflict later develops, lawyer is considered conflicted and generally must withdraw from representing both clients (absent informed consent, which can apply in certain situations)

Concurrent conflicts of interest – Waiver

- Under Rule 1.7(b), clients involved in litigation may waive concurrent conflicts of interest only if:
  - Attorney reasonably believes that the attorney can provide competent and diligent representation to each affected client;
  - Representation is not prohibited by law;
  - One client does not assert a claim against another client represented by the same attorney in the litigation; and
  - Each affected client gives informed consent in writing. (See Rule 1.1(g))

Concurrent conflicts of interest – Waiver *(cont'd)*

Example language in Joint Representation Agreement – Outside Counsel

Conflicts of Interest

Under ethical rules governing our conduct as attorneys, we cannot represent a client if the representation involves a concurrent conflict of interest unless (a) we reasonably believe that we will be able to provide competent and diligent representation to each affected client, (b) the representation is not prohibited by law, (c) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and (d) each affected client gives its informed consent, confirmed in writing.

At present time, and based upon information received to date, we do not believe that a conflict of interest exists, but to the extent that our proposed representation of XXXX is found to create a conflict or the appearance of a conflict, we are requesting a formal waiver of any such conflict of interest. As such, and after reviewing our ethical obligations and responsibilities to XXXX, we believe we can currently represent all defendants diligently and effectively in connection with the matters described above without jeopardizing or adversely affecting our ongoing relationship with any of you.

Concurrent conflicts of interest *(cont'd)*

- Officers, directors, and employees sometimes seek legal advice from in-house counsel on purely personal matters. To avoid a conflict, in-house counsel should:
  - Not advise the organization's constituents on personal legal matters
  - Instruct constituents to retain separate counsel at their own expense
  - Train constituents about the boundaries of in-house counsel's role as attorneys for the organization

In-house counsel's dual role

- In-house counsel serve a dual role at the organization as:
  - Legal advisers
  - Business partners
- Depending on the context of counsel's intra-company communications, the organization may seek to protect these communications from disclosure because they are protected by:
  - Attorney-client privilege
  - Work product doctrine

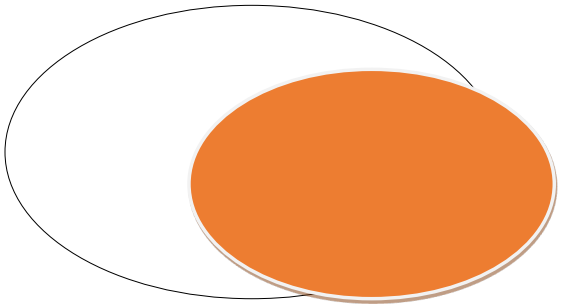
Attorney-client privilege

- Protects confidential communications:
  - Between in-house counsel and the organization's personnel
  - Made for the purpose of obtaining or providing legal advice for the organization's benefit
  - Privilege protects legal advice but does not protect business advice

Work product doctrine

- Protection extends to documents and tangible things prepared in anticipation of litigation by:
  - In-house counsel
  - Retained agents and experts, at the direction of counsel
  - Other company personnel, at the direction of counsel

What the clients or lawyers think is privileged vs. what is actually privileged



Two common in-house myths on the privilege

- Including in-house lawyers in a conversation automatically attaches the privilege
- Adding in-house counsel to an email automatically attaches the privilege

Dual role *(cont'd)*

- Examples:
  - During a business strategy meeting, you offer both legal and business advice
    - Communications regarding legal advice may be protected by attorney-client privilege, while purely business advice is not protected
  - You are asked to review a marketing plan for strategic development purposes
    - This communication would not be privileged

Dual role *(cont'd)*

- Examples:
  - You are asked to review the same plan for legal compliance
    - This communication may be privileged. Ensure that your legal advice is clearly documented and separate from any business strategy discussions.
  - You receive emails from the business development team seeking your opinion about the financial benefits of a proposed project. Later emails seek legal advice regarding what terms need to be in the draft contract.
    - Privilege will apply differently to these communications

Dual role – Best practices for protecting the organization's communications

- To protect the organization's privileged communications from disclosure, in-house counsel should:
  - Avoid mixing business and legal advice when communicating with employees
  - Mark written communications with employees with a "Privileged and Confidential" notation if they contain legal advice
  - If applicable, also add a "Work Product" notation
  - Use executive sessions at company board meetings to maintain privilege

Dual role – Best practices for protecting the organization's communications *(cont'd)*

- Check the privilege rules of the relevant foreign jurisdiction before communicating legal advice to an employee located outside of the United States
- Not interview an employee involved in litigation or a government investigation before providing that employee with an Upjohn warning, so the employee knows you represent the organization and not the employee:
  - Orally
  - In writing

Communicating with represented parties

- Under Rule 4.2, in-house counsel must **not** communicate with a party they know is represented by an attorney:
  - Without the consent of the party's attorney
  - Unless authorized by law or a court order to communicate directly with the party

Communicating with represented parties *(cont'd)*

- Examples:
  - In-house counsel at Beta Corp. is negotiating a contract with outside counsel for Kappa Corp. and runs into Kappa's CEO at a party. Can in-house counsel talk to Kappa's CEO to expedite the deal?
    - No - not without consent of Kappa's outside counsel
  - Same fact pattern but Kappa's CEO approaches Beta's in-house counsel and says, "Let's talk about the deal – my lawyers say its okay to talk to you." Can in-house counsel talk under this circumstance?
    - Maybe – but best practice would be to decline to discuss until you have cleared it with Kappa's lawyers

Communicating with represented parties *(cont'd)*

- Best practices:
  - Be diligent in asking whether a party is represented
  - Obtain written consent from opposing counsel at the outset of business negotiations if counsel intends to negotiate directly with a represented party
  - Always err on the side of caution when communicating

Communicating with represented parties *(cont'd)*

- Under Rule 4.3, in-house counsel must tread more carefully when dealing with unrepresented parties and:
  - Inform the unrepresented party of in-house counsel's role in the matter
  - Ask whether they are represented by counsel
  - Do not give legal advice to the unrepresented party
  - Tell the unrepresented party they have a right to hire counsel, particularly if that party's interests conflict or have a reasonable possibility of conflicting with the organization's interests

Keeping abreast of new technology

- Under Comment 6 to Rule 1.1, in-house counsel must represent the organization competently by:
  - Keeping abreast of changes in the law and legal practice
    - New regulations affecting the company?
  - Understanding how new technology impacts their legal duties, including:
    - E-discovery technology
    - Artificial intelligence (AI) technology

Generative AI and use by in-house counsel

- Using AI can enhance efficiency and decision-making processes
- Can present unique ethical and practice challenges
  - **Contract drafting** – AI generates a non-disclosure agreement for a new partnership
    - In-house counsel must ensure contract meets legal standards (Rule 1.1, Competence)
  - **Legal research** – AI research tools uncover new regulations affecting company
    - In-house counsel must thoroughly verify the results (Rule 1.3, Diligence)

Generative AI and use by in-house counsel *(cont'd)*

- Should in-house counsel ask outside counsel about their use of Generative AI?
- Encourage dialogue for using AI for scope of legal services
  - Potential for reduction in fees and costs
  - Realistic expectations – we still need humans

Duty to report misconduct

- Under Rule 1.13(b), in-house counsel must report to a higher authority conduct that is likely to substantially injure the company
- In-house counsel must report actions of officers and employees that either:
  - Violate a legal obligation to the company.
  - May render the company responsible for violating a law
- However, situations of mere disagreement, even if the utility or prudence of the decision is doubtful, do not apply to this rule

Duty to report misconduct *(cont'd)*

- Example:
  - The marketing director for a toy company seeks the assistance of in-house counsel to negotiate a contract for a series of television advertisements airing after 11:00 p.m. on weeknights, instead of 10:00 a.m. on Saturday mornings.
    - Counsel need not report to a higher authority that the advertisements may not reach the company's target audience

Duty to report misconduct *(cont'd)*

- Example:
  - In-house counsel at a tobacco company knows that an executive intends to launch a product sampling and social media campaign targeting teenagers
  - Counsel must:
    - Advise the executive to reconsider launching the campaign
    - Report the executive to a higher authority, such as the general counsel, chief legal officer (CLO), chief executive officer (CEO), or board of directors, if the executive refuses to reconsider
    - Not disclose confidential information outside the company unless allowed under Rule 1.6(b) (e.g., to prevent substantial bodily harm or a crime)

***Loper Bright* is the New *Chevron*: Why the End of *Chevron* Deference Could be Good for Your Business**

presented by

Rick Mullins (OKC)

Katie Crane (Tulsa)

History of Administrative Procedure Act (APA)

- *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)
  - Federal courts should offer some amount of deference to an agency's understanding of the statute administered by the agency
- 1946: Administrative Procedure Act
  - Established procedures for agency rulemaking
  - Codified the bases on which federal courts may set aside an agency's action
    - Courts required to defer to agencies unless their actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984)

- Challenge to EPA's decision to regulate all of the pieces of equipment in a given facility as a single "stationary source" of pollution under the Clean Air Act
- So long as the agency's interpretation of an ambiguous or unclear statutory provision was "reasonable," it was "entitled to deference"
- Emphasized practical considerations over language of the APA

Chevron deference

- When Congress **hasn't** spoken
- Narrow class of cases where a court disagrees with an agency's statutory interpretation that was nonetheless "reasonable"

Loper Bright Enterprises v. Raimonda, 200 U.S. 321

- Interpretation of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") by the National Marine Fisheries Service ("NMFS")
- District court: MSA unambiguous
- D.C. Circuit: MSA ambiguous, NMFS offered a reasonable interpretation of the MSA that the court was required to accept
- SCOTUS: Granted cert to determine "whether *Chevron* should be overruled or clarified"

Loper Bright decision

- 6-3 decision, authored by Chief Justice Roberts
- "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority"
- Focus on APA
- Courts are language experts; agencies are not

SCOTUS wants to preserve the judiciary

- *Chevron* was inconsistent with the APA's requirement that courts, not agencies, decide questions of law applicable to agency action
- Concern with separation of powers
- Sensitivity to administrative usurpation of traditional juridical powers and prerogatives

Loper Bright dissent

- Complex and highly technical determinations should be made by the experts
- Could enable judges to make policy decisions on contentious cultural issues like climate change, healthcare, and artificial intelligence

Loper Bright impact

- Only affects rules based on statutory ambiguity or silence
- Agency conclusions of law, not agency conclusions of fact
- Does not permit courts to reject discretionary determinations when Congress conferred upon the agency the power to make that determination
- Mere fact that a prior case relied on *Chevron* is not sufficient basis for overturning it now

Expected agency action

- More cautious?
- Greater pains to express reasoning underlying their interpretation?
- Effort to lobby Congress for grants of authority?

From FCC director after *Loper Bright*:

"But one thing I know about the FCC is, our decisions are often technical. They involve not just lawyers, but economists and engineers," she said. "And we make a really, really strong effort to make sure we're making decisions based on the engineering, the economics, and the basis of the words in the statute."

"I have some confidence if we do that well, we're going to be able to continue our work which I think is really important, because communications technology is one-sixth of the United States economy. And I think you're going to want a regulatory authority that's nimble and can keep up with technology itself."

Jolt or tiny shake?

- What we can definitely expect following *Loper Bright:*
  - More lawsuits challenging ambiguous statutory language
  - More success on lawsuits challenging ambiguous statutory language
  - Less agency rulemaking on ambiguous statutory language
  - Forum shopping by lawyers

Jolt or tiny shake? *(cont'd)*

- What may happen following *Loper Bright*
  - More specificity from Congress in writing legislations

SCOTUS isn't done

- *Garland v. VanDerStock*

Action items

- Is a regulation impacting your industry ripe for challenge in light of *Loper Bright?* Ask these questions:
  - Is the statute ambiguous?
  - Does the agency have delegated Congressional authority for rulemaking on the at-issue language?
  - What is the agency's reasoning? Is it well-founded? Is a court likely to find it persuasive?
  - What court/s do you have the option of filing in?

IP Dispute Pitfalls

presented by

Zach Oubre (OKC)

Rachel Blue (Tulsa)

Trademarks

- Priority
  - Ensure you have priority before you send a demand; otherwise, you may be admitting infringement
- Common law rights v. registration
  - Common law rights are difficult to enforce
  - Common law rights are geographically restricted
  - Registrations provide national protection
  - Registration applications provide national priority

Trademarks *(cont'd)*

- Fair use/non-infringement/aggressive claims
  - Cierra Mist v. Sierra Mist
  - *Jack Daniel's v. Bad Spaniels*
- Failure to enforce
  - Lack of enforcement creates genericness and dilution
- Failing to sue after sending a demand
  - Acquiescence/waiver/estoppel

Copyrights

- Fair use
  - Is a *defense*, where you have the burden of proof
  - Fact-intensive test that may require extensive litigation
- Do you own?
  - Work Made For Hire Agreement requirement for all contractors
  - Is the thing copied truly your copyright?
- Digital Millennium Copyright Act (DMCA)
  - Must have DMCA registration with Copyright Office and identify your agent in public notice

Patents

- Timing is everything
  - Opinion of counsel
    - Only has value if obtained **before** suit
  - Invalidity defenses
    - Should be ascertained early to tailor discovery/trial themes
    - Early prior art searches can help guide the case; waiting too long risks losing a potential defense
  - Experts
    - Early retention could lead to additional trial strategies that need foundation set during discovery/pre-trial
  - Financials
    - Figuring out value of the dispute early is key to mitigating risk of excessive spend

Patents *(cont'd)*

- Infringement/invalidity contentions
  - Not required in Oklahoma federal courts
  - Required in numerous other courts
  - Parties can adopt and make part of standard scheduling order
  - **Pro:** prevents sandbagging
  - **Con:** requires early determination of defenses

Trade secrets

- Not everything is a secret
  - General/overly broad claims by a plaintiff
    - create pleading/discovery disputes
    - create risks of contradiction or encompassing public knowledge
    - hurt credibility
  - Discovery fights by defendant from seeking defendants' trade secrets
    - create risk of de facto issue preclusion
    - hurts credibility in defense, potentially create damaging affidavits used in cross
- What venue
  - State court generally favors plaintiff
  - Federal DTSA claim is cumulative of state claim

Trade secrets *(cont'd)*

- What's your remedy
  - Early suit mitigates risk of public disclosure, hurts damages
  - Late suit risks loss of trade secret right, may increase potential damages
- Jury verdict
  - If multiple trade secrets at issue, special verdicts favor the defendant
  - General verdicts harder to overturn

General practical considerations

- Is the opposition a current business relationship?
  - Agreements or other writings may acknowledge the existence or absence of rights
  - Litigation against a current vendor injures the relationship
  - Limitations of liability clauses may exclude or cap damages
- Do communications exist that negate your position?
  - Consider pre-suit document search
- Who are your key witnesses?
  - Are they adverse to the company?
  - Consider pre-suit declarations or affidavits to ensure testimony
- Does the opposition have potential counterclaims?

McAfee & Taft

Advising Your Board Regarding Fiduciary Duties

presented by

Justin Jackson (OKC)
Josh Smith (Tulsa)

Introduction

- Every director owes fiduciary duties to the corporation and its stockholders
- Corporate counsel are often called upon to assist and advise the board members in meeting their fiduciary duties
- This presentation discusses:
  - The core fiduciary duties of care and loyalty
  - Specific director obligations that flow from the core fiduciary duties
  - The standards of review that courts apply when judging directors' conduct
  - How directors can limit their exposure to liability

The bottom line

- Despite the complexities of the law surrounding board fiduciary duties, courts basically want to see two things:
  - Directors were engaged in deliberations
  - Directors acted reasonably
- Boards that do so and can provide **a record** that they did so, should avoid liability
- Directors' focus should be on protecting shareholder interests, providing high-level oversight of corporate activities and management

Rules of thumb for satisfying fiduciary duties

- Understand the independence and disinterestedness of each director
  - This can change depending on the subject of hand
  - To elicit this information, you need (i) educated board members and (ii) a well-prepared director questionnaire
  - Don't avoid discussion of conflicts in an effort to keep them "off the record." Discuss them and keep a record reflecting the Board's consideration.
- Regularly attend and participate in Board meetings

Rules of thumb *(cont'd)*

- Be properly informed
  - Board materials – This is something the GC is often tasked with and one of the primary ways we can help board members meet their fiduciary duties
  - Ask questions
- Understand the rules permitting reliance on management and third parties
- Carefully deliberate and weigh the benefits and risks of any proposed action including alternatives
- Act in good faith to do what you believe to be in the best interests of the corporation and its shareholders

Rules of thumb *(cont'd)*

- Maintain a good record (usually GC's responsibility)
  - Record should be detailed enough to show the Board's thoughtful deliberation, but not so detailed as to pose a liability to the company. **Remember:** Board minutes are not privileged!
  - In certain matters (major deals, catastrophic events, potential shareholder litigation) you may want to include more details to build a contemporaneous record of the Board's efforts to fulfill their fiduciary duties
  - As a contemporaneous record, Board minutes will be given significant weight in any litigation – much more so than after-the-fact testimony

Board fiduciary duties

- Core fiduciary duties of the board of directors are:
  - The duty of care
  - The duty of loyalty
- Other duties like the duty of good faith, duty of disclosure, and duty of oversight stem from the core fiduciary duties

Duty of care

- The duty of care requires that directors be informed of all material information reasonably available to them when making decisions for the corporation
- A director must act with the care that a person in a like position would reasonably believe appropriate under similar circumstances
- Directors have no *per se* duty to maximize the profits of the corporation
- Directors can take actions (for example, charitable donations) that do not directly increase profits, as long as there is a connection to a rational business purpose

Duty of loyalty

- The duty of loyalty requires directors to act in good faith for the benefit of the corporation and its stockholders, not for their own personal interest
- **Corporate opportunity doctrine**: an officer or director may not divert to themselves or their affiliates any business opportunity presented to, or otherwise rightfully belonging to, the corporation
  - The corporation can renounce its interest in specified business opportunities in its certificate of incorporation or by board action, **but** waivers must be specific and narrow

Business judgment rule

- In making business decisions, directors are generally protected by the business judgment rule
- The rule presumes that disinterested and independent directors acted:
  - On an informed basis
  - In good faith
  - In the honest belief that the action was taken in the best interest of the corporation

Business judgment rule *(cont'd)*

- **Informed.** Directors must inform themselves of all material information reasonably available to them
  - Directors can rely on information and opinions from consultants and management, if those persons can competently produce those reports
- **Good faith.** Decision-making process must be substantive and cannot just rubber stamp management's actions
- **Best interest of the corporation.** Directors must reasonably believe the action was taken in the best interests of the corporation

✓ The standard for a finding of breach is gross negligence

Corporate waste

- If the plaintiff fails to rebut the presumptions of the business judgment rule (no conflict of interest, no bad faith, no gross negligence), there is no remedy **unless the challenged transaction constitutes waste**
- Stringent standard that is only met if there is **no business purpose** (in the **"rare, unconscionable case where directors irrationally squander or give away corporate assets"**)
- Spending on items such as employee vehicles, outings, social club dues, and holiday gifts for a rational business purpose has been found to **not** constitute waste

Bad faith: Breach of duty of loyalty

- No single definition of good faith or bad faith
- To act in good faith, a director must act with honesty of purpose and in the best interest of the corporation
- Situations that usually involve bad faith:
  - An **intentional failure to act** in the face of a known duty to act, demonstrating a **conscious disregard** for one's duties
  - A **knowing violation** of the law
  - Acting **for any purpose other than advancing the best interests of the corporation** or its stockholders
- Beyond gross negligence. Actual or constructive knowledge required.

Bad faith: Failure of oversight

- Oversight claim: Plaintiff alleges the Board failed to oversee the company to a degree tantamount to bad faith
- Director oversight liability arises where either:
  - Directors **utterly failed to implement** any reporting or information system or controls (information-systems claims), or
  - Directors **consciously failed to adequately monitor** such a system or controls by ignoring red flags (red-flags claims)
- Focus is on legal compliance risks, not business risks

Bad faith: Failure of oversight *(cont'd)*

- To avoid liability for an information-systems claim, the Board must make a good faith effort to put a reasonable board-level oversight system in place that:
  - is designed to provide the board with timely and accurate information; and
  - at a minimum addresses central compliance risks, including mission critical compliance risks
- To avoid liability for red-flags claim, the Board must:
  - actively monitor and use the oversight system to identify red flags of non-compliance; and
  - follow up on and take actions to remedy red flags

Conflicts of interest

- Disinterest and independence are determined on a director-by-director basis
  - If a majority of the directors are disinterested and independent, the decision is not considered conflicted (unless the business judgment rule is otherwise rebutted) and the board remains entitled to the presumption that they acted in the corporation's best interest
  - If half or more of the directors are not disinterested and independent, the decision is considered conflicted and the presumption of acting in the corporation's best interest is lost
- If a majority of the directors are not disinterested and independent, it is advisable to empower a special committee of independent and disinterested directors to make the decision

Other things to consider

- Situations requiring stricter review
  - Conflicted-controlling stockholder transactions or conflicted Board transactions
  - Sale of the company
- Exculpation, indemnification, and D&O insurance

Commercial Leasing Issues

presented by

Cole Marshall

A litany of lease issues

- Letter of Intent
- Premises Description
- Lease Term
- Renewal Terms
- Rent Structure
- Rent Adjustments
- Security Deposit
- Build out/TI
- Lease Guaranty
- Common Areas
- CAM
- Exclusions from CAM
- Landlord Services
- Utilities
- Permitted Use
- Insurance
- Pre-Lease Diligence
- Reps and Warranties
- Maintenance/Repairs
- Improvements
- Assignment/Sublease
- Affiliate Transfers
- Subordination
- Estoppels
- Landlord Access
- Brokerage
- Casualty
- Condemnation
- Payment Default
- Nonpayment Default
- Termination
- Holdover
- Indemnification
- Right of First Refusal
- Right of First Offer
- Purchase Options
- Surrender
- Restoration

A litany of lease issues *(cont'd)*

- **Letter of Intent**
- Premises Description
- Lease Term
- Renewal Terms
- **Rent Structure**
- Rent Adjustments
- Security Deposit
- **Build out/TI**
- Lease Guaranty
- Common Areas
- CAM
- Exclusions from CAM
- Landlord Services
- Utilities
- Permitted Use
- Insurance
- **Pre-Lease Diligence**
- Reps and Warranties
- Maintenance/Repairs
- Improvements
- **Assignment/Sublease**
- Affiliate Transfers
- **Subordination**
- **Estoppels**
- Landlord Access
- Brokerage
- Casualty
- Condemnation
- **Payment Default**
- **Nonpayment Default**
- Termination
- Holdover
- Indemnification
- **Right of First Refusal**
- **Right of First Offer**
- **Purchase Options**
- **Surrender**
- Restoration

Letter of intent

- General description of the leased premises
  - Address and legal description
  - Personal property?
- Duration
  - Commencement date structure
- Rent structure
  - NNN, gross, hybrid
  - Tenant improvements/allowance

Letter of intent *(cont'd)*

- Emerging trend: Assignment and subletting rights
- Nonbinding
  - Exclusivity
  - Confidentiality
- Practical necessity

The definitive lease agreement

- The anatomy of the lease varies greatly depending on the type of lease:
  - Retail
    - Percentage rent, continuous operations, exclusives
  - Industrial
    - Technical and specific use restrictions, HAZMAT
  - Office building
    - Landlord services, parking, signage
  - Medical
    - Federal compliance (AKS, Stark), unique construction requirements
  - Multi-tenant or single-tenant
    - Tenant maintenance versus CAM/OpEx

Rent structure

- Triple net, also referred to as "NNN"
  - In addition to paying rent, tenant must pay for insurance, maintenance, and taxes
  - Sometimes paid direct, sometimes landlord reimbursed (i.e. CAM/OpEx concept)
  - CAM or OpEx "pass through"
  - Exclusions
- Gross lease
  - "Rent" amount includes insurance, maintenance, and taxes
  - Landlord services
- Hybrid
  - No universal terminology

Tenant improvements and allowance

- What work will be performed?
  - Limited to the leased premises? Beyond?
- Who will perform the work?
  - Landlord? Tenant? Both?
- Structure for tenant's receipt of the allowance
  - How is the allowance calculated?
  - When is it received/paid? Reimbursable?
- Work letter
- Income tax considerations for tenants (qualified long-term real property)

Pre-lease due diligence

- Tenant considerations
  - Physical inspections
  - Phase I environmental site assessment
  - Title examination
    - Insurance
  - Survey
  - Landlord representations and warranties
- Landlord considerations
  - As is, where is
  - Financial wherewithal of tenant
  - Lease guaranty
  - Financial statements

Subordination and estoppels

- Subordination provision
  - Typically covers existing and future mortgage
  - Self-executing
  - Landlord rights if tenant won't cooperate
  - Form as an exhibit
- Estoppel provision
  - List of matters to be covered
  - Timeframe for response
  - Landlord rights if tenant won't cooperate
  - Form as an exhibit

Default and remedies

- Payment defaults and cure periods
  - Payment of rent an independent covenant versus a tenant right to offset
- Non-monetary defaults and cure periods
  - Breach of the lease, financial covenants, insurance requirements, violation of rules and regulations, use restrictions
- Landlord remedies
  - Rent acceleration is not likely enforceable
- Tenant remedies
  - Termination of the lease?

Preferential rights

- Right of first offer
- Right of first refusal
- Expansion
- Contraction
- Purchase options

Assignment and subletting

- Generally prohibited without landlord consent
  - But only if specified in the lease
- Permitted transfers
  - Affiliates
  - Similar "net worth"
  - Landlord's reasonableness standard
- Change of control
- No release of liability on assignment

Surrender and termination

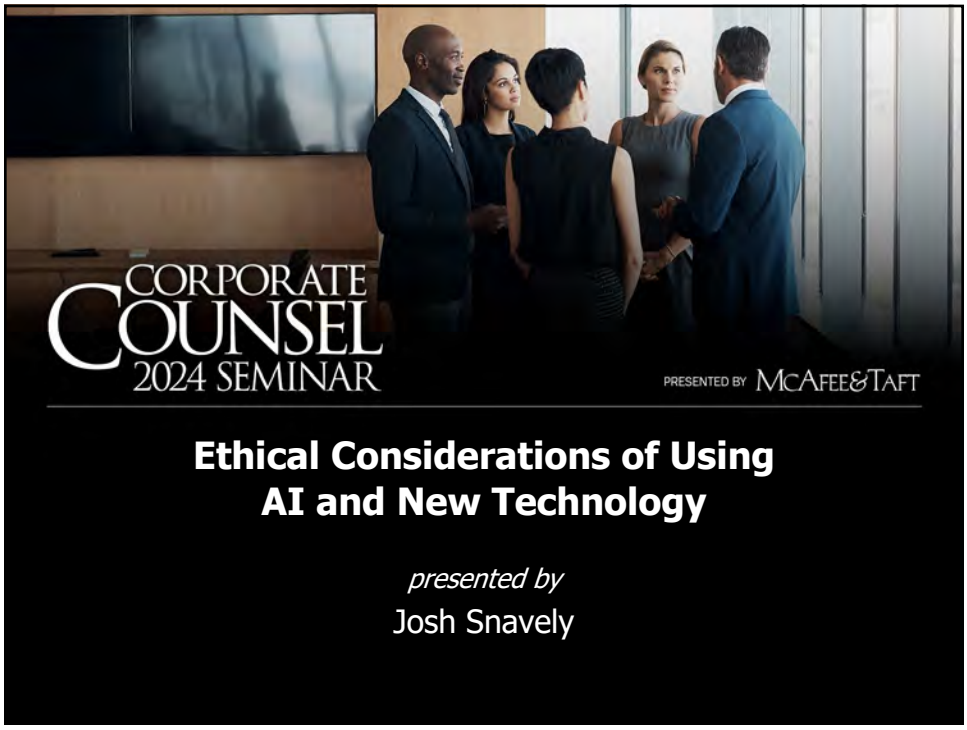
- Restoration requirements
  - Green earth?
  - Removable of trade fixtures, repair following removal
- Who retains title to the tenant improvements?
  - Check this against who is required to insure
- Timeframe for completing surrender obligations
  - Prior to lease expiration?
  - After lease expiration?
    - 41 Okla. Stat. § 52

Bonus – Financial statement impact

- Sale-leaseback transactions
  - Converts property equity into cash
  - Alternative to conventional financing
  - Improves balance sheet
    - Operating lease vs. capital lease
    - Fixed asset (land) converted to current asset (cash)
  - Emphasis on relationship between landlord and tenant is heightened
- Analyzing many of the typical lease issues is materially different than an ordinary commercial lease

Bonus – Market trends in office leases

- Tenant flexibility in term
- Co-working space
- Smart amenities
- Sustainability and green practices
- Health and wellness



Ethical Considerations of Using AI and New Technology

presented by

Josh Snavely

Overview

- Oklahoma Rules of Professional Conduct
- Rise of the machines
- Rise of the regulators
- Rise of the obligations (to clients and as lawyers)
- A playbook

5 O.S. Rule 1.1 – Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject, <u>including the benefits and risks associated with relevant technology.</u>

5 O.S. Rule 2.1 – Advisor

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
- [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Rise of the machines

- **Artificial Intelligence (AI):** technology that processes data to produce information which augments human intelligence, perception and predictive abilities
- **Machine Learning (ML):** the area of AI in which computer programs use certain methods to detect relationships and patterns in data
- **Deep Learning (DL):** a type of ML technique based on artificial neural networks in which multiple layers of processing are used to extract progressively higher-level features from data
- **Generative AI:** is a collection of models and systems that can produce new text, images, video, audio, code and synthetic data. The models can also be used to predict future outcomes, such as the next word in a sentence.

Rise of the regulators

- Global
- Federal
- State

Rise of regulators — Global

- AI and Data Act (Pending), Canada Bill C-27
- Artificial Intelligence Act (February 2024), European Union

Rise of regulators — Federal

- No comprehensive federal law
- Algorithmic Accountability Act – S. 3572 (Pending)
- Transparent Automated Governance Act – S. 1865 (Pending)

Rise of regulators — Federal *(cont'd)*

- **The White House:** AI Bill of Rights, EO 14110
- **CFPB:** Guidance on Credit Denials by Lenders using AI
- **DOL:** AI & Inclusive Hiring Framework and Worker Well-Being Best Practices
- **FTC:** Unfair or Deceptive Acts or Practices with Section 5, FTC ACT; Safeguards Rule (Revised), Health Breach Notification Rule
- **EEOC:** AI and Algorithmic Fairness Initiative
- **NIST:** AI Risk Management Framework, CSF 2.0
- **SEC:** 2025 Exam Priorities (include AI & Cybersecurity)

Rise of regulators — Federal *(cont'd)*

- **DOJ:** Updated Evaluation of Corporate Compliance Programs (ECCP)
  - ECCP considers whether a compliance program is

    (1) well designed;

    (2) applied earnestly and in good faith, with adequate resourcing and empowerment

    (3) working in practice

Rise of regulators — Federal *(cont'd)*

- **DOJ:** ECCP (continued)
  - ECCP addresses the impact of new technologies, including:
    - What technology a company uses to conduct business?
    - Whether the company has conducted a risk assessment regarding the use of such technology?
    - Whether the company has taken appropriate measures to mitigate risks associated with the technology?

Rise of regulators — Federal *(cont'd)*

- **DOJ:** ECCP
  - Other considerations:
    - How the company assesses the potential impact of AI or other new technology on the company's ability to comply with applicable laws?
    - What governance structure and controls the company has implemented with respect to the use of technology?
    - What other steps the company has taken to mitigate technology-related risks and avert potential misuse of technology?
    - How the company trains its employees on the use of AI and other new technology?

Rise of regulators — State

- AI laws
  - AI Transparency Act (September 2024), California SB 942
  - Consumer Protections for AI, Colorado SB 205
  - Industry Letter, Cybersecurity Risks Arising from Artificial Intelligence and Strategies to Combat Related Risks (October 2024), New York State Department of Financial Services
  - Artificial Intelligence Policy Act (2024), Utah SB 149
- Data breach laws in 54 jurisdictions (all of them)
- Consumer privacy laws in 19 jurisdictions (and counting)

Rise of obligations — Clients

- Breach liability
- Employment practices liability "using AI"
- IP liability "from AI"
- Directors and officers liability
- Product liability of "AI"

Rise of obligations — Lawyers

- ABA Formal Opinion No. 512, "Generative Artificial Intelligence Tools"
- Opinion No. 512 provides that attorneys have an obligation to:
  - To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including
  - Duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

A playbook

- Team and terms
- Use cases and harms
- Governance, risk and compliance framework
- Data and technology inventories
- Reporting and testing system

Your *Go-To* FAA Registration Team

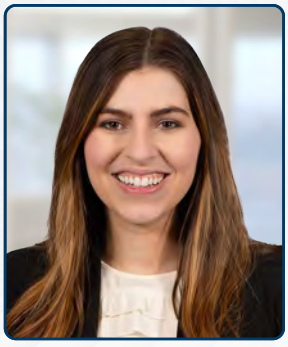
J.D. Brown

Joel Bulleigh

Brian Burget

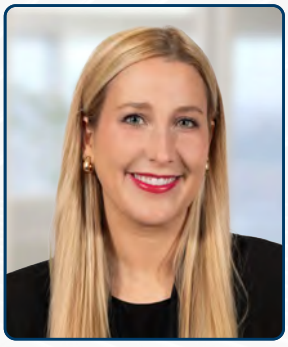
Tyler Crook

Maria Gonzalez



Amanda Landherr

Scott McCreary



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